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**INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS  
AND SOLAR MODULES**

REPORT OF THE PANEL

*Addendum*

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS456/R.

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## **ANNEX A**

### **WORKING PROCEDURES OF THE PANEL**

#### **Adopted on 13 October 2014**

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

#### **General**

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

#### **Submissions**

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, India shall submit its response to the request in its first written submission. If India requests such a ruling, the United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised

as promptly as possible. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6.

### **Questions**

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

### **Substantive meetings**

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

- a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite India to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

- a. The Panel shall ask India if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite India to present its opening statement, followed by the United States. If the India chooses not to avail itself of that right, the Panel shall invite the United States to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party

shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

### **Third parties**

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

- a. All third parties may be present during the entirety of this session.
- b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.
- c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.
- d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

### **Descriptive part**

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which

shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

### **Interim review**

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

### **Service of documents**

24. The following procedures regarding service of documents shall apply:

- a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).
- b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 4 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.
- c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to \*\*\*\*\*@wto.org, and copy \*\*\*\*\*.\*\*\*\*\*@wto.org and \*\*\*\*\*.\*\*\*\*\*@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.
- d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.
- e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

- f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

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**ANNEX B**

ARGUMENTS OF THE PARTIES

*UNITED STATES*

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## ANNEX B-1

### FIRST PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

#### EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

#### I. INTRODUCTION

1. The stated aim of India's Jawaharlal Nehru National Solar Mission ("JNNSM") Programme is to promote the use of solar energy. This is a laudable goal that the United States and many other WTO Members share, and it is not this environmental objective that the United States challenges in this dispute. Rather, the United States challenges elements of India's program that discriminate against imported products.

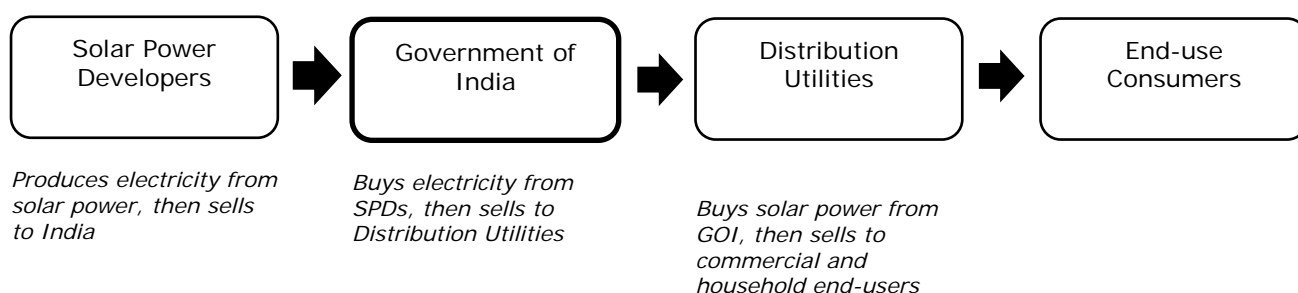
2. In particular, under the JNNSM Programme, India enters into power purchase agreements for electricity from solar power developers ("SPDs"). To enter into these contracts and receive other incentives, however, SPDs are required to use solar cells and modules made in India ("the domestic content requirement" or "DCR"). India's DCRs, therefore, accord less favorable treatment to imported solar cells and modules than to domestic solar cells and modules, as imported products are prevented from competing under the same conditions as domestically-produced cells and modules. As such, the JNNSM Programme measures, including individually executed contracts for solar power projects, are inconsistent with India's obligations under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

#### II. FACTUAL BACKGROUND

3. India established the JNNSM Programme in January 2010 with the stated goal "of establishing India as a global leader in solar energy, by creating the policy conditions for its diffusion across the country as quickly as possible." The JNNSM Programme attempts to achieve this aim by agreeing to purchase electricity from SPDs at long-term contractually guaranteed rates and providing other financial benefits to SPDs. Through the JNNSM Programme, India aims to generate 20,000 MW of grid-connected solar power capacity by 2022. To reach this goal, India is implementing the JNNSM Programme in three separate "phases."

4. Phase I had the goal of generating 1000 MW of solar power capacity by 2013. Phase I was divided into two batches: Batch 1 (FY 2010-2011) and Batch 2 (FY 2011-2012). Phase II, which is currently ongoing, began in October 2013 and is scheduled to close in 2019. To date, India has rolled out one batch under Phase II. During Phase II (Batch 1), India aims to generate 750 MW of solar power capacity. India aims to reach the 20,000 MW target by the end of Phase III, which is scheduled to run between 2017 and 2022. India has not issued any draft guidelines or detailed plans for Phase III.

5. Under each phase of the JNNSM Programme, India solicits and evaluates bid proposals from SPDs to set up "solar power generation projects." India selects certain developers and then enters into power purchase agreements ("PPAs") with those developers. Under a PPA, India agrees to purchase the electricity generated from the solar power project of a particular SPD at contractually-guaranteed long-term rates. India then sells the electricity to downstream "distribution utilities" for resale to commercial and household consumers. The basic flow of electricity generated under the JNNSM Programme is as follows:



6. In addition to meeting various financial and technical conditions, SPDs must agree to satisfy certain DCRs with respect to the solar cells and modules used to generate solar power in projects under the JNNSM Programme.

### 1. Key JNNSM Programme Administrative Entities

7. The Ministry of New and Renewable Energy ("MNRE") is responsible for administering the JNNSM Programme. NPTC Vidyut Vyapar Nigam Limited ("NVVN") was responsible for implementing the solar power project selection process under Phase I. NVVN also serves as the formal counterparty to SPDs in the PPAs (*i.e.*, the contracts) executed under Phase I. NVVN is a wholly owned subsidiary of the state-owned National Thermal Power Corporation ("NTPC"). For Phase II (Batch I), MNRE selected the Solar Energy Corporation of India ("SECI") to carry out the solar power project selection process and serve as the counterparty to SPDs in PPAs executed under Phase II (Batch I).

### 2. Operation of the JNNSM Programme

8. In operating the JNNSM Programme, India utilizes a series of instruments and documents (*i.e.*, JNNSM Programme measures) to set out relevant aspects of the Programme for each phase and batch, including the DCRs. Each of Phase I (Batch 1), Phase I (Batch 2) and Phase II (Batch 1) is governed by similar set of key documents. Specifically, the JNNSM Programme measures for each phase include: (1) a Guidelines document; (2) a request for selection ("RfS") document; (3) a model PPA; and (4) individually executed PPAs.

9. The Guidelines documents set out the requirements concerning solar power project eligibility, the bid submission process for SPDs, technical specifications, and contract issuance. The RfS document, essentially the application that SPDs use to submit bid proposals, sets out further details regarding the application process, standard terms and conditions applicable to solar power projects, and technical specifications. Again, each RfS document contains DCRs for each Phase and Batch. The model PPAs, which incorporate provisions of the Guidelines and RfS documents by reference, are used to execute individual PPAs with SPDs. The model PPAs, which form the basis for each executed PPA, incorporate DCRs.

10. As noted, the JNNSM Programme establishes DCRs under Phase I (Batch 1), Phase I (Batch II), and Phase II (Batch I) for SPDs entering into certain power purchase agreements. Each of the Guidelines documents states that SPDs' participation in the JNNSM Programme is strictly conditioned on their compliance with the applicable DCRs.

- 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)
- 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)
- 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)

11. The DCRs are restated verbatim in each of the RfS documents. Moreover, as part of bid applications submitted pursuant to the RfS documents, SPDs were obligated to furnish a "specific plan" for meeting the applicable DCRs "within 180 days of signing a PPA" under Phase I and within "210 days of signing a PPA" under Phase II (Batch 1).

12. In order for an SPD to be selected to participate in the JNNSM Programme, to enter into a PPA, and to receive the guaranteed, long-term rates under the JNNSM Programme, they must comply with the DCRs of Phase I (Batch 1), Phase I (Batch 2) and Phase II (Batch 1). The following table summarizes the DCRs for each phase.

JNNSM PROGRAMME DOMESTIC CONTENT REQUIREMENTS		
	<i>Domestic Content Required</i>	<i>Exempt from Domestic Content Requirements</i>
PHASE I (BATCH 1)	<ul style="list-style-type: none"> <li>▪ crystalline silicon solar modules</li> </ul>	<ul style="list-style-type: none"> <li>▪ thin-film solar modules</li> <li>▪ solar cells</li> </ul>
PHASE I (BATCH 2)	<ul style="list-style-type: none"> <li>▪ crystalline silicon solar modules</li> <li>▪ solar cells</li> </ul>	<ul style="list-style-type: none"> <li>▪ thin-film solar modules</li> </ul>
PHASE II	<ul style="list-style-type: none"> <li>▪ crystalline silicon solar modules</li> <li>▪ thin-film solar modules</li> <li>▪ solar cells</li> </ul>	<i>(NO Exemptions from Domestic Content Requirement under Phase II)</i>

13. As noted, to have the possibility or advantage of entering into a PPA under the program, a solar power developer must comply with the requisite domestic content requirements. In addition, under a PPA entered under both Phases I and II, India (through NRVN and SECI, respectively) purchases the electricity generated by SPDs at contractually guaranteed long-term tariff rates. These contracts (*i.e.*, the PPAs) remain in effect for a term of 25 years.

### 3. Individually Executed JNNSM Programme Power Purchase Agreements

14. The measures at issue in this dispute also include the DCRs under the JNNSM Programme incorporated in individually executed PPAs. NRVN has entered into 36 PPAs with SPDs under Phase I (Batch 1) and 27 PPAs under Phase I (Batch 2). In addition, SECI has issued Letters of Intent to enter into PPAs with 47 SPDs under Phase II (Batch 1). As noted above, each PPA is executed based on a model PPA that incorporates DCRs from the Guidelines and RfS for that Phase and Batch. Each PPA thus incorporates DCRs.

## III. LEGAL ARGUMENT

### A. The Domestic Content Requirements in the JNNSM Programme Are Inconsistent with India's National Treatment Obligation Under Article III:4 of the GATT 1994

15. The DCRs under the JNNSM Programme measures are inconsistent with India's national treatment obligations under Article III:4 of the GATT 1994, because, *inter alia*, the DCRs operate to accord "less favourable" treatment to imported solar cells and modules than that accorded to cells and modules of Indian origin. India cannot justify these DCRs by invocation of the "government procurement" exception under Article III:8(a) of the GATT 1994.

16. The DCRs under the JNNSM Programme measures are inconsistent with India's national treatment obligations under Article III:4 of the GATT 1994, because (i) imported and domestic solar cells and modules are "like products"; (ii) they impose "requirements" on SPDs "affecting" the "internal" "sale," "purchase," or "use" of solar cell and modules; and (iii) they accord imported solar cells and modules treatment less favorable than to "like products" of Indian origin.

17. Solar cells and modules manufactured domestically in India and those imported from the United States are "like products" within the meaning of Article III:4 of the GATT 1994. Apart from country of origin, the JNNSM Programme measures make no further distinction between imported and domestic solar cells and modules. Previous reports have found this to be a sufficient basis to conclude that imported and domestic products are like.

18. Like the measures at issue in those disputes, none of the JNNSM Programme measures note any difference between solar cells and modules made in India as compared with imported solar cells and modules. Indeed, in the JNNSM Programme's DCR provisions, the only distinguishing criterion is between those cells and modules "made in India" or "manufactured in India" versus cells and modules "sourced from any country." Furthermore, in its submissions, India does not dispute that imported solar cells and modules made in India are "like products" within the meaning of Article III:4 of the GATT 1994. Accordingly, the Panel in this dispute should find that solar cells

and modules at issue in this case are "like products within the meaning of Article III:4 of the GATT 1994.

19. The domestic content provisions of the JNNSM Programme measures are "requirements" that "affect" the "internal" "sale", "purchase," or "use" of solar cells and modules in India within the meaning of Article III:4 of the GATT 1994.

20. As the panel noted in *India – Autos*:

GATT jurisprudence . . . suggests two distinct situations which would satisfy the term "requirement" in Article III:4:

- (i) obligations which an enterprise is "legally bound to carry out";
- (ii) those which an enterprise voluntarily accepts in order to obtain an advantage from the government.

21. The JNNSM Programme's domestic content provisions are "requirements" because, under those provisions, an SPD selected to participate in the program and entering into a PPA will voluntarily accept an obligation to use solar cells and modules manufactured in India. Having entered into the PPA, the solar power developer is legally bound, by contract, to carry out that commitment.

22. Specifically, the Phase I and Phase II Guidelines make clear that the applicable DCRs are "mandatory." Specifically:

- 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...(emphasis added)" Section 2.5(D)
- 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...(emphasis added)" Section 2.5(D)
- 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. (emphasis added)" Section 2.6(E)

23. The Phase I and Phase II RfS documents – pursuant to which SPDs submit bid applications – also make clear that the applicable DCR provisions are mandatory. Specifically:

- 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..." Section 3(D)
- 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..." Section 3(D)
- 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." Section 3(E)

24. Moreover, as noted above, when submitting a bid pursuant to the RfS documents, SPDs must "certify" that they will "specify their plan for meeting the requirement for domestic content" "within 180 days of signing of [a] PPA" under Phase I and within "210 days of signing of [a] PPA" under Phase II (Batch 1). By so certifying, SPDs also acknowledge that failure to provide such specification will be penalized by forfeiture of an earnest money deposit.

25. Thus, the domestic content provisions are properly viewed as "requirements" because SPDs submit their bid(s) with full knowledge that participation in the JNNSM Programme is conditioned on compliance with the domestic content provisions.

26. The DCRs affect the internal sale, purchase, and use of solar cells and modules because those requirements modify the conditions of competition between solar cells and modules manufactured in India and those imported.

27. The term "affecting" assists in defining the types of measures that must conform to the obligation not to accord "less favourable treatment" to like imported products as set out in GATT 1994 Article III:4. The Appellate Body and panels have found the term "affecting" to mean having "an effect on", encompassing measures that modify the conditions of competition between domestic and imported goods in the market. The Appellate Body, in particular, noted that the term "affecting" in GATT 1994 Article III:4 has "a broad scope of application", and that it operated to connect identified types of government action (*i.e.*, "laws, regulations and requirements") with specific transactions, activities and uses relating to products in the marketplace (*e.g.*, "sale", "purchase", or "use"). Further, the Appellate Body and panels have found measures that "create an incentive" for domestic over imported goods to "affect", *inter alia*, the internal "use", "purchase" or "sale" of those goods.

28. Per the terms of JNNSM Programme measures at issue in this dispute, a SPD satisfies the applicable DCRs by *purchasing* and *using* solar cells and modules made in India. The sale, purchase, or use of the equipment should be considered "internal" because the requirements apply inside the customs territory of India and not at the border. The JNNSM Programme measures are therefore properly viewed as measures "affecting" the "internal sale....purchase... or use" of solar cells and modules within the meaning of GATT 1994 Article III:4.

29. The Appellate Body in *Korea – Various Measures on Beef* determined that "[a]ccording to 'treatment no less favourable' means . . . according conditions of competition no less favourable to the imported product than to the like domestic product." Thus, the focus of this analysis in this dispute is whether the JNNSM Programme measures *modify the conditions of competition* in the relevant market to the *detriment* of imported products.

30. The DCRs under the JNNSM Programme measures accord less favorable treatment to imported solar cells and modules than that accorded to like products of Indian origin by incentivizing the use of Indian-manufactured solar cells and modules, versus imported cells and modules, and thus modify the conditions of competition in favor of Indian-manufactured cells and modules to the detriment of imported equipment.

31. As explained above, under the JNNSM Programme, India will enter into PPAs with selected solar power developers contingent on their agreement to use domestically-produced solar cells and modules. A solar power developer that opts to use imported solar cells and/or modules is not eligible to participate in such portion of the program subject to the DCRs. Thus, such a developer may not enter into a PPA under the program without undertaking the domestic use commitment.

32. Because the JNNSM Programme requires that a SPD use solar cells and modules of Indian origin in order to enter into a PPA under that part of the program subject to DCRs, the program thus creates an incentive for SPDs to purchase solar cells and modules made in India. In *India – Autos*, the panel found 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 it was "more than likely to have some effect on manufacturers' choices as to the origin of parts and components to be used in manufacturing automotive vehicles", as the manufacturers would "need to take into account the requirement to use a certain proportion of products of domestic origin." Under these circumstances, the panel found that the DCRs at issue clearly modified the conditions of competition of domestic and imported parts and components in the Indian market in favor of domestic products.

33. Similarly, the DCRs of the JNNSM Programme clearly modify the conditions of competition between domestic and imported solar cells and modules in the Indian market in favor of domestic equipment. Because the JNNSM Programme has altered the conditions of competition in favor of Indian-produced solar cells and modules to the detriment of such equipment produced in the

United States and elsewhere, it thereby accords imported equipment less favorable treatment than it accords to like products of Indian origin.

34. Moreover, where the DCRs apply the use of imported cells and/or modules is prohibited. Barring foreign products from some sales opportunities available to domestic suppliers clearly modifies the conditions of competition to the detriment of imported products.

**B. The JNNSM Programme's domestic content requirements for solar cells and modules cannot be justified by the "government procurement" exception under GATT 1994 Article III:8(a) because the Indian government does not procure solar cells and modules through the JNNSM Programme.**

35. GATT 1994 Article III:8(a) provides an exemption from the national treatment obligation in Article III:4. The DCRs at issue in this dispute, however, fail to qualify for this exemption because India acquires *electricity* under the PPAs whereas the products which are subject to requirements affecting their sale, purchase, or use are *solar cells and modules*. These products – electricity versus solar cells and modules – are not the same nor in a competitive relationship. Put differently, while India procures electricity under the JNNSM Programme through PPAs, it does not procure solar cells or modules. Thus, Article III:8(a) cannot serve to exempt a requirement that discriminates against imported solar cells or modules.

36. This understanding of the exemption under Article III:8(a) was reached by the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*, which found that for purposes of GATT 1994 Article III:8(a), the imported product being discriminated against must be in a competitive relationship with the domestic product being purchased by the government.

37. Like the measures at issue in *Canada – Renewable Energy / Feed-In Tariff Program*, under India's JNNSM Programme, "the product being procured [by India] is electricity, whereas the product discriminated against for reason of its origin is generation equipment," *i.e.*, solar cells and modules. Neither solar cells nor solar modules are in a competitive relationship with electricity. Accordingly, the discrimination relating to solar cells and modules under the JNNSM Programme is not covered by the derogation of Article III:8(a) of GATT 1994.

#### **IV. CONCLUSION**

38. For the reasons stated above, the United States requests that the Panel make the following findings:

- the DCRs contained in the JNNSM Programme measures, including both Phase I and Phase II and individually executed PPAs for solar power projects, accord less favorable treatment to imported solar cells and modules than accorded to like products of Indian origin, inconsistent with Article III:4 of the GATT 1994; and
- the DCRs contained in the JNNSM Programme measures, including both Phase I and Phase II and individually executed PPAs for solar power projects, constitute trade-related investment measures inconsistent with the provisions of Article III of the GATT 1994, and are therefore inconsistent with Article 2.1 of the TRIMs Agreement.

39. Accordingly, the United States respectfully requests the Panel to recommend that India bring the DCRs under the JNNSM Programme measures, including both Phase I and Phase II and individually executed PPAs for solar power projects, into conformity with the GATT 1994 and the TRIMs Agreement, pursuant to Article 19.1 of the DSU.

EXECUTIVE SUMMARY OF US OPENING ORAL STATEMENT  
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

**I. The DCRs under Phases I and II of the NSM Program Are Inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of TRIMs Agreement.**

40. The DCRs at issue fall squarely within the types of measures included in paragraph 1(a) of the Annex to the TRIMs Agreement, and are therefore inconsistent with Article 2.1 of the TRIMs Agreement. That is, (i) imported solar cells and modules made in India are "like products" within the meaning of Article III:4 of the GATT 1994; (ii) the DCRs are "requirements" that "affect" the "internal" purchase or "use" of solar cells and modules in India; or (iii) the DCRs are "trade-related investment measures" within the meaning of the TRIMs Agreement. These facts – none of which India disputes – by themselves, establish an inconsistency with Article 2.1 of the TRIMs Agreement *as well as* Article III:4 of the GATT 1994. As stated by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff*, "[b]y its terms, a measure that falls within the coverage of paragraph 1(a) of the Illustrative List is 'inconsistent with the obligation of national treatment provided for in [Article III:4 of the GATT 1994].'"

41. The United States notes India's specific 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." But this statement (which appears to envision erroneously that the only "benefits" or "advantages" are the rates under signed contracts) applies only to *some* of the SPD projects under the NSM – the portion to which DCRs do not apply. It does not change the fact that, for the share of projects reserved to those developers who purchase and use domestic products, there is less favorable treatment for imported products, as the *use of imported cells and/or modules is prohibited*. Under Article III, compliance with national treatment for some transactions does not excuse a Member from its obligation to comply with national treatment for other transactions.

42. The Appellate Body has made clear that where a measure "modifies *the conditions of competition* to the detriment of imported products" that measure operates to accord less favorable treatment to imported products within the meaning of Article III:4. Even as described by India, the NSM Program operates so that *some* SPD contracts prohibit the use of imported solar cells and modules – that is, only some of them allow the use of imported solar equipment. Barring foreign products from some sales opportunities available to domestic suppliers clearly modifies the conditions of competition to the detriment of imported products.

43. Thus, even putting aside the Illustrative List of the TRIMs Annex, under which India's DCRs are *necessarily* inconsistent with Article III:4 of the GATT 1994, as well as Article 2.1 of the TRIMs Agreement, the facts of this dispute also demonstrate that the DCRs do operate to "modify the conditions of competition to the detriment" of imported solar cells and modules and thereby accord less favorable treatment to imported products within the meaning of Article III:4 of the GATT 1994.

**II. The DCRs at Issue Are Not Covered by Government Procurement Derogation under Article III:8(a) of the GATT 1994**

44. The Appellate Body has found that Article III:8(a) of the GATT 1994 derogates from Article III only where the imported product being discriminated against is in a competitive relationship with the product being purchased. In *Canada – Renewable Energy / Canada – Feed-in Tariff*, the Appellate Body found that the government procurement was unavailable to Canada because the product being procured by the government was electricity, whereas the product discriminated against for reason of its origin was generation equipment. The Appellate noted that the those two products were not in a competitive relationship and, accordingly, found that the discrimination relating to generation equipment was not covered by Article III:8(a) of the GATT 1994.

45. Similar to the facts of *Canada – Renewable Energy / Canada – Feed-in Tariff*, the Indian government is not purchasing solar cells and modules under the NSM Program, but rather the



*electricity* generated through the use of those cells and modules. Therefore, following the logic clearly articulated by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff*, the Article III:8(a) government procurement provision does not apply to the facts of *this* dispute. Simply put, Article III:8(a) does not permit India to purchase electricity but discriminate against imported solar cells and modules.

46. India acknowledges that the Indian government is *not* purchasing solar cells and modules under the NSM Program and makes no attempt to argue that solar cells or modules are in a competitive relationship with electricity. Rather, India asserts that because solar cells and modules are "integral to the generation of solar power [they] cannot be treated as distinct from the generation of solar power." On that basis, India posits that the Indian government is *effectively* procuring the cells and modules because it is "buy[ing] solar power [i.e., the electricity] generated from such cells and modules."

47. India's line of reasoning, however, has already been rejected by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff*. In that dispute, the panel had observed the generation equipment at issue "[was] needed and used" to produce the electricity, and therefore there [was] a 'close relationship' between the products affected by the domestic content requirement (generation equipment) and the product procured (electricity)." When reviewing the findings on appeal, however, the Appellate Body declared that the "connection" between the DCRs and electricity was insufficient to bring the DCRs within the purview of Article III:8(a). As noted, the Appellate Body concluded that the government procurement derogation *did not* cover the DCRs at issue in *Canada – Renewable Energy / Canada – Feed-in Tariff* because the government was procuring *electricity*, whereas the products being discriminated against were imported solar and wind power generation equipment. It found there was no competitive relationship between solar power (or wind power) equipment purchased by developers and the electricity purchased by the government.

48. Likewise, because the Indian government is not procuring solar cells and modules under the NSM Program, the DCRs pertaining to those cells and modules fall outside the coverage of Article III:8(a). India has not even tried to demonstrate that solar cells and modules and electricity are in a competitive relationship. Accordingly, any suggestion that DCRs under the NSM Program are properly viewed as "laws, regulations or requirements governing procurement" within the meaning of Article III:8(a) cannot be squared with the Appellate Body's analysis of that provision.

49. India also seeks to avoid the implications of the Appellate Body findings in *Canada – Renewable Energy / Canada – Feed-in Tariff* by highlighting certain mechanical distinctions between the DCRs at issue in that dispute and this one. But the differences it cites are inconsequential. The Appellate Body based its findings in *Canada – Renewable Energy / Canada – Feed-in Tariff* on the observation that the electricity purchased by the Government of Ontario did not compete with the solar and wind power generation equipment purchased by power developers. The metrics used to determine the "Minimum Required Domestic Content Levels" under Ontario's FIT Programme were irrelevant to this conclusion. Therefore, the minor differences identified by India do not detract from the applicability of the Appellate Body's findings to the facts of this dispute.

50. India has also failed to demonstrate that any alleged procurement is "for governmental purposes" within the meaning of Article III:8(a). The Appellate Body has identified two ways for evaluating whether a product is procured for a "governmental purpose" within the meaning of Article III:8(a). Specifically, the Appellate Body has stated that "the phrase 'products purchased for governmental purposes' refers to (i) what is consumed [or used] by the government; or (ii) "what is provided by government to recipients in the discharge of its public functions." It is clear from the facts of this dispute that the Indian government is not itself consuming or using the electricity it procures from SPDs through the NSM Program, and India has not argued to the contrary. And India also has not demonstrated that the government is providing electricity to recipients in the discharge the Indian government's public functions.

51. The Appellate Body has clarified that the mere assertion of "governmental aims or objectives" *does not* amount to a "governmental purpose" within the meaning of Article III:8(a). India asserts that its "procurement of solar power...is an act pursuant to the government purpose of promoting ecologically sustainable growth while addressing India's energy security challenge." In its submission, however, India has not explained why promoting sustainable development

should be understood as a "public function" as opposed to an important "aim or objective" of the Indian government. This is another crucial omission by India: as noted by the Appellate Body, "governmental agencies *by their very nature* pursue governmental aims or objectives." 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." Therefore, India has not demonstrated that its procurement of solar power is for a governmental purpose within the meaning of Article III:8(a).

52. Another reason that the Panel may conclude that India cannot avail itself of the derogation in Article III:8(a) is that any alleged procurement *is* "with a view to commercial resale" within the meaning of Article III:8(a). The Appellate Body has explained that an inquiry into whether a transaction is with a view to "commercial resale" for purposes of Article III:8(a) "must be assessed having regard to the entire transaction." With respect to a buyer, the Appellate Body has stated that "commercial resale" is evident where "the buyer seeks to maximize his or her own interest."

53. The United States observes that many of the distribution companies (or DISCOMs) to which India resells solar power are corporatized entities with a fiduciary duty to maximize profits or returns for shareholder. Indeed, one-quarter of Indian DISCOMs are wholly-private concerns. Thus, the DISCOMs are properly viewed as "buyer[s] seek[ing] to maximize [their] own interests." And on that basis, India's sale of the solar power (procured from SPDs) to such entities is properly viewed as "commercial resale" within the meaning of Article III:8(a). For this reason as well, India cannot avail itself of the derogation in Article III:8(a).

### **III. India Has Failed to Demonstrate that the DCRs at Issue Are "Essential" to Addressing a Short Supply of Solar Cells and Modules within the Meaning of Article XX(j)**

54. India argues that the DCRs at issue are justified under Article XX(j) of the GATT 1994. Article XX(j) allows a Member to take measures that are "essential to the acquisition or distribution of products in general or local short supply." India, however, has not demonstrated that there is a short supply of solar cells and modules in India. Indeed, India acknowledges that there is an "adequate availability" of solar cells and modules on the international market, but does not bother to explain why India is unable to avail itself of this supply. Moreover, India complains that more than 90 percent of its solar PV installations rely on imported solar cells and modules – 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).

55. Moreover, India's view of "products in general or local short supply" as referring to domestic products rests on a misunderstanding of Article XX(j). This provision is not concerned with the supply of products of a particular origin, but rather the supply of that product in general or local situations without respect to origin. The term "products" in Article XX(j) is unqualified by origin while other provisions of the GATT 1994, which are addressed to products of a particular origin identify those products explicitly. Therefore, India's interpretation of this provision as relating to a short supply of domestic products is in error.

56. India has not demonstrated how DCRs could be "essential" to "the acquisition" of those products. The Appellate Body has observed that the Oxford English Dictionary defines "essential" to mean "absolutely indispensable or necessary." Therefore, for purposes of Article of XX(j), India would need to establish that the DCRs are "absolutely indispensable or necessary" to acquiring solar cells and modules purportedly in short supply. It has not done so.

57. Lastly, India appears to be not so much concerned with its ability to acquire solar cells and modules than with the apparent dearth of Indian-manufactured solar cells and modules. Specifically, India argues that the DCRs are designed to "incentivize domestic manufacturing of cells and modules" and are therefore "essential" to addressing the apparent shortage of Indian-produced cells and modules. In other words, by India's own acknowledgment, it views the DCRs as "essential" to encourage local supply (production) and not essential to "the acquisition" of solar cells or modules.

**IV. India Has Failed to Demonstrate that the DCRs at Issue Are Necessary to Secure Compliance with Laws or Regulations Not Inconsistent with the GATT 1994 within the Meaning of Article XX(d)**

58. India argues that the DCRs at issue are measures "necessary to secure compliance with laws or regulations [not] inconsistent with the provisions of [GATT 1994] ..." for purposes of Article XX(d). The Appellate Body has found that "[a] Member who invokes Article XX(d) as a justification has the burden of demonstrating that" the measure at issue "is necessary to secure compliance."

59. First, many of the instruments cited by India appear to be broad policy documents with non-binding or merely hortatory effect. That is, they do not appear to be laws or regulations with which India must "comply" within the meaning of Article XX(d). Previous GATT panels have reasoned that "to comply" means "to enforce obligations" not "to ensure the attainment of the objectives of laws and regulations." Thus, even if the DCRs are designed to pursue the sustainable development goals reflected in the cited instruments, that is still insufficient to demonstrate that the DCRs are necessary to "secure compliance" with the instruments themselves. On this fact alone, India has failed to demonstrate that the DCRs are necessary to comply with any law or regulation for purposes of Article XX(d).

60. Second, India has also failed to demonstrate that the DCRs at issue are "necessary" to comply with the obligations contained in any allegedly binding instruments. India argues that its DCRs are "necessary" – for purposes of Article XX(d) – because "[t]he DCR Measures contribute to enforcing the sustainable development commitments undertaken by India, through its laws and regulations." The Appellate Body has observed that, as a general matter, "necessary" can mean anything from "indispensable" to simply "makes a contribution to." But for purposes of Article XX(d), the Appellate Body has made clear that a "necessary measure is...located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."

61. Finally, the United State observes that several of the instruments cited by India are international instruments, not domestic Indian laws or regulations. India has not sufficiently demonstrated that those instruments have been incorporated into India's domestic legal system. As India states in its submission, in India "rules of international law are [automatically] accommodated into domestic law" only if "they do not run into conflict with laws enacted by Parliament."

**ANNEX B-2****SECOND PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS  
OF THE UNITED STATES****U.S. Second Written Submission****I. Introduction**

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

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

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

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

**II. India Has Raised No Valid Defense to the U.S. Claims Under GATT 1994 and the TRIMs Agreement****A. India Has Not Refuted the U.S. Claims that the DCRs at Issue Are Inconsistent with GATT 1994 Article III:4 and TRIMs Agreement Article 2.1**

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

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

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

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

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

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

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

11. The most straightforward rebuttal to this argument is that India has the facts wrong. Solar cells and modules are not inputs in the generation of electricity. They are *not* incorporated into or otherwise physically detectable in the electricity procured by the Indian government. Instead, solar cells and modules are more accurately characterized as capital goods – equipment like a turbine or a generator. Therefore, contrary to India's assertions, when it buys solar electricity, it *does not* acquire the cells and modules. Rather, as it acknowledges, the cells and modules remain in the clear custody and ownership of the solar power developers. Therefore, the legal question of whether Article III:8(a) provides special a rule for "integral inputs" into products procured by the government is one that the Panel does not have to answer.

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

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

14. India attempts to draw a further distinction between solar cells and modules – which it characterizes as "integral inputs" to the generation of solar power – and other types of equipment,

which India refers to as merely "ancillary" (inverters, electrical wiring, etc.). India seems to suggest that the DCRs at issue in this dispute are legally permissible because they are limited to so-called "integral" generation equipment like solar cells and modules, *in contrast* to the DCRs in *Canada – FIT*, which also covered merely "ancillary" equipment like electrical wiring, inverters, mounting systems, etc.

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

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

### **III. India has Failed to Meet the Conditions for Justifying the DCRs at Issue Under Paragraphs (j) OR (d) OF Article XX of the GATT 1994**

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

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

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

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

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

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

- **The objective.** The "objective" in question in a necessity analysis under Article XX of GATT 1994 is the objective protected under the clause that a Member seeks to invoke. With respect to Article XX(j), that objective would be the acquisition and distribution of solar cells and modules, assuming *arguendo* that they are in short supply. India has in particular expressed a desire "to ensure domestic resilience in addressing any supply side disruptions."
- **The importance of the objective.** The United States does not question that the acquisition and distribution of solar cells and modules to Indian SPDs, and ensuring domestic resilience against supply-side disruptions, are important.
- **Contribution of the measure to the objective.** The NSM DCRs do not appear to make much of a contribution to the objectives. In the short term, they would tend to exacerbate a short supply situation by limiting access to imported solar cells and modules for some solar power projects. In the long term, any capacity added in India would become part of the global market, and in a short supply situation would tend to serve the highest paying purchaser, which would not necessarily be in India.
- **Trade-restrictiveness of the measure.** For projects to which they apply, the DCRs impose a ban on imports, which is one of the most severe forms of trade restriction. While they do not apply to all projects funded through the NSM, they do cover a large proportion, and the NSM envisages a dramatic increase in India's solar power generation capacity. Therefore, even when viewed across the totality of Indian demand for solar cells and modules, the NSM DCRs appear to represent a substantial restriction on trade.
- **Reasonably available alternative measure.** There are two WTO-consistent alternatives. First, India could acquire a "reserve" of solar cells and modules by importing a surplus for the purpose of stockpiling, which it could then draw down in the event of a supply shock. Another option would be to secure dedicated import sources by entering into long-term contracts with foreign suppliers. Either of these measures would do at least as much as DCRs to address any short-supply situation that may arise in India and ensure resiliency in the face of supply shocks in a matter that is consistent with WTO-rules.

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

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

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

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

24. As noted above, India cites several domestic and international legal instruments as requiring it to take certain actions to protect the environment or pursue a sustainable development strategy. The United States observes, however, that India does not argue that any of the cited instruments

are enforced (much less enforceable) against its citizens or persons otherwise subject the jurisdiction of the Indian government. That is, India has not argued that the cited instruments constitute laws or regulations that persons under its jurisdiction must obey in order to comply with Indian law. Rather, India explicitly describes these instruments as containing legal obligations that apply to the Indian government *itself*.

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

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

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

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

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

##### **I. Introduction**

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



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## II. The Domestic Content Requirements at Issue are Inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement

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

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

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

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

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

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

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

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**IV. India Has Failed to Demonstrate that the DCRs at Issue Are Justified Under Paragraphs (j) or (d) of Article XX of the GATT 1994**

36. As the United States has noted, India has not demonstrated that solar cells and modules are "in short supply" either generally *or* locally in India within the meaning of Article XX(j) of the GATT 1994. Even though it concedes that it is having no difficulty acquiring solar cells and modules at the current time, India argues that the DCRs are nonetheless justified because there is a *risk* that India could face supply shocks in the future. But Article XX(j), by its very terms, is applicable only with respect to products that are presently "in short supply" *not* products that might or could fall into short supply sometime in the future. Other text in Article XX(j) supports this plain reading. The reference to "general" and "local" gives two concrete areas or markets in which such current short supply should exist. And the condition that the measure "shall be discontinued as soon as the conditions *giving rise* to them *have ceased to exist*" reinforces that the short supply must *currently* exist.

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

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

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

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

41. India also has at its disposal other tools that would appear to keep India in compliance with its various international commitments, including, *inter alia*, more environmental regulation, promoting the development of other renewable energy sources (including geothermal, hydroelectric, and wind), or promoting the consumption of energy from renewable energy sources on a non-discriminatory basis. These alternatives reveal that the DCRs at issue make only an indirect contribution (at most) to India's compliance with its commitments. As such, the DCRs, again, can hardly be considered "necessary" within the meaning of Article XX(d).

**ANNEX B-3****FIRST PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA****I FACTUAL BACKGROUND**

1. The Panel Request of the United States specified domestic content requirements ("DCR Measures") for solar cells and modules in Phase I (Batches I and II), and Phase II (Batch I) of the Jawaharlal Nehru National Solar Mission (JNNSM) as the subject matter of the dispute. The United States claims that the DCR Measures violate India's obligations under GATT Article III:4 and TRIMs Article 2.1. In its first written submission, the United States also claims that Article III:8(a) of the GATT 1994 will not apply because the government of India is purchasing electricity, and not solar cells and modules.

2. India submits that at the heart of this dispute is the basic question on the ability of governments to design policies and schemes that balances its trade related obligations, while ensuring development of an indigenous manufacturing base for solar cells and modules with a view to having better control over its energy security.<sup>1</sup>

3. The JNNSM Mission Document explains that: The National Mission is a major initiative of the Government of India and State Governments to promote ecologically sustainable growth while addressing India's energy security challenge. It will also constitute a major contribution by India to the global effort to meet the challenges of climate change.<sup>2</sup>

4. India underscores that the DCR Measures are limited in scope, and do not operate as a prohibition on imports of solar cells and modules. In fact, India acknowledges the strong and critical role that imports have to play in the growth of its solar power generation, and continues to encourage and incentivize the same. Imports of solar cells and modules play a predominant role in India's solar PV sector. Domestically manufactured cells and modules under the DCR Measures account for only 140 MW out of the total 3110 MW of solar PV installed capacity in India.<sup>3</sup> India further submits that the DCR Measures do not seek to maximise self-sufficiency by reducing imports of solar cells and modules; instead they aim to reduce the risks linked to dependence solely on imports.

**II INDIA'S REQUEST FOR A PRELIMINARY RULING**

5. Along with its first written submission, India made a request for a preliminary ruling with a view to ensuring that the Panel proceedings are limited to the United States' Panel Request. The United States' first written submissions stated that India is implementing the JNNSM through "JNNSM Programme measures". The reference to the "JNNSM Programme Measures" exceeds the terms of reference of the Panel, which, as explained in the first paragraph of this summary, was limited to the DCR Measures in the instruments in Phase I (Batch I and Batch II) and Phase II (Batch I) of the JNNSM. Along with its first written submission, therefore, India made a request for a preliminary ruling on the terms of reference of the Panel.

6. The United States has subsequently confirmed that the Panel Request is with respect to the identified measures as they existed on the date of the establishment of the Panel.<sup>4</sup>

7. India's concern however remains that the United States has not modified its request for findings, which is not limited to the instruments identified in the Panel Request, and instead refers

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<sup>1</sup> Paragraph 1 of the WTO Agreement recognizes the right of countries to pursue policies consistent with their respective needs and concerns at different levels of economic development, within the overall context of the objective of sustainable development, and the need to protect and preserve the environment.

<sup>2</sup> *Jawaharlal Nehru National Solar Mission: Towards Building Solar India*, Ministry of New and Renewable Energy at p.1 (IND-1).

<sup>3</sup> This is based on data as on January 15, 2015

<sup>4</sup> United States' response to India's request for preliminary ruling, paras 3, 11 and 12.

to "domestic content requirements contained in the JNNSM Programme measures, including both Phase I and Phase II."<sup>5</sup>

8. The United States has acknowledged that the JNNSM is a broader initiative than the measures identified in the Panel Request and in its first written submission,<sup>6</sup> but it continues to refer to the disputed measures as the "JNNSM Programme measures", and not as the "DCR measures in the instruments identified in the Panel Request". India has therefore requested for a preliminary ruling on the basis that the precise identification of the measure at dispute constitutes the very foundation of any dispute, and cannot be vaguely defined. If the United States agrees that the measures at dispute are the domestic content requirements in the instruments identified in the Panel Request, then it cannot in the same breath continue to have an open-ended prayer referring to domestic content requirements contained in the JNNSM Programme measures, including both Phase I and Phase II.

9. India further submits that, flowing from the basic characterization of the measure at dispute as 'domestic content requirements' in the legal instruments identified in the Panel Request, any related or amending or implementing measure would be measures related to or amending or implementing DCR within the specific instruments identified in the Panel Request (i.e., Phase I, Batches I and II, and Phase II, Batch I). India reiterates that any one batch cannot be said to constitute measures that are *related to, amendments of, or measures implementing* the DCRs in another batch. Each batch in each phase of JNNSM is independent of the other.<sup>7</sup>

### III UNITED STATES' CLAIMS ON GATT ARTICLE III:4 AND TRIMS ARTICLE 2.1

10. The United States has argued that different conditions apply to domestic cells and modules and imported cells and modules, and that this violates GATT Article III:4 and TRIMs Article 2.1. WTO jurisprudence on Article III:4 is explicit that each of the requirements of that provision need to be established. It cannot be assumed that any distinction that is based on criteria relating to nationality or origin of products is incompatible with Article III. Furthermore, regulatory distinctions between imported and like domestic products are, in themselves, not determinative of whether imported products are treated less favourably within the meaning of Article III:4.<sup>8</sup>

11. India argues that it is necessary to apply the principle explained by the Appellate Body in *Thailand-Cigarettes* that "what is relevant is whether the regulatory differences distort the conditions of competition to the detriment of imported products."<sup>9</sup> The analysis of whether imported products are accorded less favourable treatment requires a careful examination grounded in close scrutiny of the fundamental thrust and effect of the measure itself.<sup>10</sup> This would require further identification or elaboration of its implications for the conditions of competition in order to properly support a finding of less favourable treatment under Article III:4 of GATT 1994.<sup>11</sup>

12. Applying the above principle of close scrutiny of the thrust and effect of the measure, as explained by the Appellate Body in *Thailand-Cigarettes*, India submits that the predominant role of imported solar cells and modules in India's solar PV installed capacity needs to be considered. It should be noted that imports from the United States itself make a significant contribution to India's solar PV installed capacity, and a recent report of the United States International Trade Commission has itself noted that JNNSM "had little negative impact on US exports of PV modules to India".<sup>12</sup>

<sup>5</sup> United States' first written submission, para 94, reiterated in United States' response to India's request for preliminary ruling, para 9.

<sup>6</sup> United States' response to India's request for preliminary ruling, para 28.

<sup>7</sup> In this regard, India also submits that the JNNSM is not a singular programme implemented through a uniform set of measures, and that it does not mandate any specific methods or approaches to achieve its aims and objectives.

<sup>8</sup> Appellate Body Report, *EC-Asbestos*, para 100.

<sup>9</sup> Appellate Body Report, *Thailand-Cigarettes*, para 128.

<sup>10</sup> Appellate Body Report, *Thailand-Cigarettes*, para 129, relying on the Appellate Body in *US-FSC (Article 21.5-EC)*, para 215.

<sup>11</sup> Appellate Body Report, *Thailand-Cigarettes* - para 130.

<sup>12</sup> *Trade, Investment, and Industrial Policies in India: Effects on the U.S. Economy*, United States International Trade Commission (December, 2014) at p.179 (IND-32). The report also notes that exports by First Solar (a major manufacturer of solar cells and modules in the US) accounted for more than 60 per cent of US PV module exports to India in 2011, and more than 75% in 2012.

13. The bidding conditions under JNNSM Phase I (Batches I and II), and Phase II (Batch I), have not affected the opportunity for imported solar cells and modules to enter the market, and the United States has failed to demonstrate that they are subject to less favourable treatment for the purposes of GATT Article III:4, and consequently, no violation of TRIMs Article 2.1.

**Sequence of Analysis: GATT Article III:4 and TRIMs Article 2.1**

14. The United States' claim begins with Article III:4 of GATT and then moves to Article 2.1 of the TRIMs Agreement. Based on the European Union's third party submission, the Panel has raised the question of whether Article 2.1 of the TRIMs Agreement is the more specific provision for consideration of the facts of this dispute. India submits that the specific claim made by the United States (i.e., claim under GATT Article III:4, and a consequent claim under TRIMs Article 2.1), would need to be the basis on which the Panel proceeds with its analysis.<sup>13</sup>

15. India also submits that TRIMs Article 2.1 is not a more specific provision, in that it does not add to or subtract from GATT obligations, but merely serves to clarify that Article III:4 may cover investment related matters.<sup>14</sup> This is clear from the wording of TRIMs Article 2.1, which states that *any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT, 1994, shall not be applied by a Member.*

16. India further submits that the Appellate Body in interpreting Article 2 and the Illustrative List of the TRIMs Agreement in *Canada-Renewable Energy/ Canada- Feed-in Tariff Programme* has stated that "Paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement did not obviate the need for the Panel to undertake an analysis of whether the challenged measures are outside the scope of application of Article III:4 of the GATT, 1994."<sup>15</sup>

17. In conclusion, owing to the fact that the United States has itself not made a standalone claim under the TRIMs Agreement, and has linked the finding on TRIMs Article 2.1 to a finding of violation under GATT Article III:4,<sup>16</sup> and in view of WTO jurisprudence that a finding under the TRIMs Agreement does not obviate the need for an analysis of the measure under GATT Article III:4, India respectfully submits that the Panel should first analyze consistency with GATT Article III:4, and then analyze whether the measure violated TRIMs Article 2.1.

**IV APPLICABILITY OF THE DEROGATION UNDER GATT ARTICLE III:8(A)**

18. Without prejudice to India's arguments that the DCR Measures do not violate Article III:4 of GATT 1994 and TRIMs Article 2.1, India respectfully submits that the measures at issue are justifiable under Article III:8(a) of GATT 1994 (under which the Government is allowed to derogate from principles of national treatment in the context of procurement for government purposes and not for commercial resale).

19. The United States has argued that the derogation of GATT Article III:8(a) will not apply to the present dispute. They have relied on the Appellate Body ruling in *Canada-Renewable Energy/ Canada- Feed-in Tariff Programme*, to support their argument.

20. India respectfully disagrees, and submits that the United States' analysis is over-simplistic. The reasoning by the Appellate Body cannot be read out of context to fit into all sets of facts and circumstances that are sought to be pleaded under Article III:8(a). As noted by the Appellate Body in *Japan-Alcoholic Beverages II*, WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world.<sup>17</sup>

21. The key factual distinction between the *Canada-Renewable Energy/ Canada- Feed-in Tariff Programme* and the facts before this Panel, are the nature of products in question:

<sup>13</sup> United States first written submission, para 94

<sup>14</sup> Panel Report, *EC-Bananas III*, para 7.185

<sup>15</sup> Appellate Body Report, *Canada-Renewable Energy/ Canada- Feed-in Tariff Programme*, para 5.26.

<sup>16</sup> United States' first written submission, para 94.

<sup>17</sup> Appellate Body Report, *Japan-Alcoholic Beverages*, at p.31.

- In Canada's case, electricity generation facilities needed to comply with "Minimum Required Domestic Content Levels" in the development and construction of their facilities. The "Domestic Content Level" of a facility participating in either stream of the FIT Programme was calculated pursuant to a methodology that identified a range of different "Designated Activities" and an associated "Qualifying Percentage." The focus of the domestic content requirements under Canada's programme was therefore not limited to inputs that are integral to renewable energy generation, and instead pertained to a wider category of materials and activities relevant for the development and construction of the power plant.
- In the facts before this Panel, the focus of the domestic content requirements is on the generation of solar power from Indian manufactured solar cells and modules. Solar cells and modules basically convert the energy of light directly into electricity by the photovoltaic effect. Solar cells and modules do not have any purpose other than generating solar power. They are therefore integral to the generation of solar power, and cannot be treated as distinct from the generation of solar power.

22. It is important to note that the Appellate Body in *Canada-Renewable Energy/ Canada- Feed-in Tariff Programme* has stated that:

"What constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product. In its rebuttal of Canada's claim under Article III:8(a), the European Union acknowledges that the cover of Article III:8(a) may also extend to discrimination relating to inputs and processes of production used in respect of products purchased by way of procurement. Whether the derogation in Article III:8(a) can extend also to discrimination of the kind referred to by the European Union is a matter we do not decide in this case."<sup>18</sup> (Emphasis added).

23. Flowing from the logic of the afore-mentioned observation by the Appellate Body, it may be possible to envisage circumstances wherein the discrimination is on inputs used for producing a product that it finally purchased. The Appellate Body acknowledges that there may be situations wherein the products purchased are quite different from the inputs that have been discriminated upon, and that it is not conclusively deciding on such situations.<sup>19</sup> The Appellate Body thereby left room for interpretation based on the facts before a panel, and in doing so, it implicitly recognized that "competitive relationship" between product being discriminated against and product being purchased, is not a single inflexible rule to be applied in all circumstances for consideration under Article III:8(a).

24. The solar PV cell/module converts the energy of sunlight directly into electricity through the photovoltaic effect. India's submission is that solar cells and modules are integral to the generation of solar power, and cannot be treated as distinct from solar power.<sup>20</sup> Solar cells and modules are integral inputs which generate the solar power. In fact, other than cells and modules, all other equipment used in a solar PV generation plant (inverters, electrical wiring, etc.) can be characterized as ancillary equipment.

25. To give full effect and meaning to Article III:8(a), India respectfully submits that when a product being discriminated against is an integral input for generation or production of the product that is finally purchased, the derogation under Article III:8(a) should be available for such products.

26. India also reasons that to deny the characterization of "government procurement" to India's method of procuring solar cells and modules merely because the Government does not physically acquire or take custody of the solar cells and modules, and instead chooses to buy the solar power generated from such cells and modules, would inadvertently narrow the scope and intent of GATT Article III:8(a).

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<sup>18</sup> Appellate Body Report, *Canada-Renewable Energy/ Canada- Feed-in Tariff Programme*, para 5.63.

<sup>19</sup> *Ibid.*

<sup>20</sup> India's first written submission, paras 110- 111.

*The procurement is governed by "law, regulation or requirement"*

27. India accordingly requests the Panel to complete the analysis under Article III:8(a). In this regard, India submits that the instruments and documents governing the bidding process for the selection of SPDs under Batch I and Batch II of Phase I of the JNNSM, and under Batch I of Phase II of the JNNSM, are a set of well-defined framework of requirements governing procurement of solar power generated from solar cells and modules.<sup>21</sup> These would therefore qualify as "law, regulation or requirement governing procurement" for the purposes of Article III:8(a).

*The procurement is by government agencies*

28. The procurement is by NRVN and SECI, which, as the United States also agrees,<sup>22</sup> are government agencies implementing Phase I (Batches I and II) and Phase II (Batch I) of the JNNSM.

*The procurement is for governmental purposes*

29. The procurement by NRVN and SECI is for the governmental purpose of promoting ecologically sustainable growth while addressing India's energy security challenge. India has also explained that "promoting ecologically sustainable growth" and "addressing the energy security challenge" cannot be seen as distinct from each other, and that ecologically sustainable growth is fundamental to India's strategy to address energy security.<sup>23</sup>

30. The public functions that India seeks to discharge through the procurement process is to enable generation and distribution of electricity generated from solar cells and modules.<sup>24</sup> The government of India's role with regard to ensuring access to renewable solar electricity is a natural corollary of the overall challenges for India to cater to the economic development requirements of its population in an environmentally sustainable manner.

*The procurement is not with a view to commercial resale or with a view to production of goods for commercial sale*

31. Neither NRVN nor SECI are engaged in the commercial resale of the solar power procured; rather through the bundling scheme implemented under Phase I (Batch I and Batch II), and the viability gap funding (VGF) scheme under Phase II (Batch I), the Government ensured that the price of sale of solar power to Discoms was at a level that would enable distribution to consumers at an affordable price. But for the bundling scheme and the VGF scheme being built into the process of procurement of solar power (through the involvement of NRVN and SECI respectively), 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. The JNNSM Mission Document recognized this and emphasized the need for government intervention and suitable schemes to bring down the costs of solar power.<sup>25</sup> The intervention by the Government in designing the procurement programmes incorporating bundling and VGF, therefore, essentially ensured that the sale of power is not linked to the costs of generation of such power, since that would have essentially made it unviable for Discoms to purchase such power, or for consumers to pay for the same.

**V GENERAL EXCEPTIONS TO GATT OBLIGATIONS**

32. Should the Panel find that the DCR Measures are inconsistent with the provisions of GATT 1994 and TRIMs invoked by the United States, India submits, in the alternative, that any such inconsistency would be justified under Article XX(j) and Article XX(d) of GATT 1994.

<sup>21</sup> India's first written submission, paras 76-83.

<sup>22</sup> United States' Response to Panel Question, paras 4-9.

<sup>23</sup> India has also explained that the state's role with regard to ensuring access to renewable energy is a natural corollary of the overall challenges for the state to cater to the economic development requirements of its population in an environmentally sustainable manner. The JNNSM Mission Document succinctly summarizes the challenge of the Government as stemming from its tackling of crippling electricity shortages, rising price of electricity, and the gradual shift towards imported coal to meet its energy demand, which in turn will only lead to further increase in electricity prices: para 140, India's first written submission.

<sup>24</sup> India's first written submission, paras 136-143.

<sup>25</sup> India's First Written Submission, para 154.

**India's Policy Objectives**

33. The DCR Measures need to be seen in the context of the overall energy scenario and the challenges that India is currently facing: energy deficit, increasing demands for energy, and its dependence on fossil fuels and imported materials for its energy requirements. Any dependence on imports brings with it risks associated with supply side vulnerabilities and fluctuations. India has an obligation to ensure energy access for its population in an ecologically sustainable manner. It therefore needs to ensure that its move to renewable energy is achieved in a way that does not make the generation of such power solely dependent on import of solar cells and modules which are intrinsic to solar power generation.

34. The key policy objectives that India seeks to achieve through the DCR Measures are:

- (i) Energy Security and Sustainable Development; and
- (ii) Ecologically sustainable growth, while addressing the challenges of climate change.

35. An essential corollary to the energy security objective, is the need for ensuring control over the country's energy destiny. India understands that this will require security of supply of energy products such as solar cells and modules which are critical components intrinsic to solar power development. As explained earlier, India's solar PV installations predominantly rely on imported cells and modules. This exposes India to the risks of market fluctuations in international supply. Government intervention is required in order to minimize dependence on imports cells and modules, and ensure domestic resilience in addressing any supply side disruptions. It is important for India's pursuit of its objective of energy security, and ecologically sustainable growth, to improve its resilience to the uncertainties arising from a dependence on imports of solar cells and modules which are integral to solar PV power generation. The only manner in which this can be addressed is by ensuring that there is adequate domestic manufacturing capacity.

36. India acknowledges that security of supply does not mean that it needs to locally manufacture all of its requirements for solar cells and modules; but that it needs to have manufacturing capacity that can effectively reduce the risks linked to import dependence. It is for this reason that India's policies have a significant focus on encouraging imports; while ensuring the development of indigenous manufacturing.

37. Renewable energy such as 'solar' cannot be stockpiled and stored in the same manner as fossil fuels. From the energy security perspective, therefore, what is important is that a country has the inherent capacity to develop renewable energy in order to secure its long-term supply. India believes that the development of its solar manufacturing capacity is essential in order for it to ensure resilience in its ability for continued production of solar cells and modules that can generate solar power, and develop a bank of knowledge and resources to enable such manufacturing.

38. India also needs to ensure ecologically sustainable growth, fundamental to which is the concept of sustainable development, in that India's energy requirements to fuel its economic growth would need to be achieved in a sustainable manner. The WTO Agreement has in its preamble incorporated sustainable development as one of the guiding principles. It recognizes that the objective of sustainable development will be pursued by countries, guided by their own needs and concerns depending on their levels of economic development.<sup>26</sup>

39. Against the above background of India's policy objectives, we outline the basic line of reasoning that India seeks to advance in relation to the general exceptions available under Articles XX(j) and XX(d) of GATT 1994.

**The DCR Measures are justifiable under Article XX(j)**

40. Article XX(j) allows WTO Members to take measures that are essential to the acquisition or distribution of products in general or local short supply. This provision essentially requires answering three questions:

- Whether the measure seeks to address the general or local short supply of a product;

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<sup>26</sup> Paragraph 1, WTO Agreement.



- Whether the measure is essential for the acquisition or the distribution of such product; and
- Whether the measure complies with the elements in the proviso to Article XX(j).

41. India respectfully submits that Article XX(j) would encompass situations wherein a product available internationally is still in short supply in certain local markets, and the United States agrees with this proposition.<sup>27</sup>

42. India argues that "general or local short supply" would occur in circumstances wherein the product is not produced or manufactured in a particular market. However, India's submission is **not** that Article XX(j) is an exception available to address any situation where a country's indigenous manufacturing capacity for any product is low. Article XX(j) cannot transform itself to a magic wand that would allow countries to impose import restrictions for any and all products which it cannot produce or manufacture by itself.

43. India submits that any justification for invoking Article XX(j) would need to rest on whether a measure is *essential to* redress such a situation of general or local short supply. The element regarding "*essential to*" signifies the relationship between a measure and its objective of acquisition or distribution of products in general or local short supply. India's DCR Measures needs to be examined in the context of the overall objectives of energy security and ecologically sustainable growth for which acquisition or distribution of indigenously manufactured solar cells and modules is essential.

44. The United States has argued that short supply for the purposes of Article XX(j) cannot exist when a product can be imported, but also acknowledges that a product available internationally can still be in short supply in certain local markets. India submits that Article XX(j) could not have meant that short supply will not be considered to exist when products can be imported since in a globalized world, no product will be in short supply as it can always be imported. Such an interpretation would render the whole of Article XX(j) redundant. In fact, the very essence of use of the words "general or local short supply" in the main part of Article XX(j) and "international supply" in the proviso to Article XX(j) indicates that situations of "general or local short supply" will occur even when there is international supply of a product.

45. The United States has argued that Article XX(j) should be limited only to emergency situations. This however ignores the fact that during the review process that resulted in retention of Article XX(j) in its current form, specific references to shortages resulting from the war, or maintenance of government stocks, were deleted.<sup>28</sup> In fact under GATT, the only provision which allows specific exceptions relating to a war is GATT Article XXI, which explicitly makes reference to the term "war". In its current form in which Article XX(j) has been incorporated into the GATT, there is nothing in its language that suggests that it is limited in any manner to specific situations.

46. Article XX(j) therefore needs to be understood in terms of its contemporary relevance. India argues that the current relevance of Article XX(j) needs to take into account the evolution of circumstances: the spectre of scarcity and shortages that may have been relevant only in situations of 'war' or 'post-war' during the 1940s and 50s, needs to be seen in the present times in the context of evolution of circumstances whereby energy security and sustainable development are important concerns globally. Winning the climate change war and effectively addressing the challenges of energy security, while ensuring ecologically sustainable economic growth, are the new challenges for the 21st century world. In such a scenario, the need to have liberalized trade and dismantle trade barriers, has to be balanced with the ability of a country to secure its energy security through domestic manufacturing capacity of certain key products such as solar cells and modules which are material to addressing a country's overall objective of energy security.

47. Japan has argued that Article XX(j) would apply only in the context of export restraints.<sup>29</sup> India has highlighted in this regard that nothing in the language or context of Article XX(j) would suggest such a limitation. Article XI:2(a) and Article XX(i) are GATT provisions that are sought to

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<sup>27</sup> United States' Response to the Panel's Questions, para 33.

<sup>28</sup> Article XX, GATT, Analytical Index: Guide To GATT Law And Practice (Updated 6th Ed. 1995) at p. 593, relying on L/334, and Addendum, adopted on 3 March 1955, 3S/222, 230, para. 41.

<sup>29</sup> Japan's third party submission, paras 15-18.

be confined to export restraints, and their language is explicit in this regard. It would not be appropriate to read into Article XX(j) words that would confine and narrow its meaning and scope.

48. The United States has further argued that Article XX(j) does not explicitly refer to origin related discrimination, and that this indicates that it addresses supply of that product without respect to origin.<sup>30</sup> India notes in this regard that the United States' argument would imply that Article XX(j), and other clauses of Article XX which are also silent on the issue of origin, can never be applied to a situation which discriminates between domestic and imported products. A natural corollary to this would mean that Article XX cannot be used to justify a violation of the National Treatment obligation under Article III, which necessarily includes instances of origin-based discrimination. Such an interpretation defeats the very purpose of Article XX, which is an exception available in the context of inconsistency with any provision of GATT 1994.

49. India also submits that the concept of "short supply" under Article XX(j) would include situations of existing short supply, as well as risks to short supply. In this regard, India further submits that sole dependence on imported solar cells and modules brings risks associated with supply side vulnerabilities and fluctuations. In order to achieve energy security, India needs to achieve domestic resilience to such risks. India respectfully submits that development of its solar manufacturing capacity is essential in order for it to ensure resilience in its ability for continued production of solar cells and modules that can generate solar power, and develop a bank of knowledge and resources to enable such manufacturing. India also relies on a study by the World Bank to explain the risks associated which notes that dependence on foreign financing for India's solar projects is fraught with risks arising from mismatches in currency flows, as the revenues of the solar projects are all denominated in Indian Rupees while overseas debt servicing is in foreign currency. Furthermore, India has highlighted the uncertainties in solar PV manufacturing industry worldwide, resulting primarily from the fact that PV remains a policy-driven business, where political decisions influence considerably the potential market off-take.

*Elements of Article XX(j) proviso*

50. Two elements have to be established in the context of the proviso to Article XX(j): (a) the measure shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products; and (b) such measures shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

51. The determination of what is 'equitable' to all the contracting parties in any given set of circumstances will depend upon the facts in those circumstances."<sup>31</sup>In this regard, India has explained that the DCR Measures do not in any manner adversely impact the equitable entitlement to the product by other Members, and hence this element of the proviso is complied with.

52. Inherent in the second element of the proviso to Article XX(j) is the expectation of reaching a point in time when conditions giving rise to the short supply have ceased to exist. India does not intend for the DCR measures to be maintained indefinitely. In fact, it has put in place systems of review and evaluation to assess the evolution of the JNNSM. As explained, India's overall strategy also comprises of multiple interacting measures including measures to incentivise imports. The importance of the values relating to ecologically sustainable growth and energy security, and the overall strategy of encouraging trade, while carving out policy space for building India's indigenous capacity, needs to be viewed holistically by the Panel in making its assessment.

*The DCR Measures are justifiable under Article XX(d)*

53. India respectfully submits that developing and maintaining the DCR Measures is integral to its compliance with both domestic and international law obligations to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change. India's domestic law obligations are those embodied in the Electricity Act read with the National Electricity Policy, and the National Climate Change Action Plan. India's international law obligations are those embodied in various international instruments, including, but not limited to the WTO Agreement, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development (1992), and

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<sup>30</sup> United States' responses to the Panel's Questions, para 39.

<sup>31</sup> Report of the Working Party "D" on Quantitative Restrictions. GATT/CP.4/33, 18 March 1950.

the Rio+20 Document: 'The Future We Want', adopted by the United Nations General Assembly in 2012. India's DCR Measure has been designed to secure compliance with the afore-mentioned laws and regulations which are themselves not GATT inconsistent.

54. Developing and maintaining the DCR Measures is integral to India's compliance with obligations under the afore-mentioned instruments to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change. India understands the term "ecologically sustainable growth" to mean "economic growth in an ecologically sustainable manner". India submits that environment and development cannot be looked at in isolated compartments, and that environmental protection, economic development, and social development are the three interdependent dimensions of sustainable development.<sup>32</sup>

55. Seen in this context, India submits that the concept of "sustainable development" as embodied under the UNFCCC, the Rio documents, and the Preamble to the WTO Agreement, encompasses within it the concept of 'ecologically sustainable growth'. India further clarifies that ecologically sustainable growth is fundamental to India's strategy to address its energy security objective as well, and they cannot be seen as distinct from each other. The laws and regulations with which compliance is sought to be secured for the purposes of Article XX(d), encompass obligations relating to sustainable development. In contributing to the realization of India's obligations of sustainable development (and hence ecologically sustainable growth), the DCR Measures directly contribute towards meeting India's energy security challenge.

56. India also respectfully submits that merely because the legal instruments specified by it do not prescribe specific implementation measures, and instead leave open flexibility for India to design its implementation measures, does not mean they constitute an *objectives* that need not be complied with, or that compliance with such obligations need not be secured.

57. India further explains that under the Constitution of India, acts of the executive are not confined to areas where there is a pre-existing law. Acts of the union executive extend to aspects over which the Parliament has the power to enact laws. This means that the Government can suo moto take implementing actions to secure compliance with India's international law obligations under the afore-mentioned instruments. They therefore have direct effect in the domestic legal system in India. Acts of the Government in implementing international law obligations pursuant to treaties and resolutions that India has adhered to at the international level, have been recognized under Indian law as constituting implementation of those obligations.

#### ***No Reasonable Alternatives to achieve India's Policy Objectives***

58. It is important to underscore that India is not seeking to restrict all imports of cells and modules, or limit the imports of auxiliary equipment required for the generation of solar power. In implementing the DCR Measures, India is seeking to develop a functional local manufacturing base for cells and modules, which are the essential components in a solar PV generation plant, thereby ensuring a sustained supply of the same in the event of disruptions in imports. India is doing so in a measured manner by weighing and balancing the importance of having a steady flow of imports and developing a manufacturing base so that in the event imports were to be impacted for any reason, it will continue to have the ability to sustain its solar energy programme. In this regard, particular note needs to be taken of India's measures relating to incentivising imports, which have been discussed in India's submissions.

59. India further respectfully submits that at this point in time, India does not have any reasonably available alternatives to achieve its objective of energy security. Building a domestic manufacturing base for solar cells and modules is both essential and necessary for it to achieve domestic resilience to the fluctuations and uncertainties associated with imports. India does not have the resources to give direct subsidies to the domestic manufacturers of cells and modules. India has weighed and balanced its various priorities, and in sum, its limited use of the DCR Measures, while incentivising imports, provides the best possible manner in which its policy objectives can be achieved.

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<sup>32</sup> This has also been recognized recently in the Rio+20 Outcome Document "The Future We Want", which emphasizes the need for sustained and inclusive economic growth, social development and environmental protection and thereby ensure overall benefits.

**The DCR Measures are consistent with the requirements of the Chapeau to Article XX**

60. India reiterates the settled position under *US-Gasoline* that the focus of the chapeau to Article XX is not so much on the questioned measure or its specific contents, but rather the manner in which that measure is applied.<sup>33</sup> The measures falling under the particular exceptions must be applied reasonably with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.<sup>34</sup> Accordingly, India submits that the focus of the Panel's review of its measures under the chapeau of Article XX should be on the manner of application of the measures rather than on the specific contents of the measure.

61. As noted by the Appellate Body in *US-Shrimp*, the task of interpreting and applying the chapeau is essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.<sup>35</sup> The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.<sup>36</sup> India respectfully submits that this line of equilibrium under the current facts needs to be located in the factual scenario that clearly demonstrates that imports of solar cells and modules play a significant role in India, and that the DCR Measures are applied in a very limited manner to achieve its legitimate policy objective.

62. In this regard, India demonstrates that the DCR Measures under Batch I and Batch II of Phase I and Batch I of Phase II are measures applied in good faith, without circumventing its obligations towards other WTO Members, including the United States. India highlights that it is applying the measure in a careful and limited manner, with due regard to encouraging imports of solar cells and modules. India's endeavour has been to ensure that the measure is applied in a limited and reasonable manner, to protect India's legitimate interests, and not as one that circumvents its WTO obligations towards the United States and other Members. It has not been applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination. Neither is it a disguised restriction on international trade.

63. India's submission is that any assessment of the requirements of the chapeau of Article XX would require an analytical process that involves putting all the variables of the situation together and evaluating them in order to make an overall assessment. The trade restrictiveness of India's policies towards solar cells and modules need to be looked at as a whole to understand that India's measure is not at all acting as a ban on imports of solar cells and modules. On the contrary, imports of solar cells and modules play a significant part in India's solar PV generation capacity, and the DCR measure has been applied in a very narrow manner to achieve certain legitimate policy objectives. At the same time, with a view to minimizing the risks of dependence on imports, it seeks to encourage the development of domestic manufacturing of solar cells and modules; but this is not being done in a manner that presents any threat to imports.

**CONCLUSIONS**

64. For the reasons stated above, India requests the Panel to conclude that the DCR Measures do not accord less favourable treatment to imported solar cells and modules than the treatment accorded to like products of Indian origin, and hence these are not inconsistent with Article III:4 of GATT 1994, and Article 2.1 of the TRIMs Agreement.

65. Should the Panel uphold the United States' claims under Article III:4 of GATT 1994, and Article 2.1 of the TRIMs Agreement, India requests the Panel to find that the derogation under Article III:8(a) of GATT 1994 is applicable to the DCR Measures.

<sup>33</sup> Appellate Body Report, *US-Gasoline*, at p.20.

<sup>34</sup> Appellate Body Report, *US-Gasoline*, at p.21.

<sup>35</sup> Appellate Body Report, *US-Shrimp*, para 159.

<sup>36</sup> *Ibid.*

66. Should the Panel find that the DCR Measures are inconsistent with the provisions of GATT and TRIMs, India requests the Panel to find that any such inconsistency would be justified under Article XX(j) and/or Article XX(d) of GATT 1994.

## ANNEX B-4

### SECOND PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

#### I INTRODUCTION

1. In its second written submission, India sought to address the following specific elements in response to the issues raised by the United States as well as questions raised by the Panel:

- a. The sequence of analysis between GATT Article III:4 and TRIMs Article 2.1;
- b. Interpretation of the elements of GATT Article III:8(a);
- c. Interpretation of the exception under Article XX (j);
- d. Interpretation of the exception under Article XX (d); and
- e. Applying the principles of the chapeau to Article XX.

2. These aspects were further elaborated in India's opening and closing statements at the second substantive meeting. India seeks to outline below the summary of its arguments.

#### II GATT AND THE TRIMS AGREEMENT

3. India highlighted that the Appellate Body in the *Canada-Renewable Energy* dispute explained that Article 2.2 and the Illustrative List must be understood as clarifying to which TRIMs the general obligation in Article 2.1 applies and agreed with the principle stated by the panel in that case that Article 2.2 of the TRIMs Agreement does not impose any obligations on Members, but rather informs the interpretation of the prohibition set out in Article 2.1.<sup>1</sup> India respectfully submits 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. In undertaking an evaluation under Article 2.1 of the TRIMs Agreement, the Panel would necessarily need to come to a view about the merits of the U.S. allegations regarding GATT Article III:4.

4. Accordingly, in undertaking an evaluation under Article 2.1 of the TRIMs Agreement, the Panel will necessarily have to come to a conclusion on the merits of the United States' claims regarding GATT Article III:4, which involves satisfaction of three elements: that the imported and domestic products at issue are 'like products'; that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products. Contrary to what is being suggested by the United States, these elements cannot be presumed to exist by the mere presence of a measure that falls within the Illustrative List to the TRIMs Agreement.

#### III GATT ARTICLE III:8(A)

##### *Scope of Article III:8(a)*

5. The United States has argued that India cannot resort to GATT Article III:8(a) because India acquires *electricity* under the PPAs, whereas the products which are subject to requirements affecting their sale, purchase, or use are *solar cells and modules*, and these products are not the same, nor are they in a competitive relationship. India has however explained that the Appellate Body in the *Canada-Renewable Energy/ Canada-Feed-in-Tariff Programme* dispute clarified that, whether the derogation in Article III:8(a) can extend also to discrimination relating to inputs and processes of production, is a matter, which it is not deciding upon.<sup>2</sup> India has submitted that the

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<sup>1</sup> Appellate Body Report, *Canada-Renewable Energy/ Canada- Feed-in Tariff Programme*, para 5.26, and fn 449 to para 5.26.

<sup>2</sup> Appellate Body Report, *Canada-Renewable Energy/ Canada-Feed-in-Tariff Programme*, para 5.63

Appellate Body reasoning needs to be applied in view of the facts before the Panel which offer it the opportunity to consider principles that would apply with reference to GATT Article III:8(a) when the discrimination is with reference to inputs used in a product that is purchased.

6. In the context of the facts before the Panel, a mechanical application of the Appellate Body's findings focusing only on the test of *competitive relationship* between the product discriminated against and the product being purchased, will not address the distinct nature of facts before it. In this regard, India has emphasized that the Panel needs to consider the important differences between the prevailing factual matrix and that which was applicable under the *Canada-Renewable Energy* dispute. Under the present circumstances the domestic content requirements are applicable only to solar cells and modules, as opposed to the Canada case where domestic content requirements were applicable cumulatively on a wide range of equipment and services required to construct and maintain a solar power generation system.

7. India has explained that solar cells and modules are semi-conductor devices that produce electricity when light falls on them. When light energy strikes the solar cell, electrons are knocked loose from the atoms in the semiconductor material, and this is what manifests itself as electricity. The reason this happens is because of the inherent property of the semi-conductor materials in cells and modules, which enables them to absorb photons of light and release electrons. When these free electrons are captured, an electric current results which is used as electricity.

8. A key question that arises is whether there is any difference at all between solar cells and modules and other components of a solar PV generation system? India emphasizes that there is indeed an important difference, in that the solar cells and modules are *integral inputs* for the generation system as explained above; whereas all other components of a PV generation plant such as inverters, mounting systems or any other electrical hardware can be classified as ancillary equipment. Solar modules comprise of materials that have the ability to convert sunlight directly into electric current through the photovoltaic process. Ancillary equipment such as an inverter is required, only when the electricity so generated has to be converted from direct current to alternating current (DC to AC). Therefore, if solar cells and modules are removed from the system, no electricity would be generated. However, if we eliminate an inverter or for that matter any other item, the solar cells and modules would continue to generate electricity.

#### **Government Purpose**

9. The United States has argued that India has "failed to demonstrate that the alleged procurement is for government purposes within the meaning of Article III:8(a)." India respectfully submits that it is absurd to assume that India is merely pursuing an "aim or objective"- as suggested by the United States, and not discharging important public functions. India has explained that the public functions sought to be performed is that of ensuring the provision of affordable solar power for its population, and achieving sustainability in the same by ensuring that there is no excessive dependence on imports of solar cells and modules which are critical components for generation of solar energy. India's argument on existence of governmental purpose and public functions is as follows:

▪ *The procurement by the government relies on implementation of the schemes of bundling and viability-gap funding (VGF) in Phase I (Batches I and II) and Phase II (Batch I) respectively, which ensures that the price of solar power is reduced and made affordable for the consumer. The clear and specific public function sought to be discharged is that of ensuring solar power development and enabling affordable access to solar power. It is only due to the intervention by the government of India in designing and implementing Phase I (Batches I and II), and Phase II (Batch I), by incorporating bundling and VGF, that made it possible to ensure that affordable and ecologically sustainable solar power is available to its population.*

▪ *That the government of India is discharging specific public functions is also evident from the fact that it has specifically designated NRVN and SECI to implement Phase I (Batch I and II), and Phase II (Batch I) respectively. In their capacities as the implementing agencies, these entities are discharging the public function of ensuring a stable supply of energy and contributing towards energy security. NRVN and SECI are governmental agencies that have been given the mandate to discharge the specific public functions of making solar power affordable to consumers by implementing Phase I (Batch I and II), and Phase II (Batch I) of the JNSSM Mission.*

- *Further, the public functions to ensure that the development of solar power is sustainable, and does not become excessively dependent on imports of solar cells and modules, is being achieved by implementation of domestic content requirements as a part of the procurement process to ensure that part of the electricity purchased is generated from use of domestically manufactured solar cells and modules.*

### **No Commercial Resale**

10. India has also explained that the execution of these important public functions were "*not with a view* to commercial resale." In other words, the government did not contemplate or perceive any commercial resale in the transaction in the design of the batches under consideration before this Panel. Fundamental to India's implementation of the JNNSM Phase I (Batch I) and Phase II (Batch II), was the design of the Bundling and the VGF schemes. These schemes involved the government's dedicated contribution of the government's unallocated quota of thermal power (in Bundling), and funds from the National Clean Energy Fund in VGF, to enable the sale of solar power to discoms at a significantly low cost. In the absence of Bundling in Phase I, the price of solar power to discoms would have been in the range of Rs.12/kWh in Batch I and Rs.8.77/kWh in Batch II, as opposed to the actual sale price to discoms of Rs.4.14/kWh to Rs.4.81/kWh, that was achieved in Phase I. Similarly, under Phase II, absent VGF, the price at which solar power could have been procured would have been Rs. 8.75/kWh, as opposed to Rs. 5.45/kWh. India has also explained that any higher costs of procurement would have resulted in Discoms charging higher amounts from consumers, thereby defeating the overall public function of ensuring affordable access to solar power.

11. The United States, during the second substantive meeting of the Parties, confirmed that it agrees with the description of the Bundling and VGF schemes, but failed to acknowledge the important role of these schemes in making expensive solar power affordable and accessible for consumers. Instead, it seeks to deliberately take a myopic view of the procurement process by stating that the sale by NVVN and SECI to discoms is a separate transaction that needs to be looked at in isolation to arrive at an assessment of 'commercial resale'. Such reasoning is not supported by the basic guidance set out by the Appellate Body which underscored that the transaction needs to be looked at in its entirety. From the seller's, i.e., NVVN's and SECI's perspective, India has explained that had they been independent sellers driven by market forces, they would not have had access to Bundling and VGF which enabled them to fulfil the Government mandate of sale of power to discoms at a price substantially lower than the prevailing price of solar power.

12. India has also underscored the fact that neither Bundling nor VGF were available in the Canada-Renewable Energy dispute. These schemes fundamentally alter the nature and extent of government involvement in the transaction, and the economics of the transaction, and cannot be ignored.

13. As noted by the Appellate Body in the *Canada-Renewable Energy/ Canada-Feed-in-Tariff Programme* dispute, the assessment of what constitutes a "commercial resale" must look at the transaction from the seller's perspective and at whether the transaction is oriented at generating a profit for the seller. The answer in the facts of this dispute is a clear- No. As emphasized by India, neither NVVN nor SECI has profit as a motive in entering into the relevant transactions under Phase I and Phase II. In fact, both were not provided any fees or remuneration to conduct the entire bidding process- they were mandated to conduct the same as governmental agencies. Both NVVN and SECI are therefore merely vehicles for implementation of the public function of ensuring affordable solar power through Bundling and VGF. In the design and implementation of the batches under consideration, they are not acting as independent entities which can determine the market price of what they are procuring and selling.

## **IV THE EXCEPTION UNDER ARTICLE XX(J)**

### **Meaning of General or Local Short Supply**

14. The United States has argued that India has not demonstrated that there is a short supply of solar cells and modules in India since these can be imported. The essence of India's argument is that by the use of the terms "local" and "general" to qualify "short supply" in Article XX(j), the intent of the negotiators clearly was to encompass situations where a product available



internationally is still in short supply in certain local markets, or generally within a country or a region. Article XX(j) addresses the scenario where short supply exists in certain markets despite availability of imports. And one of the situations when this would occur is when there is lack of or low domestic manufacturing. As India has explained, this is reflected in the wording of three crucial terms in Article XX(j): "local or general short supply" in the main part of Article XX(j), and "international supply" in the proviso to Article XX(j).

15. The United States' argument on the other hand renders the phrase "general or local short supply" in Article XX(j) redundant. If the intention of the negotiators was to refer to international short supply in the first sentence of Article XX (j), this could have been achieved by qualifying the phrase "short supply" with "international", or with nothing at all. However the negotiators chose to refer to "general or local short supply", which clearly indicates that the provision pertains to short supply that is distinct from "international short supply". This becomes evident when examined in the context of the negotiating history of Article XX(j), which reveals that the initial text which read "*equitable distribution among the several consuming countries of products in short supply*", was replaced by the current text which is phrased as an exception to which countries can have recourse to, in order to deal with situations of "*general or local short supply*".

16. The United States has also argued that Article XX(j) needs to be confined to an assessment of emergency situations. India submits that the fact that Article XX(j) in its ordinary meaning does not refer to 'emergencies' and that the provision was retained without the need for further review, indicates that the application of Article XX(j) is not limited to war or emergency situations. India has also pointed out that where a provision in fact under GATT, the only provision which allows specific exceptions relating to a war, is GATT Article XXI, which explicitly makes reference to the term "war". Article XXI also specifies "emergency in international relations" and Article XIX dealing with "Safeguards" specifies in its title "emergency action in imports of specific products". Where GATT negotiators sought to limit a provision to situations of war or emergency, they have explicitly stated so, in so many words. These words cannot be imported into Article XX(j) to limit its ambit.

17. The United States also claims that 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), because the term "products" is unqualified by origin. India has argued that GATT Article XX applies as 'general exceptions' to all of GATT obligations. WTO jurisprudence has established that Article XX of GATT, 1994 can be invoked to justify discriminatory treatment of domestic products and like imported products to the extent that the 'necessity' test, or the 'essential' test, as well as the conditions of the chapeau, are met. As noted by the Appellate Body in *US-Shrimp*, "Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT, 1994 because the domestic policies embodied in such measures have been recognized as important and legitimate in character."<sup>3</sup>

18. In the facts of this dispute, United States has alleged discrimination under GATT Article III:4 (and TRIMs Article 2.1) on the ground that India's measures allegedly provide favourable treatment to domestically manufactured products; and then it seeks to argue that Article XX(j) cannot be applied as an exception because the language of Article XX(j) is not qualified by origin. Such reasoning turns the entire range of exceptions under Article XX on its head since it alleges that Article XX(j) can be available as an exception only for certain types of discrimination.

19. It is clear through the ordinary meaning of Article XX, including the provisions of Article XX(j), that they operate as general exceptions applicable to all substantive obligations undertaken under the GATT, 1994 and related agreements. In fact, except for Article XX(i), none of the provisions of Article XX are qualified by origin. It is significant to understand the wording Article XX(i), in this context as, it specifically relates to export restrictions on domestic materials in certain specified circumstances, and its proviso specifically mandates that the restrictions shall not depart from non-discrimination provisions of GATT. Like Article XI:2(a), Article XX(i) is clearly limited to use of export restraints on domestic products in certain specified circumstances. Clearly, no country can put import restraints on domestic materials. On the other hand, the wording of Article XX(j), as in the case of Article XX(a), (b), (d) or (g), is neutral with regard to the type of GATT inconsistencies that can be justified under it. Consequently, Article XX of GATT can be invoked to justify discriminatory treatment of domestic products and like imported products to the extent that the 'necessity' test (as used in sub-clauses (a), (b), (d)), or the 'essential' test (in (j)),

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<sup>3</sup> Appellate Body, *US-Shrimp* para 121.

or requirement of relatedness (as used in sub-clause (g)) are met. For this reason, merely because Article XX(j) does not specify origin related application, does not mean it cannot be used to justify discrimination under Article III. There can be no *a priori* exclusion to the nature of inconsistencies that Article XX(j) can be applied to.

### ***Meaning of "Essential"***

20. The United States also argues that an "essential measure," within the meaning of Article XX(j), is a measure that is "absolutely indispensable" or "absolutely necessary." India has explained that this test is satisfied because the DCR Measures are indeed essential for achieving India's policy objective of energy security. India has also demonstrated that it has weighed and balanced its various priorities and the risks relating to excessive dependence on imports of solar cells and modules. India believes that the DCR Measures implemented in a limited manner, provide the best possible way in which its policy objectives can be achieved.

21. India has emphasized that the DCR Measures are limited in scope, and do not operate as a prohibition on imports of solar cells and modules. On the contrary, the DCR Measures need to be seen as part of an overall comprehensive strategy comprising of multiple interacting measures, which, as the United States acknowledges, includes measures to incentivize imports, and enable flow of investments into the country. The importance of the values relating to ecologically sustainable growth and energy security, and the overall strategy of encouraging trade, *while* carving out policy space for building India's indigenous capacity, needs to be viewed holistically by the Panel in making its assessment regarding the WTO consistency of the DCR Measures.

22. India underscores that security of supply does not mean that it needs to locally manufacture all of its requirements for solar cells and modules; but that the Government's intervention seeks to reduce the risks linked to excessive dependence on imports of solar cells and modules, and ensure domestic resilience in addressing any supply side disruptions.

23. India's overall strategy comprises of multiple interacting measures including measures to incentivize imports. As India has explained, the importance of the values relating to ecologically sustainable growth and energy security, and the overall strategy of encouraging trade, while carving out policy space for building India's indigenous capacity, needs to be viewed holistically by the Panel in making its assessment. As noted by the Appellate Body observed, that "*the more vital or important [the] common interests or values pursued the easier it would be to accept as necessary measures designed to achieve those ends.*"<sup>4</sup> India submits that this same principle would apply to the test of whether the DCR Measures are *essential* under Article XX(j).

### ***Risks related to import dependence***

24. India's basic argument is that the lack of domestic manufacturing capacity of solar cells and modules constitutes "local or general short supply" in India, as used in the present tense. India has further clarified that relying predominantly on imports of solar cells and modules constitutes an unreasonable risk of exposure to the geopolitical and financial risks associated with predominant dependence on imports. India cannot afford to wait for imports to completely be affected by supply side vulnerabilities, before it contemplates the action of setting up domestic manufacturing facilities for solar cells and modules. If remedial measures such as the DCR Measures are allowed to be instituted only at the time when the international supply of solar cells and modules is affected, it would negate the purpose of the exception under Article XX(j), as India would not be capable of meeting its requirements without having the ability to manufacture solar cells and modules.

25. Manufacturing facilities for solar cells and modules cannot spring up overnight. Inherent in the nature of India's legitimate policy objectives, is the need for India to have an inherent capacity to develop renewable energy in order to secure its long-term supply. India has substantiated its arguments with evidence to demonstrate that the global solar PV manufacturing industry is indeed volatile and subject to possible shortfall in supply of cells and modules. India has explained that it cannot afford to be complacent; otherwise it will be too late to take any remedial action. It needs to build its manufacturing base for its own energy security.

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<sup>4</sup> Appellate Body Report, *EC-Asbestos*, para 172.

**Addressing the Proviso to Article XX(j)**

26. The focus of the first part of the proviso to Article XX(j) is on "equitable share in the international supply", which means, in the present context, Members' access to international supply of solar cells and modules. This remains unaffected in the facts of this case, and hence this requirement of the proviso is satisfied.

27. The second part of the proviso requires that the measure "shall be discontinued as soon as the conditions giving rise to them have ceased to exist". This means that the measure sought to be justified under Article XX(j) is a *temporary measure*. It is significant to note that the proviso to Article XX(j) does not prescribe any specific timelines to assess what is "temporary". India therefore respectfully submits that the characteristics of the product in short supply, and reasons pertaining to its short supply, would inform a country's determination of the duration for which the measures needs to be maintained in accordance with Article XX(j).

28. In the facts of this dispute, India has submitted in its previous submissions that it does not intend for domestic content requirements to be applied indefinitely. Inherent in the proviso to Article XX(j) is the expectation of reaching a point in time at which conditions giving rise to the short supply have ceased to exist. In the facts of this case, the DCR Measures are clearly finite measures pertaining to 140 MW in Phase I (Batches I and II), and 375 MW Phase II (Batch I). These are clearly and by their very design, temporary and limited measures confined to specific batches only.

29. India emphasizes that it does not intend for domestic content requirements to cater to supply of cells and modules for the the entire target of the JNNSM which has been set at 100 GW of solar power. As explained, India is taking various measures to incentivize domestic manufacturing. At the same time, India has determined DCR measures to be essential to the acquisition of solar cells and modules, which constitute integral inputs for solar power generation. As India attempts to achieve ecologically sustainable growth and energy security, it needs to ensure that the generation of solar energy, on which it aims to increasingly depend, is not under the influence of externalities that it has no control over. In this regard, India has carefully designed the DCR Measures in a manner that does not seek to maximize self-sufficiency by reducing imports of solar cells and modules; instead they aim to reduce the risks linked to predominant dependence on imports. This weighing and balancing of some degree of domestic capacity, and incentivizing continued imports is a function of national policy choice that India seeks to continue, while ensuring compliance with its WTO obligations.

30. India is further undertaking regular review and evaluation of the domestic manufacturing capacity with a view to assessing the growth in such capacity. Overall, its focus is to develop some indigenous capacity while encouraging imports of cells and modules.

**V THE EXCEPTION UNDER ARTICLE XX(D)**

31. The United States has stated that "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." The United States does not provide any authority or explanation for this statement.

32. India underscores that the terms used in Article XX(d) *is necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement; and not enforcement of laws and regulations vis-à-vis persons subject to its jurisdiction*, as asserted by the United States.

33. Few disputes have considered the ambit of Article XX(d), and none of these have concluded that "to secure compliance" refers only to situations requiring *enforcement of laws and regulations vis-à-vis persons* within a country's jurisdiction. While enforcement of laws and obligations vis-à-vis persons constitutes one of the instances that amounts to "secure compliance", it does not in any way circumscribe the wider meaning and ambit of "secure compliance"- which needs to be given its ordinary and contextual meaning.

34. The Appellate Body in *Mexico-Soft-drinks* has interpreted the nature of compliance required under Article XX(d), and noted that: "In our view, a measure can be said to be designed 'to secure compliance' even if the measure cannot be guaranteed to achieve its result with absolute certainty. Nor do we consider that the 'use of coercion' is a necessary component of a measure designed 'to secure compliance'. Rather, Article XX(d) requires that the design of the measure contribute 'to secure compliance with laws or regulations which are not inconsistent with the provisions of GATT 1994.'<sup>5</sup> (emphasis added).

35. India therefore concludes that while enforcement of laws and obligations, through compulsion can be one of the ways in which Article XX(d) is sought to be implemented; but this is not the only way in which a country can seek to "secure compliance" with its laws, rules and regulations. The term "secure compliance with laws, rules or regulations" necessarily encompasses situations which may not require coercive implementation, and situations where a government seeks to implement obligations as set forth under the legal framework.

### ***DCR Measures are Necessary for implementation of India's obligations***

36. Developing and maintaining the DCR Measures is integral to India's compliance with both domestic and international law obligations to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change. India's domestic law obligations are those embodied in the Electricity Act read with the National Electricity Policy, and the National Climate Change Action Plan. India's international law obligations are those embodied in various international instruments, including, but not limited to the WTO Agreement, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development (1992), and the Rio+20 Document: 'The Future We Want', adopted by the United Nations General Assembly in 2012.

37. India's DCR Measure has been designed to secure compliance with the afore-mentioned laws and regulations which are themselves not GATT inconsistent. Developing and maintaining the DCR Measures is integral to India's compliance with obligations under the afore-mentioned instruments to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change. India understands the term "ecologically sustainable growth" to mean "economic growth in an ecologically sustainable manner". India submits that environment and development cannot be looked at in isolated compartments, and that environmental protection, economic development, and social development are the three interdependent dimensions of sustainable development.<sup>6</sup>

38. Seen in this context, India submits that the concept of "sustainable development" as embodied under the UNFCCC, the Rio documents, and the Preamble to the WTO Agreement, encompasses within it the concept of 'ecologically sustainable growth'. India further clarifies that ecologically sustainable growth is fundamental to India's strategy to address its energy security objective as well, and they cannot be seen as distinct from each other. The laws and regulations with which compliance is sought to be secured for the purposes of Article XX(d), encompass obligations relating to sustainable development. In contributing to the realization of India's obligations of sustainable development (and hence ecologically sustainable growth), the DCR Measures directly contribute towards meeting India's energy security challenge.

39. India also respectfully submits that merely because the legal instruments specified by it do not prescribe specific implementation measures, and instead leave open flexibility for India to design its implementation measures, does not mean they constitute an *objective* that need not be complied with, or that compliance with such obligations need not be secured.

40. India has also explained that under the Constitution of India, acts of the executive are not confined to areas where there is a pre-existing law. Acts of the union executive extend to aspects over which the Parliament has the power to enact laws. This means that the Government can *suo moto* take implementing actions to secure compliance with India's international law obligations under the afore-mentioned instruments. They therefore have direct effect in the domestic legal system in India. Acts of the Government in implementing international law obligations pursuant to

<sup>5</sup> Appellate Body Report, *Mexico-Taxes on Soft Drinks*, para 74.

<sup>6</sup> This has also been recognized recently in the Rio+20 Outcome Document "The Future We Want", which emphasizes the need for sustained and inclusive economic growth, social development and environmental protection and thereby ensure overall benefits.

treaties and resolutions that India has adhered to at the international level, have been recognized under Indian law as constituting implementation of those obligations.

## VI NO REASONABLY AVAILABLE ALTERNATIVES

41. India has discussed the alternatives proposed by the United States, and demonstrated how none of the alternatives proposed achieve India's desired level of protection as addressed by the DCR measures. A mere theoretical possibility of alternatives which imposes an undue burden on India without taking into account ground realities and capabilities would not constitute reasonably available alternatives. India has made a careful assessment of alternatives before it and has adopted the present set of measures keeping in view its sovereign right to achieve a certain level of protection, and emphasized that having an indigenous manufacturing base and the inherent capacity and human skills to manufacture solar cells and modules, is important for India to ensure resilience against supply-side disruptions.

42. India has also explained that most of the 'alternatives' proposed by the United States are in fact already being adopted by India and these include: (a) 100% foreign direct investment; (b) excise and custom duty exemptions and concessions on solar cells and modules to encourage their imports, as well exemptions on other capital equipment used in the generation of solar power; and (c) enhancing the targets for solar power generation which can incentivize the setting up of manufacturing facilities for solar cells and modules in India. India views these as part of a comprehensive policy comprising a multiplicity of interacting measures.

43. India has also explained that domestic content requirements are the *only* way in which India can achieve the objective of energy security by creation of a manufacturing base for solar cells and modules. Other 'alternatives', as cited by the United States, are only incentives, which India is in fact already adopting. An incentive, by its very nature, can only act as a motivation or encouragement; it cannot ensure with any certainty that private entities in fact are motivated and encouraged to commence manufacturing in India. But India cannot leave a goal as critical as energy security, to the chance and expectation that domestic manufacturing facilities will in fact be set up in India to ensure the country's resilience to the uncertainties of imports of solar cells and modules that are so intrinsic to solar power development.

44. With regard to the United States' argument that 'stockpiling' of cells and modules is a possible alternative, India has explained that in view of rapid evolution of technology, it makes little logical sense for India to even consider stockpiling of solar cells and modules as a viable option. It will only result in sunk investment in a technology that would be unviable for it to 'stockpile' and use over a period of time.

## VII ADDRESSING THE CHAPEAU REQUIREMENTS OF ARTICLE XX

45. As noted by the Appellate Body in *US-Shrimp*, the task of interpreting and applying the chapeau is essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.<sup>7</sup> The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.<sup>8</sup> India respectfully submits that this line of equilibrium under the current facts needs to be located in the factual scenario that clearly demonstrates that imports of solar cells and modules play a significant role in India, and that the DCR Measures are applied only in a very limited manner to achieve its legitimate policy objective, while having due regard to encouraging imports of solar cells and modules.

46. In the facts of this dispute, to achieve the policy objective of energy security and ecologically sustainable growth, India needs to build its domestic ability to respond to disruptions in supply of a critical component of solar energy, viz., cells and modules. It is for this reason that India needs to have an inherent capacity and human skills to develop solar cells and modules. This

<sup>7</sup> Appellate Body Report, *US-Shrimp*, para 159

<sup>8</sup> *Ibid.*

rationale for its policy needs to be taken into account by the Panel, and not a quantification of its degree of self-reliance.

47. India does not hold the view that there is a quantitative threshold for finding "*arbitrary or unjustifiable discrimination*". In fact, the Appellate Body in *Brazil-Retreaded Tyres* has noted that assessment of the chapeau does not require exclusive focus on the *effect* of the discrimination; but that instead the focus should be, as discussed in the response to question (b), on the cause or rationale for the discrimination.<sup>9</sup> At the same time, the Appellate Body noted in that case that in certain cases, the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable.<sup>10</sup> The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure.<sup>11</sup>

48. Applying this reasoning, India's submission is that any assessment of the requirements of the chapeau of Article XX would require an analytical process that involves putting all the variables of the situation together and evaluating them in order to make an overall assessment. The trade restrictiveness of India's policies towards solar cells and modules need to be looked at as a whole to understand that India's measure is not acting as a ban on imports of solar cells and modules. On the contrary, imports of solar cells and modules play a significant part in India's solar PV generation capacity, and the DCR measure has been applied in a very narrow manner to achieve certain legitimate policy objectives. At the same time, with a view to minimizing the risks of dependence on imports, it seeks to encourage the development of domestic manufacturing of solar cells and modules; but this is not being done in a manner that presents any threat to imports.

49. The DCR measures do not constitute a "*disguised restriction to trade*", to the extent that they are not concealed or unannounced. India submits that it releases draft guidelines for comments from stakeholders, and each set of guidelines under Phase I, Batch I and Batch II, and Phase II, Batch I have been subject to the learnings from the previous guidelines. Furthermore, keeping in view the Appellate Body's reasoning under *US-Gasoline*, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade.<sup>12</sup> Therefore, as noted above, the DCR measures do not constitute an arbitrary or unjustifiable discrimination, or disguised restriction to trade.

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<sup>9</sup> Appellate Body Report, *Brazil- Retreaded Tyres*, paras 229-230.

<sup>10</sup> *Ibid.*

<sup>11</sup> Appellate Body Report, *Brazil- Retreaded Tyres*, paras 227.

<sup>12</sup> Appellate Body Report, *US-Gasoline*, at p.25.

**ANNEX C****ARGUMENTS OF THE THIRD PARTIES**

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**ANNEX C-1****EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL****1 PRELIMINARY RULING REQUEST**

1. Brazil considers that it is for the panel to determine the appropriate scope of its own jurisdiction, following the requirements of Article 6 of the DSU. Brazil suggests that this Panel should carefully consider its own terms of reference in this dispute, with a view toward protecting the effectiveness of the WTO dispute settlement process and ensuring an effective resolution of the dispute.

2. Prior jurisprudence has delimited the scope of measures with regard to their existence at the time of the establishment of the panel. The Appellate Body in *EC – Chicken Cuts*<sup>1</sup> established a general rule where "t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel.", whereas, in *EC – Selected Customs Matters*<sup>2</sup>, the Appellate Body summarized the two exceptions to the requirement that measures be in force at the time of the establishment of the panel, as identified in its prior jurisprudence: "[...] a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure" and a measure 'whose legislative basis has expired, but whose effects are alleged to be impairing the benefits accruing to the requesting Member under a covered agreement' at the time of the establishment of the panel"

3. In Brazil's view, for implementing measures and measures not yet in force at the time of the panel's establishment to fall within the jurisdiction of the Panel, they must partake of the same nature or essence of the measures at issue. As the Panel in *China – Raw Materials*<sup>3</sup> in deciding its jurisdiction stated, "[...] the Panel is entitled to examine measures that existed at the time of its establishment as well as measures that came into effect after that date if they are of the same essence as the original ones that formed the basis of the Panel's terms of reference."

4. This seems to be an adequate balance between due process concerns and the possibility of respondents to turn changing measures into "moving targets"<sup>4</sup>. Thus, a panel cannot make general, abstract decisions with regard to its jurisdiction vis-à-vis future measures or amendments. The analysis must be done in a case-by-case basis, as a wide range of substantive issues must be taken into account in order to see if they are of the same "essence" of the original measures.

**Article III:8(a)**

5. Article III:8(a) establishes a limit on the obligations set out in Article III, removing from their scope: "[...] laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes" as long as they are "[...] not with a view to commercial resale or with a view to use in the production of goods for commercial sale." Measures falling within this provision are not subject to and therefore cannot be considered inconsistent with the provisions of that Article.

6. That was clearly established by the AB in the *Canada – Renewable Energy* case where it stated that "The opening clause of Article III:8(a) uses the term 'apply' in the negative, thus precluding the application of the other provisions of Article III to measures that meet the requirements of that paragraph."<sup>5</sup> It went further to characterize Article III:8(a) as "[...] a

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<sup>1</sup> *EC – Chicken Cuts*, Appellate Body Report, para. 156.

<sup>2</sup> *EC – Selected Customs Matters*, Appellate Body Report, para. 184.

<sup>3</sup> *China – Raw Materials*, Panel Report, para. 7.15.

<sup>4</sup> *Chile – Price Bands*, Appellate Body Report, para. 144.

<sup>5</sup> *Canada Renewable Energy*, Appellate Body Report, para. 5.56



derogation from the national treatment obligation of Article III for government procurement activities falling within its scope<sup>6</sup>."

7. In this sense, the Appellate Body gave a certain guidance as to the interpretation of the provision, in stating:

"We consider that Article III:8(a) should be interpreted holistically. This requires consideration of the linkages between the different terms used in the provision and the contextual connections to other parts of Article III, as well as to other provisions of the GATT 1994. At the same time, the principle of effective treaty interpretation requires us to give meaning to every term of the provision.

8. It is Brazil's understanding that this "holistic" interpretation, by the very meaning of the word, should not be restrictive, but should give meaning to the terms and phrases of the provision, bearing in mind the policy space which states retained in their governmental procurement when adhering to the GATT.

9. Brazil believes that the holistic interpretation to Article III:8(a) should be used as well in order to determine which situations and which products should be considered governmental purchases on a case-by-case basis.

#### **Relationship between Article III:4 of the GATT and 2.1 of TRIMS**

10. Brazil does not concur that in all cases TRIMs should be automatically applied first. Brazil considers that the appropriate order of analysis for a Panel to follow in this case would be to begin with Article III:4 of the GATT, then examine whether the measure at issue is covered by the limitations contained in Article III:8 and, finally, whether it is justified by the general exceptions of Article XX. Only then, if the measure is found to be inconsistent with the GATT, the Panel should determine whether the measure is also one of the types exemplified by the Illustrative List of the TRIMs Agreement and reach the corresponding findings, if necessary.

#### **Article XX(j)**

##### *Short supply*

11. In Brazil's understanding, "products in general or local short supply" is a concept that must be analysed in the context of the measures – and products - at issue, and in light of the purpose of Article XX(j) as a whole. As concerns products, one could say that the "more essential", or "important", or necessary", or indispensable" products are, the easier they may be considered in "short supply", even at a higher level of availability than less essential products.

12. In addition, the notion of "short supply" in Article XX(j) must relate to a temporary phenomenon, as suggested by the requirement that measures justified by paragraph (j) be discontinued "as soon as the conditions giving rise to them have ceased to exist". A permanent natural phenomenon, in this sense, should not be justified under Article XX(j) – in fact, Article XX(b) would rather come to mind. In sum, the determination of relative availability of the products at issue must be made in light of abnormal variations in its supply, due to economic or non-economic factors. Even though natural disasters or wars come easily to mind, other factors such as critical market failures should not be discarded aprioristically as justifications for Article XX(j).

13. With that said, an imminent risk of a product becoming in short supply may allow for countries to adopt measures less drastic than those required when a shortage is already underway.

##### *Essentiality*

14. With regard to the "essential to" test, Brazil considers that the words connecting the Chapeau of Article XX and the specific situations covered by the paragraphs reflect distinct degrees

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<sup>6</sup> *Canada Renewable Energy*, Appellate Body Report, para. 5.56

of proximity between the policy objective pursued and the measure it justifies. At one extreme, paragraphs (c), (e) and (g) suggest a looser relationship between the measure and the objective, since it uses the term "relating to". Conversely, paragraphs (a), (b) and (d) require a much closer nexus, as the term "necessary to" indicates and the Appellate Body has abundantly explained. The term "essential to" suggests an even closer relation between the measure and the objective, especially in terms of effectiveness and lack of alternatives. "Essential", in the context of Article XX(j), is something that is both necessary and indispensable.

15. Brazil believes, furthermore that Article XI:2(a) may provide relevant context for the interpretation of the term "essential". In the question at issue, their differences are highlighted. In Article XI:2(a), the term "essential" qualifies the term "product"; therefore, according to the panel in *China – Raw Materials*, the analysis is a determination of whether a particular product is "essential" to a Member (para. 7.282). On the other hand, "essential" in Article XX(j) qualifies the acquisition or distribution of products, not the products themselves. Therefore, the measure falling under Article XX(j) should be read as being absolutely necessary or indispensable" (id., para. 7.275) for the acquisition and distribution of products, without any judgement with regard to the product itself and its essentiality.

#### *Equitable Share*

16. Brazil believes that the "equitable share" is a reflection of the general principle that when a restriction is put into place, "[...] Members' access to goods and materials should reflect as closely as possible the situation that would prevail in the absence of these restrictions". However, as Article XX lists exceptions to the obligations under the GATT, one could say that a measure falling under Article XX(j) must be mindful of such principle, but need not ensure "equal or strictly non-discriminatory allocation", as it would alter its condition of "exception". The proper interpretation of XX(j), in this sense, should be similar to that of the requirement "restrictions on domestic production or consumption" under paragraph XX(g). While these restrictions must exist in order to for the measure fall within the purview of Article XX(g), they need not be exactly the same as those imposed to imported products.

#### *Temporarily applied*

17. Brazil finds the interpretation given by the Appellate Body in *China – Raw Materials*<sup>7</sup> to the term "temporarily", in Article XI:2(a), to be of relevance to the question at issue. The Appellate Body stated that

"In our view, a measure applied "temporarily" in the sense of Article XI:2(a) is a measure applied in the interim, to provide relief in extraordinary conditions in order to bridge a passing need. It must be finite, that is, applied for a limited time".

The Appellate Body<sup>8</sup> also recalled that temporarily is understood to be "irrespective of whether or not the temporal scope of the measure is fixed in advance."

18. Just as those measures under Article XI:2(a), measures falling under Article XX(j) must be temporary, taken "in order to bridge a passing need". Whereas there is no pre-defined limit under Article XI:2(a), paragraph (j) seems to establish that the measure must end when the conditions which gave rise to the shortages have ceased to exist. It is important to note, however, that while the final limit for the measure is "pre-defined" (that is, the cessation of the conditions which gave rise to the shortage), the temporal scope of a measure taken under Article XX(j) cannot be pre-defined, as it is dependent upon the condition mentioned above.

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<sup>7</sup> *China – Raw Materials*, Appellate Body Report, para. 330.

<sup>8</sup> *China – Raw Materials*, Appellate Body Report, para. 331.

**ANNEX C-2****EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA****I. ARTICLE III:8(A) OF THE GATT 1994**

1. Article III:8(a) of the GATT provides, under certain conditions, an exclusion for procurement measures from the obligations in Article III. For a measure to fall within the ambit of Article III:8(a), it must be a "law, regulation or requirement governing procurement by government agencies of products purchased".

2. In *Canada – Renewable Energy/Canada – Feed-in-Tariff Program*, the Appellate Body looked at the scope of the term "products" found in other parts of Article III to inform the interpretation of the phrase "products purchased" under Article III:(8)(a) (para. 5.63). It found that the products subject to less favourable treatment under Article III and the products purchased pursuant to a measure covered by Article III:8(a) must be the same or in a competitive relationship (para. 5.63). The Appellate Body added that "[w]hat constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product" (para. 5.63).

3. Canada considers that direct inputs used in the production of a product, and incorporated into the product, should be taken into account in assessing, as the Appellate Body suggests (para. 5.63), whether there is a competitive relationship between products purchased and the products subject to domestic content requirements. Direct inputs can materialize into a physical characteristic of the product that is explicitly sought in the procurement. Direct inputs that are incorporated into the product and are physically detectable can also represent an integral part of the product. Article III:8(a) should not, however, extend further up the supply chain to cover discriminatory measures such as those governing the origin of the machinery or the location of the facility used to produce the direct inputs.

4. Just as Article III:8(a) can exclude a procurement that affords less favourable treatment to an imported product, it should also exclude less favourable treatment under a procurement that is accorded to an imported product based on the direct inputs incorporated into the product. In such a scenario, the product subject to the less favourable treatment is the imported product that contains imported inputs, whereas the product being purchased is the domestic product with domestic inputs. These products would be in a competitive relationship with each other.

5. Canada considers that the solar cells and solar modules at issue in this dispute do not constitute direct inputs incorporated into the solar power being purchased. Solar cells and solar modules should therefore not be taken into account in assessing whether there is a competitive relationship between the products that are purchased and the products subject to the domestic content requirements.

**II. ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TRIMS AGREEMENT**

6. In this dispute, the correct analytical sequence begins with an examination of whether the measure falls within the scope of Article III:8(a). If the measure falls within the scope of Article III:8(a), it is not subject to the obligations under Article III.

7. A measure that is not inconsistent with Article III:4, perhaps because it is a measure under Article III:8(a), would not be inconsistent with Article 2.1 of the TRIMs Agreement. If Article III:8(a) does not apply, the Panel should then assess whether the measure is inconsistent with Article III:4. The measure violates Article 2.1 if it is inconsistent with Article III:4 and it is a trade-related investment measure (TRIM) under the TRIMs Agreement, such as the measures contained in the Illustrative List. However, the fact that a measure is on the Illustrative List is not dispositive of a violation of Article 2.1. A violation of Article III:4 must still be shown in order to demonstrate a violation of Article 2.1.

8. Article 2.1 of the TRIMs Agreement is not a more specific provision than GATT Article III:4. Article 2.1 is a specific provision only to the extent that it applies to a particular set of measures, i.e. trade-related investment measures. The panels in *Canada – Autos* (paras. 10.63 - 10.64) and *India – Autos* (para. 7.157) have rejected the argument that Article 2.1 is the more specific provision. The panel in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* also rejected this argument (para. 7.120), which was upheld by the Appellate Body (para. 5.33).

### III. ARTICLE XX(J) OF THE GATT 1994

#### A. The measure must be "essential"

9. A measure falling under the scope of Article XX(j) must be "essential to the acquisition or distribution of products in general or local short supply". The product that is in short supply does not have to be essential to the WTO Member adopting the measure. Rather, the measure must be essential to the acquisition or distribution of products in general or local short supply.

10. The Appellate Body in *China – Raw Materials* (para. 326) applied the dictionary definition of the term "essential" in GATT Article XI:2(a) as meaning "[a]bsolutely indispensable or necessary". This suggests a higher standard than a measure that is "necessary" to fulfill a policy objective under Article XX(a), (b) or (d). A stronger connection or relationship between the measure and the policy objective sought is required under Article XX(j) than a measure that is "necessary" to fulfil a policy objective.

11. Article XX(j) does not require a measure to be essential to achieve the stated objectives of the measure. Instead, Article XX(j) covers a measure that is essential for a very specific and identified purpose: for acquiring or distributing products that are in general or local short supply. Canada considers that there is no sufficient nexus, let alone a rational connection, between a measure that restricts the purchase of solar cells and solar modules to those of domestic origin and a measure that aims to facilitate the acquisition or distribution of solar cells and solar modules in India.

12. Similar to the necessity test under other subparagraphs in Article XX, the "essential to" test under subparagraph (j) should still involve weighing and balancing the importance of the objective, the contribution of the measure to that objective and the trade-restrictiveness of the measure, followed by a comparison of the measure with less trade-restrictive alternatives.

#### B. The products are in "general or local short supply"

13. The Appellate Body in *China – Raw Materials* (para. 325) has interpreted the phrase "in short supply" as meaning "available only in limited quantity, scarce". For Article XX(j) to apply, a product would need to be subject to limited availability.

14. India argues that the phrase "general or local short supply" must be interpreted in the light of contemporaneous circumstances so that its lack of manufacturing capacity of solar cells and solar modules would amount to a situation of general or local short supply. India's measures do not seem, however, to be directed at addressing a situation of shortage of supply or limited availability. Rather, they are directed at increasing the supply of domestically-produced solar cells and solar modules.

15. As recalled by the panel in *China – Rare Earths* (para. 7.359), Article XX(j) was drafted to handle special circumstances, i.e. shortages caused by war and other emergencies. The panel found that access to goods and materials subject to certain restrictions on trade should "reflect as closely as possible the situation that would prevail in the absence of these restrictions" (para. 7.359) and that the overarching goal or concern of provisions such as Article XX(j) 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" (para. 7.359). Canada considers a measure that creates new trade distortions for the sole purpose of benefiting domestic production would undermine the overarching goal expressed by the panel in *China – Rare Earths*.

**C. The measure must be discontinued as soon as the "conditions giving rise to them have ceased to exist".**

16. Article XX(j) requires that the measure must be discontinued as soon as the "conditions giving rise to them have ceased to exist". If a measure is essential to the acquisition or distribution of products in general or local short supply, it must be removed once the conditions that made the measure essential have subsided. This requirement provides overall context for interpreting Article XX(j). The Appellate Body in *China – Raw Materials* (para. 328) noted that the characteristics of the product that are subject to the measure, as well as factors pertaining to the critical situation, can inform the duration of time when a WTO Member can maintain that its measure conforms with Article XI:2(a) – a provision whose elements are analogous to those in Article XX(j).

17. India's goal to become self-reliant and more resilient against the uncertainties arising from a dependence on imports appears to be a long-term one for which there is no ascertainable point of achievement. The reasons for the alleged short supply are due primarily to economic factors and market forces. The elimination of India's dependence on solar cells and solar modules of foreign origin is unlikely in the short-term as 90 percent of the market is controlled by imports. The absence of domestic production cannot constitute a condition that can give rise to a temporary trade-restrictive measure under Article XX(j).

**ANNEX C-3****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION****I. INTRODUCTION**

1. The European Union considers the objective of promoting renewable energy to be legitimate. WTO Members should actively support it, for instance, by granting subsidies consistent with the covered agreements, but they cannot misuse it in order to shield domestic industries to the detriment of imported goods, specifically by imposing domestic content requirements.

**II. INDIA'S REQUEST FOR A PRELIMINARY RULING**

2. Regarding India's request for a preliminary ruling, the European Union is of the view that the Panel may take into account the existence of the Draft Guidelines as part of its assessment of the consistency of the measures at issue. Moreover, should those Guidelines be adopted during these proceedings, the Panel would be entitled to make findings about their consistency. Finally, even if the Panel were to restrict its findings to, for example, Phase I and Phase II, Batch 1, a finding of inconsistency would surely be relevant for future stages as well.

3. In addition, it should be pointed out that domestic content requirements seem to be required by the Guidelines and other documents adopted within the National Solar Mission. They do not simply result from case-by-case administrative discretion.

**III. CLAIMS UNDER THE TRIMS AGREEMENT AND UNDER THE GATT 1994****3.1. Order of analysis**

4. In response to the Panel's Question 1(a), the European Union believes that the analysis of the measures at issue should begin with the TRIMs Agreement, read in conjunction with the GATT 1994.

5. Though it is closely related to the GATT 1994, the TRIMs Agreement was designed to be the centre of gravity for the analysis of trade-related investment measures. Article 2.1, as informed by Article 2.2 and the Illustrative List, is more specific and detailed than Article III:4 of the GATT 1994 in this context. According to Appellate Body's findings in *EC-Bananas III*, it should therefore normally be applied first. Applying the national treatment obligation in Article 2.1 of the TRIMs Agreement means, however, by necessity, that Article III of the GATT is applied at the same time. This was the approach followed by the panel in *Canada-FIT Programme*.

6. Regardless of the order of analysis, however, the European Union considers that the Panel should make independent findings on the compatibility of the measures at issue with the TRIMs Agreement and/or the GATT 1994.

**3.2. Article 2.1 of the TRIMs Agreement**

7. The Appellate Body in *Canada – FIT Programme* confirmed that TRIMs falling within the Illustrative List and thus under Article 2.2 of the TRIMs Agreement, and which do not fall within Article III:8 of the GATT 1994, are inconsistent both with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT.

8. Paragraph 1(a) of the Illustrative List applies to measures that require the purchase or use by an enterprise (in this case, a solar power developer) of products of domestic origin (in this case, solar cells and modules manufactured in India), compliance with which is necessary to obtain an advantage (in this case, to conclude long-term power purchase agreements with contractually guaranteed rates). Thus, in the European Union's view, the measures at issue squarely fall under paragraph 1(a) of the Illustrative List. The domestic content requirements are specified by spelling

out particular products. The fact that they may not apply to all the envisaged new generation capacity does not change this assessment.

### **3.3. Article III:4 of the GATT 1994**

9. In the European Union's view, the measures at issue would be incompatible with Article III:4 of the GATT 1994 even in the absence of more specific provisions of the TRIMS Agreement. Solar cells and modules manufactured in India and elsewhere are indisputably like products, and the measures at issue are clearly a "law, regulation or requirement" affecting the "internal sale, offering for sale, purchase, transportation, distribution or use" of goods. Finally, according to the Appellate Body report in *Korea—Various Measures on Beef*, less favourable treatment exists whenever a measure modifies the conditions of competition to the disadvantage of imported like products, regardless of the actual effects of the contested measure in the marketplace".

10. The European Union notes that Article III:4 prohibits incentives to favour domestic products, such as the rule linking tax benefits to the use of domestic goods in *US-FSC*, the incentive to purchase domestic automobile parts in *India – Auto*, or indeed the domestic content requirements for renewable energy projects in *Canada – FIT Programme*.

## **IV. ARTICLE III:8 OF THE GATT 1994**

11. In *Canada – FIT Programme*, the Appellate Body found that Article III:8(a) of the GATT 1994 did not apply to domestic content requirements imposed on generation equipment used by renewable energy producers, because the product being procured was electricity. Generation equipment and electricity are not in a competitive relationship.

12. On this point, the measures at issue are fully analogous to those in *Canada – FIT Programme*. Regardless of whether domestic content requirements cover all or only some of the types of equipment that are used to generate electricity, that equipment would still not be in a competitive relationship with electricity.

13. Moreover, in response to India's Question 2, the European Union does not share India's view that, in addition to purchasing activities, Article III:8(a) covers a separate category of measures that can be described as "procurement". In order for Article III:8(a) to apply, there needs to be both purchasing and procurement. In order to benefit from Article III:8(a), it is not enough for a government to simply purchase certain products on an *ad hoc* basis. In addition to that, the purchase must be performed in the context of procurement, i.e. a binding structure of laws and regulations.

## **V. ARTICLE XX OF THE GATT 1994**

### **5.1. Article XX(J) of the GATT 1994**

14. The jurisprudence on Article XX(j), read in context of Articles XI:2(a), XII and XVI:3 of the GATT 1994, as well as various statements made by the Contracting Parties, speak to the relatively limited circumstances in which that subparagraph can be invoked.

15. Article XX(j) of the GATT 1994 has so far been interpreted as relevant to shortages in the supply of products after wars and natural disasters. As the European Union has pointed out in its answers to Questions 3 and 4 of the Panel, as well as to Question 3 from India, that provision seems to largely, although perhaps not exclusively, concern export restrictions. It does not refer to situations of potential or hypothetical future shortages in the supply of a product, but rather to actual or at least imminent situations of shortage. In addition, while Article XX(j) does not only refer to "essential" products, the use of the term "essential" in relation to the measure at issue, speaks against frivolous reliance on that provision that fails to take into account the importance of the product concerned.

16. The scope of this particular exception seems therefore to the European Union to be narrower than as India describes it. In essence, India argues that the measure at issue is necessary to increase the market share of domestically produced solar cells and modules. In general terms, the European Union points out that the fact that there may be a low capacity to produce a product in a

Member's territory does not in and of itself mean that there is a shortage of that product in that territory.

17. More specifically, it is difficult to see how imposing domestic content requirements on solar energy projects is connected to the acquisition or distribution of products in short supply. Firstly, it is not clear what product is said to be in short supply and why. Solar cells and modules appear to be readily available globally and locally, and even if they were not, it is unclear how measures restricting their importation could alleviate the alleged shortage in supply. If anything, they would have the opposite effect.

18. As discussed in the European Union's answer to Question 5 from the Panel, the proviso to Article XX(j) refers to the "equitable share" of all Members of the "international supply" of the products concerned. The notion of an equitable share in the supply of products means that, in case of justifiable (primarily, export) restrictions in a situation of shortage, the regulating Member should ensure that the access of certain other Members to that product is not unfairly foreclosed. The provision does not speak of an "equitable share" of Members in the global or local *production* of a product. In that connection, the European Union recalls the findings of the Panel in *China – Rare Earths* that the overarching goal of the proviso to Article XX(j) is to reduce, not increase distortion in trade flows.

19. Finally, the phrase "shall be discontinued as soon as the conditions giving rise to them have ceased to exist" in the proviso to Article XX(j) shows that "local or general short supply" should be understood as a contingent and narrowly defined event of a temporary nature, and implies that a measure can only be justified under Article XX(j) if the regulating Member has an idea, when adopting the measure, of when and/or how the shortage will be resolved.

## **5.2. Article XX(D) of the GATT 1994**

20. Article XX(d) entails two requirements: (i) the measure must be designed to secure compliance with a national law or regulation which is not in itself incompatible with the GATT 1994; and (ii) the measure must be necessary to ensure such compliance.

21. As the European Union pointed out in its answer to the Panel's Question 6, Article XX(d) could justify certain measures taken by a government as tool for applying or enforcing another (GATT-consistent) measure of that same government, assuming that the latter measure takes the form of a specific legal requirement imposed on the basis of domestic law and otherwise fulfils the requirements of Article XX.

22. This provision, however, requires India to identify a specific legal obligation, and then explain why domestic content requirements are necessary in order to comply with it. It does not suffice to cite the general objectives of certain laws (such as, for example, the Electricity Act's reference to the optimal use of renewable energy). Policy documents or broad declaratory measures (such as the National Electricity Policy) are not covered by Article XX(d). As for international law instruments, India must demonstrate that they are incorporated domestically or directly effective. In this sense, the European Union recalls the findings of several panels that measures which merely secure compliance with the objectives of a law or regulation, rather than with the laws or regulations themselves, do not fall within the purview of Article XX(d) of GATT 1994.

23. In addition, even if it were possible for India to claim that the measures at issue are "designed to secure compliance" with general objectives such as the security of energy supply or sustainable development instead of specific legal obligations in the context of Article XX(d) of the GATT 1994, it would still bear the burden of showing that they are in fact apt to secure compliance with them.

24. The European Union also notes the Appellate Body Report in *Mexico—Taxes on Soft Drinks*, finding that a measure that is not suitable or capable of securing compliance with the relevant laws or regulations will not meet the necessity requirement.



### 5.3. Necessity

25. As discussed above, the European Union does not consider the measures at issue to be in the scope of either Article XX(j) or Article XX(d). Even if they were, however, they would seem to fall short of the necessity requirement under each. In connection with the Panel's Question 3(b), the European Union notes that both subparagraphs require a close nexus between the measure at issue and a legitimate regulatory objective, one using the term "essential" and the other "necessary". In general terms, this difference in wording should be given meaning. In the European Union's view, however, whatever the practical consequences of the difference may be, they do not seem to be decisive in this dispute.

26. Under either of the subparagraphs of Article XX, a comparison between the challenged measure and possible alternatives should be undertaken in most cases. There are, however, circumstances in which such a comparison may not be required. This includes, for example, cases where a measure does not fall within the scope of the cited exception or contribute to its stated objective at all.

27. Several remarks should be made with regard to the necessity of the specific measures at issue. Firstly, whether "indigenous manufacturing" of electricity from renewable sources is in fact needed for the security of energy supply is a separate issue from the alleged necessity of "indigenous manufacturing" of solar cells and modules. Secondly, domestic content requirements can actually endanger security of supply. Thirdly, it seems to the European Union that there is any number of reasonably available, less trade restrictive and possibly more effective alternative measures, such as subsidies to the research and development of renewable energy technologies consistent with the covered agreements.

### 5.4. The chapeau of Article XX of the GATT 1994

28. Finally, the measures at issue also seem to fall short of the requirements of the *chapeau* of Article XX. The analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the *chapeau* should focus on the actual cause or rationale of the discrimination, and not of the overall set of policies in the context of which discrimination takes place. The actual rationale of the domestic content requirements at issue does not seem to be sustainable development and the security of energy supply, but benefitting domestic manufacturers. As the Appellate Body established in *Brazil – Retreaded Tyres*, their current impact in the marketplace is irrelevant to that assessment.

## VI. CONCLUSION

29. The European Union considers that this case raises important questions on the interpretation of various provisions of the TRIMs Agreement and the GATT 1994. The European Union requests the Panel to carefully review the scope of the claims in light of the observations made in this submission.

**ANNEX C-4****EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. INTRODUCTION**

1. Japan welcomes the opportunity to present its views as a third party in this dispute due to its systemic interest in the proper interpretation of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Japan addresses below the proper legal interpretation of the "government procurement" exception in Article III:8(a), the national treatment obligation in Article III:4, as well as the general exceptions in Articles XX(d) and (j) cited by India. Japan respectfully requests that the Panel take Japan's views into consideration.

**II. ARGUMENTS****A. Article III:8(a) of the GATT 1994 Operates as an Exception to Article III and Requires Government Purchases "For" Governmental Purposes**

2. On the proper interpretation of Article III:8(a) of the GATT1994, as a preliminary matter, Japan submits that Article III:8(a) operates as an *exception* to a violation of Article III of the GATT1994. The measures that fit the description contained therein, i.e., "laws, regulations and requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale", do not fall outside the scope of Article III. Those measures are not inconsistent with Article III even though these measures would be contrary to one of the other provisions of Article III, for example, where imported products are not "accorded treatment no less favourable than that accorded to like products of national origin".

3. Japan concurs with the United States that the "government procurement" exception under Article III:8(a) does not apply here.<sup>1</sup> That is, the Appellate Body interpreted "products purchased" in Article III:8(a) to mean that, as a threshold issue, if the product discriminated against under Article III:4 of the GATT1994 is not in a competitive relationship with the product allegedly purchased under Article III:8(a), the derogation of Article III:8(a) does not apply.<sup>2</sup> Here, just as in *Canada – Renewable Energy/Feed-in Tariff Program*, the product discriminated against by India for reason of its origin is generation equipment (i.e., solar cells and modules), while the product allegedly purchased or procured is electricity. India does not purchase or procure solar cells and modules under the Jawaharlal Nehru National Solar Mission ("JNNSM") Programme, despite its arguments to the contrary.<sup>3</sup>

4. In case the Panel declines to find that Article III:8(a) is inapplicable for the reason given by the United States, Japan urges the Panel to fully consider the meaning of the term "purchased for governmental purposes" in Article III:8(a). The Panel should recognize the importance of a true and genuine connection between the "purchase" by a governmental agency and the "governmental purpose" at issue. An interpretation of Article III:8(a) within the context of Article III:4 should ensure that the exclusion for products "purchased for governmental purposes" is not so expansive that it allows WTO Members to avoid their obligations under Article III simply by assigning a "governmental purpose" to a particular trade-restrictive measure, e.g., by requiring a product to be distributed to consumers through a governmental agency allegedly for the purpose of ensuring the stable supply of such product or the supply of such product at an affordable price or of promoting certain domestic industry. Only purchases objectively necessary to achieve a "governmental purpose" should be considered as those "*for*" governmental purposes and thus, be included within the scope of Article III:8(a). In this line, Japan considers that the requirement "not with a view to commercial resale" serves to exclude from the scope of the Article III:8(a) exception the purchase of products to be resold for profit for the purpose of obtaining government revenue. It is obviously a "governmental purpose" to obtain governmental revenue, but if this

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<sup>1</sup> See United States' first written submission, paras. 74-79.

<sup>2</sup> Appellate Body Report, *Canada – Renewable Energy/Feed-In Tariff Program*, para. 5.79.

<sup>3</sup> See India's first written submission, paras. 112-114.

were included within the scope of Article III:8(a), a Member could completely circumscribe its national treatment obligations under Article III:4 simply by requiring that a product be distributed through a governmental agency to consumers. Such an interpretation is not supported by the most relevant context of Article III:8(a), i.e., Article III:4.

5. Japan submits that purchases of electricity by the Government of India under the JNNSM Programme cannot be viewed as "purchase[s] [by a governmental agency] for governmental purposes". As characterized by India, the governmental purposes behind the domestic content requirement measures in Phases I and II of the JNNSM Programme<sup>4</sup> are to "ensur[e] availability of affordable solar power to consumers" and "to ensure that development of solar power does not become dependent on imports of cells and modules,"<sup>5</sup> which India then recasts as "promoting ecologically sustainable growth while addressing India's energy security challenge".<sup>6</sup> In order to ensure the availability of affordable solar power to consumers, the Government of India could have provided a subsidy to electricity companies or consumers for the supply or use of solar power, and did not need to purchase solar power generated through domestically manufactured solar panels. In the same vein, in order to ensure that the development of solar power does not become dependent on imports of cells and modules, the Government of India could have provided subsidies to manufacturers of such cells and modules, and again, did not need to purchase solar power.<sup>7</sup>

6. Finally, the measures at issue in the present dispute are indistinguishable from those at issue in *Canada – Renewable Energy/Feed-in Tariff Program* for purposes of assessing whether they are purchases "for" governmental purposes as well. In *Canada – Renewable Energy/Feed-in Tariff Program*, as Japan had argued, Ontario's alleged purchase of electricity under the FIT Programme and Contracts was not necessary to achieve its stated purpose of securing a stable supply of electricity from clean sources.<sup>8</sup> Similarly, here, to ensure the availability of affordable solar power to consumers or to ensure that the development of solar power does not become dependent on imports of cells and modules, the government of India also need not purchase solar power.<sup>9</sup>

**B. "Less Favourable Treatment" Under Article III:4 of the GATT 1994 Exists When a Measure Incentivizes the Use of Local Goods**

7. The United States submits that the domestic content requirements in Phases I and II of the JNNSM Programme are inconsistent with Article III:4 of the GATT 1994 because they accord less favorable treatment to imported solar cells and modules as compared to Indian-made solar cells and modules.<sup>10</sup> As a preliminary matter, Japan believes that the analysis of the measures at issue should begin under Article III:4, not under Article 2.1 of the TRIMs Agreement. In this regard, Japan agrees with the United States that the domestic content requirement measures at issue facially create "requirements" to use local goods and are therefore inconsistent with Article III:4.

8. Further, Japan submits that, even in the hypothetical case where the use of Indian goods were not technically "required" by the JNNSM Programme, the fact that the Programme's domestic content provisions incentivize the use of local goods partially affords "less favourable treatment" to imported goods and thereby still violates Article III:4.

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<sup>4</sup> India submits in its preliminary request that the United States intentionally expands the terms of reference of the Panel through the reference to the JNNSM Programme rather than using the specific reference to the domestic content requirement measures in Phases I and II of the JNNSM Programme. Japan is of the view that there seems to be no disagreement between the Parties that domestic content requirements under Phase I (Batch 1), Phase I (Batch 2) and Phase II (Batch 1) of the JNNSM are at issue. The term "domestic content requirement measures in Phases I and II of the JNNSM (Programme)" or simply "domestic content requirements" in this submission is used to express the above common understanding.

<sup>5</sup> India's first written submission, para. 142.

<sup>6</sup> India's first written submission, para. 143.

<sup>7</sup> Japan is aware of India's argument that subsidies allowed under Article III:8(b) are not an economically feasible option and thus there is no measure that could potentially be as effective as DCR in achieving the objective of incentivizing local manufacturing of cells and modules (See India's first written submission, p. 91.). Japan is not persuaded by India's contention.

<sup>8</sup> See Appellate Body Reports, *Canada – Renewable Energy/Feed-In Tariff Program*, para. 2.70.

<sup>9</sup> Japan's third party submission, para. 5.

<sup>10</sup> See United States' first written submission, para. 45.

9. Japan submits that the standard under Article III:4 is broader than the identification of a requirement to use local goods. At the crux of the Article III:4 analysis is whether the measure at issue – be it a requirement or more subtle regulation – accords "less favourable treatment" to imported goods. An *incentive* to use domestic goods by virtue of a domestic content provision, as exists under the JNNSM Programme, is sufficient to establish that a measure accords "less favourable" treatment within the meaning of Article III:4.

10. The "less favourable treatment" analysis hinges upon whether the domestic content requirement measures under the JNNSM Programme modify the conditions of competition in the relevant market to the detriment of imported products.<sup>11</sup> By requiring the use of India-origin solar cells and modules, domestic content requirement measures under the JNNSM Programme necessarily create incentives, or a purchasing preference, among solar project developers. Thus, the provisions affect conditions of competition in a way that disadvantages imported solar cells and modules as compared with like goods of Indian origin, thereby according "less favourable treatment" to imported goods.

11. In *India – Autos*, the panel examined measures requiring Indian car manufacturers to purchase Indian parts and components to achieve a level of indigenization of components up to a minimum level of 50% in the third year or earlier and 70% in the fifth year or earlier in order to obtain import licenses. The panel found that "the very nature of the indigenization requirement *generates an incentive to purchase and use domestic products and hence creates a disincentive to use like imported products*", and that it was "more than likely to have some effect on manufacturers' choices as to the origin of parts and components to be used in manufacturing automotive vehicles", as the manufacturers would "need to take into account the requirement to use a certain proportion of products of domestic origin".<sup>12</sup> Under these circumstances, the panel found that *imported products could not compete on an equal footing with Indian-origin parts and components, and therefore, the indigenization requirement clearly modified the conditions of competition of domestic and imported parts and components in the Indian market in favor of domestic products*.<sup>13</sup>

12. Similarly, domestic content requirement measures under the JNNSM Programme generate an incentive to purchase and use domestically produced renewable energy generation equipment and hence create a disincentive to use imports of such equipment manufactured outside of India. Under these circumstances, imported products could not compete on an equal footing with Indian-origin equipment, and therefore, the domestic content requirement measures clearly modified the conditions of competition of domestic and imported equipment in the Indian market in favor of domestic products. Thus, whether or not less favorable treatment is the result of an explicit requirement, India has altered the conditions of competition in favor of India-produced renewable energy generation equipment to the detriment of such equipment produced elsewhere. Japan submits India's assertions to the contrary in its first written submission – including that "imported cells and modules have a dominant share of the market"<sup>14</sup> – do not address the fact that India's measures create incentives that affect negatively the conditions of competition for imported goods. Accordingly, in addition to the United States' reasons, in Japan's view, India's domestic content requirement measures under the JNNSM Programme violates Article III:4.

### **C. Neither Article XX(j) Nor Article XX(d) Should Be Interpreted to Exempt Import Substitution Measures**

13. In its first written submission, India argues that, should the Panel find that its measures are inconsistent with Article III of the GATT 1994 (and the TRIMs Agreement), any inconsistencies would be justified under the general exceptions of Article XX(j) or Article XX(d) of the GATT 1994.<sup>15</sup> Japan is deeply concerned about the position advanced by India which would greatly expand and distort the appropriate scope of these exceptions. For the reasons described below, Japan urges the Panel to reject India's interpretation.

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<sup>11</sup> See Appellate Body Report, *Korea – Various Measures on Beef*, para. 135. See also Panel Report, *Turkey – Rice*, para. 7.232.

<sup>12</sup> Panel Report, *India – Autos*, para. 7.201 (emphasis added).

<sup>13</sup> See Panel Report, *India – Autos*, para. 7.202 (emphasis added).

<sup>14</sup> India's first written submission, para. 93.

<sup>15</sup> India's first written submission, para. 165.

## 1. Article XX(j) Is Limited to Export Restrictions in "Emergency Situations", and Cannot Justify Import Substitution Measures

14. Beginning with Article XX(j) of the GATT 1994, Japan considers that India's attempt to use this general exception to justify an import substitution measure, specifically through the mechanism of a domestic content requirement, must fail. Japan submits that, by its terms and in context of the GATT 1994, Article XX(j) addresses *export* measures that restrict access to, and secure an equitable share of, the supply of a product. This is contrary to India's position, which assumes that the article is referring to *import* restrictions.

15. Article XX(j) provides a general exception for measures "essential to the acquisition or distribution of *products* in general or local short supply".<sup>16</sup> The term "products" is not qualified in any way. Thus, there is no language in Article XX(j) that restricts the scope of the term "products" to only domestically manufactured products. Rather, it is plain that the term "products" covers both domestically manufactured and foreign manufactured imported products. Moreover, the proviso to Article XX(j) references "the international supply of such products" indicating that the term "products" should capture products manufactured globally.

16. India appears to assume that the term "products" may cover only domestic products and therefore Article XX(j) may be used to justify import restrictions. However, there is no basis for that assumption. Japan considers that the text of Article XX(j) leads to the understanding that the term "products" references products manufactured globally, and the consequences of such understanding should be that Article XX(j) cannot be used to justify an import substitution measure due to the alleged limited domestic manufacture of a product.

17. Further, Japan notes that Article XX(j) sets forth "the principle that all Members are entitled to an equitable share of the international supply of such product". According to this text, it is difficult to envisage a situation where import restrictions may pose an obstruction to Members' access to "an equitable share of the international supply of [such] product".

18. Article XX(j) still has a *raison-d'etre*, which is different from Article XI:2(a) of the GATT 1994, even when it permits only export restrictions. Japan submits that Article XI:2(a) allows a Member to employ an export restriction to prioritize domestic demand in a rather limited situation, or for a limited product scope. The Appellate Body found in *China – Raw Materials* that "the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j)".<sup>17</sup> Further, under Article XI:2(a), it is the product at issue that must be "essential" to the exporting Member, while under Article XX(j), it is the measure at issue that must be "essential" to the acquisition or distribution of products in general or local short supply. Finally, Japan does not understand Article XI:2(a) to have been prepared to address "temporary situations arising out of ... war", like Article XX(j).<sup>18</sup>

19. Japan's position that Article XX(j) addresses export measures is borne out by the drafting history of Article XX(j). The report on discussions in the London session of the Preparatory Committee on the Charter of the International Trade Organization discussed what became Article XX(j) in the context of "a post-war transitional period [when] it should be permissible to use [quantitative] restrictions to achieve the equitable distribution of products in short supply ...".<sup>19</sup> When the GATT 1947 contracting parties reviewed in 1960 the continuing need for the provision, they agreed "that it would be appropriate to retain such provisions to enable contracting parties to meet emergency situations which may arise in the future".<sup>20</sup> Logically, the measures that the GATT 1947 contracting parties considered were those that they would need to take to restrict *exports* to meet "emergency situations".

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<sup>16</sup> Emphasis added.

<sup>17</sup> Appellate Body Reports, *China – Raw Materials*, para. 325.

<sup>18</sup> Note by the Director-General, Article XX – Sub-Paragraph (j), L/3276, 2 December 1969, para. 2 (citation omitted).

<sup>19</sup> Analytical Index of the GATT, p. 592, quoting London Report, p. 11, para. III.C.1(b).

<sup>20</sup> Analytical Index of the GATT, p. 594, quoting the Decision of the CONTRACTING PARTIES at the Sixteenth Session, BISD 9S/17.

20. Even assuming that India's interpretation is correct, and that Article XX(j) applies to import substitution measures, the facts before the Panel hardly suggest that the products at issue are in short supply in India.

21. But even if the products were in short supply locally, the Panel should reject the application of Article XX(j) where the limitation on local supply is due to the scope of local manufacturing capacity, particularly as India asserts that its domestic content requirements are essential to achieving broader policy objectives such as energy security or sustainable development which does not appear to be relevant to "the acquisition or distribution of products in ... local supply". First, India cannot support the notion that its domestic content requirements are essential to achieve its stated policy objectives so as to cope with a short supply situation, given that GATT-consistent alternative measures – encouraging imports of the products at issue or offering subsidies to domestic producers – are readily available to increase the supply of solar cells and modules to promote energy production. Second, shifting incentives to increase domestic production would not normally increase supply quickly enough to relieve the kinds of "emergency situations" that the GATT 1947 contracting parties had in mind when they decided to maintain Article XX(j) in the 1960s.

22. Finally, India also bears the burden of establishing that its domestic content requirement measures conform with the chapeau of Article XX of the GATT 1994. In other words, even if India has demonstrated that its measures satisfy the requirements of paragraph (j), the measures must also "not be applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade". Some paragraphs of India's first written submission address the chapeau; however India has offered very little or almost no defense of its domestic content requirement measures under the chapeau. India has not even attempted a sincere effort to demonstrate that its measures meet its burden with respect to the chapeau. Accordingly, India failed to demonstrate how a Member could justify the use of import substitution measures – essentially protectionist policies – under the chapeau of Article XX.

## **2. Local Content Requirements Are Not "Necessary" Measures that Qualify Under Article XX(d)**

23. Japan submits that the Panel should also reject India's defense under Article XX(d) of the GATT 1994, which is limited to measures "necessary" to secure compliance with other, WTO-consistent requirements. While it may be WTO-consistent to promote local production, it is not necessary to impose import substitution measures to do so. As noted above, a Member may afford production subsidies to domestic producers. Further, Japan notes that the phrase "to secure compliance" in Article XX(d) has been interpreted to mean "to enforce compliance",<sup>21</sup> and based on that interpretation, Japan does not believe Article XX(d) permits India to undertake a measure that enforces India's own compliance with WTO-consistent laws or regulations. Finally, the term "laws or regulations" in Article XX(d) refers to *domestic* laws or regulations, and includes international law only insofar as that international law is implemented in a Member's domestic laws or regulations.<sup>22</sup>

### **III. CONCLUSION**

24. Japan respectfully requests the Panel to take these comments into account in interpreting the relevant provisions of Articles III and XX of the GATT 1994.

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<sup>21</sup> Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.175. See also GATT Panel Report, *EEC – Parts and Components*, para. 5.18.

<sup>22</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69.

**ANNEX C-5****EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF KOREA  
AT THE MEETING OF THE PANEL\***

Mr. Chairman and Members of the Panel,

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views as a third party. Korea would like to focus its statement on two systemic issues: the order of analysis, raised through the Panel's advanced question, and the Panel's terms of reference, raised through the India's request for a preliminary ruling.

2. With respect to the Panel's advanced question on the order of analysis, Korea is mindful in sharing the EU's view in paragraph 24 of its third party written submission that it began its analysis under paragraph 1(a) of the Illustrative List of the TRIMS Agreement because paragraph 1(a) is more specific than Article III:4 of the GATT 1994 is. In the footnote 30 of its submission, the EU cited paragraph 5.32 of the Appellate Body Report in *Canada – Feed-In Tariff Program* to support its approach. However, it is not clear to us how the footnote 30 works in support of the EU's approach.

3. Korea does not believe that this Panel must follow the order of analysis employed in *Canada – Feed-In Tariff Program*. Rather, with respect to the order of analysis, Korea would like to remind the Panel of the Appellate Body's guidance in *Canada- Wheat Exports and Grain Imports*. The Appellate Body in that dispute stated that "... in each case it is the nature of the relationship between two provisions that will determine whether there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law. In some cases, this relationship is such that a failure to structure the analysis in the proper logical sequence will have repercussions for the substance of the analysis itself...."<sup>1</sup>

4. Also, in addressing the sequence of Article XVII:1(a) and (b) of the GATT 1994, the Appellate Body continued that "[a]s a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member. Furthermore, panels may choose to use assumptions in order to facilitate resolution of a particular issue or to enable themselves to make additional and alternative factual findings and thereby assist in the resolution of a dispute should it proceed to the appellate level."<sup>2</sup>

5. Although there is no specific rule in the DSU of how to sequence the claims raised by a complainant, a panel is required to "structure the analysis in the proper logical sequence," as the Appellate Body directed in the previous dispute. In this regard, Korea would like to note that the Appellate Body guided panels to "take account of the manner in which a claim is presented to them" by a complainant. In addition, the Appellate Body stated that "panels may choose to use assumptions or make additional and alternative factual findings, if necessary for prompt and effective resolution of a dispute." The proper logical sequence, in Korea's view, should address the core issues raised by the complainant that must be resolved in order to settle the dispute promptly pursuant to Articles 3.3 and 3.7 of the DSU.

6. Korea further notes that a false assumption made by a panel and ensuing false order of analysis may engender false judicial economy, which will diminish the rights and obligations of the parties to the dispute. Although the Appellate Body allowed a discretionary power to a WTO panel in structuring the order of analysis, the panel must structure its order of analysis so as to effectively address the claims raised by the complainant. Particularly, a panel must consider the manner in which a claim is presented to them by a complainant. In this specific dispute, the

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\* Korea requested that its oral statement serve as its executive summary.

<sup>1</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports* (WT/DS276/AB/R), para. 109.

<sup>2</sup> See Appellate Body Report, *Canada – Wheat Exports and Grain Imports* (WT/DS276/AB/R), para. 126.

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United States first raised a detailed claim of discrimination pursuant to Article III:4 of the GATT 1994. Korea sees no reason to reverse the manner of presentation made by the United States.

7. Furthermore, Article 2.1 of TRIMS states that "[w]ithout prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994." An ordinary reading of Article 2.1 does not invite us to start the analysis from Article 2.1 of the TRIMS Agreement. It seems more logical that one may first analyze the consistency of Article III or Article XI, and then move forward next question of whether a specific measure violated Article 2.1. This seems to be the complainant's manner of presentation.

8. In sum, in Korea's view, this Panel is not required to follow the sequence adopted in *Canada – Feed-In Tariff Program*. A panel must structure the order of analysis on a case by case basis, as guided by the Appellate Body. The United States first provided a detailed argument with respect to Article III:4 of the GATT 1994 and then continued its arguments on Article 2.1 of TRIMS Agreement, followed by the claim under the Annex to the TRIMS Agreement. Considering the Appellate Body's guidance and the manner in which the United States presented its claim, the sequencing suggested by the EU, does not seem to be appropriate in this dispute.

9. Next, with respect to India's request for a preliminary ruling, Korea would like to refresh the notion that the fundamental principle of the WTO dispute settlement procedures is to reach a positive resolution promptly.

10. In the present dispute, India argued that "JNNSM Programme" or "JNNSM Programme measures" is not a measure challengeable before the Panel. India provided two reasons. First, the term, "JNNSM Programme," is not identified in the panel request but first appeared in the United States' first written submission. Second, the nature of the JNNSM is dynamic and evolving, and thus is not an established measure to be challenged.

11. In principle, a panel request must be the basis for respondent's defense and the panel's analysis, unless there is successful request for a preliminary ruling by the respondent. As noted by the previous panels and the Appellate Body, one of the main functions of panel request is to provide adequate notice for respondent to make its case. Obviously, respondent can legitimately challenge complainant's panel request if it does not identify proper measures at issue and legal basis sufficient to present the problem clearly.

12. Although there is no provision in the DSU governing the preliminary ruling procedures, panel's working procedures specify and address the process if necessary. Generally, request for a preliminary ruling must be done before or upon submitting first written submissions. If not raised at that stage, it should be assumed that respondent accepted the terms of reference as structured by complainant.

13. Having said that, Korea would like to express a concern on the problem of 'moving target.' Korea wishes that the dynamic and evolving nature of the JNNSM as claimed by India would not negatively affect the fundamental principle of the WTO dispute settlement procedures.

14. As the Appellate Body in *Chile – Price Band System* endorsed the approach taken by the panel in *Argentina – Footwear (EC)*, if an amended measure remains essentially same, it would be appropriate to rule on the current measure in force "to secure a positive solution to the dispute and to make sufficiently precise recommendations and rulings so as to allow for prompt compliance."<sup>3</sup> Of course, the Appellate Body in *EC – Chicken Cuts* has cautioned on the broad terms of reference so as to prevent frivolous catch-all provision in the panel request. In that dispute, the Appellate Body distinguished the measures from its decision in *Chile – Price Band System* and stated that "the notion of measures having the 'same effect' is too vague and could undermine the requirement of specificity and the due process objective enshrined in Article 6.2."<sup>4</sup>

15. In its panel request, the United States identified specific measures "as well as any amendments, related measures, or implementing measures."<sup>5</sup> Whether or not 'JNNSM

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<sup>3</sup> See Appellate Body Report, *Chile – Price Band System* (WT/DS207/AB/R), paras. 142-143.

<sup>4</sup> See Appellate Body Report, *EC – Chicken Cuts* (WT/DS269,286/AB/R), paras. 158-160.

<sup>5</sup> Request for the Establishment of a Panel by the United States, 15 April 2014 (WT/DS456/5).



Programme' or 'JNNSM Programme measures' is any amendments, related measures, or implementing measures would be a question of fact. Korea considers, however, that mere change of name should not be decisive in determining whether a measure is included within the terms of reference. In determining the scope of terms of reference, this Panel must carefully consider the WTO jurisprudence with respect to the problem of 'moving target.'

16. This concludes Korea's oral statement. Thank you.

**ANNEX C-6****EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF NORWAY  
AT THE MEETING OF THE PANEL\***

Mr. Chair, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel, and will therefore in this oral statement briefly set out its views on one legal issue; the applicability of the GATT Article III:8(a).<sup>1</sup>

2. The United States claims that the JNNSM Programme's domestic content requirements for solar cells and solar modules are contrary to India's obligations under the GATT Article III:4, and that the measures cannot be justified by the "government procurement" derogation under the GATT Article III:8(a). India disagrees with these claims.

3. According to the GATT Article III:8(a), Article III "shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale".

4. In *Canada – Renewable Energy/Feed-In Tariff Program*, the Appellate Body found that "the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased", in order for the derogation of Article III:8(a) to apply.<sup>2</sup> In that case, the products discriminated against because of their origin were generation equipment, while the product procured was electricity. The Appellate Body thus found that these products were not in a competitive relationship with each other. Accordingly, the relevant measures were not covered by Article III:8(a).

5. On this basis, the United States asserts that solar cells and solar modules (the products discriminated against) are not in a competitive relationship with electricity (the products procured). The United States thus argues that the local content requirements relating to solar cells and solar modules of the JNNSM Programme are not covered by the derogation of Article III:8(a).<sup>3</sup>

6. Norway finds this line of argument to be persuasive. As the Appellate Body has held, the crucial question is whether the relevant products are in a competitive relationship with each other. Norway agrees with the European Union that India's arguments aim at distinguishing the present case from that of *Canada – Renewable Energy/Feed-In Tariff Program*, based on the whether the products discriminated against are directly used in the generation of power or not.<sup>4</sup> India, as Norway understands it, seems to argue that it is sufficient for the application of Article III:8(a) for the products to be somehow related to each other. This would however undermine the relevant criteria set out by the Appellate Body, which qualified the type of relationship relevant for the application of the provision. Some form of relationship connected to the production process is not enough; there needs to be a competitive relationship between the products in question. As stated by the European Union; a different interpretation would indeed open the doors for discrimination by proxy.<sup>5</sup>

Mr. Chair, Members of the Panel,

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\* Norway requested that its oral statement serve as its executive summary.

<sup>1</sup> The General Agreement on Tariffs and Trade 1994 ("the GATT").

<sup>2</sup> 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, para. 5.79.

<sup>3</sup> United States' First Written Submission, paras. 78-79.

<sup>4</sup> European Union's Third Party Written Submission, paras. 37.

<sup>5</sup> European Union's Third Party Written Submission, para. 38.

7. Having cited past Appellate Body practice, Norway would like to recall the role of precedents in the WTO dispute settlement system. The Appellate Body has underlined "that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute. Following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same. This is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral trading system."<sup>6</sup> Norway would add that following previous reports also ensures fewer disputes and preserves both the system and the systemic function of the Appellate Body.

Mr. Chair, Members of the Panel,

8. This concludes Norway's statement here today. I thank you for your attention.

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<sup>6</sup> Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 2 June 2009, para. 362 (emphasis added).

**ANNEX C-7****EXECUTIVE SUMMARY OF THE THIRD-PARTY SUBMISSION  
OF THE KINGDOM OF SAUDI ARABIA\*****I. INTRODUCTION**

1. The Kingdom of Saudi Arabia has joined as a third party in this dispute to provide its views on systemic issues relating to the interpretation of the "chapeau" of Article XX of the General Agreement on Tariffs and Trade 1994 ("GATT"). The Kingdom takes no position on the merits of the claims that are based on the particular facts of this case.

**II. THE CHAPEAU OF GATT ARTICLE XX ESTABLISHES STRICT CONDITIONS FOR THE JUSTIFICATION OF A MEASURE**

2. The analysis under the chapeau of Article XX requires careful scrutiny of a challenged measure in strict relation to the criteria of the chapeau because it acts as an independent and express limiting condition on a Member's right to justify the measure under one of the enumerated exceptions. As stated by the Appellate Body, "[t]he language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau".<sup>1</sup>

3. The chapeau also serves an important interest – "to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members".<sup>2</sup> The Appellate Body recently added that "[t]he function of the chapeau of Article XX of the GATT 1994 is to prevent the abuse or misuse of a Member's right to invoke the exceptions contained in the subparagraphs of that Article".<sup>3</sup> The chapeau thus demands strict application of the three standards therein: "first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade".<sup>4</sup>

4. The chapeau thus sets a separate, three-part test that a measure must meet. This test is higher than that of provisional justification under the Article's exceptions, and it must be assessed independently of such justification.<sup>5</sup> As stated by the Appellate Body, "the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau".<sup>6</sup>

**III. THE CHAPEAU OF GATT ARTICLE XX REQUIRES A CONTEXTUAL ASSESSMENT OF THE MEASURE IN QUESTION**

5. The Kingdom is further of the view that in judging whether a challenged measure satisfies the chapeau of Article XX, a panel should undertake a fact-specific contextual assessment of the measure in question. As stated above, the chapeau is a critical element of any Article XX analysis, but its strict disciplines are not fixed and instead vary according to the specific facts of a particular

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\* Saudi Arabia requested that its third party submission serve as its executive summary.

<sup>1</sup> Appellate Body Report, US – Shrimp, para. 157. (emphasis original)

<sup>2</sup> Appellate Body Report, Brazil – Retreaded Tyres, para. 215; Appellate Body Report, US – Gasoline, p. 22.

<sup>3</sup> Appellate Body Report, EC – Seal Products, para. 5.297.

<sup>4</sup> Appellate Body Report, US – Shrimp, para. 150.

<sup>5</sup> Appellate Body Report, US – Gasoline, pp. 22-23 ("The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue").

<sup>6</sup> Appellate Body Report, US – Shrimp, para. 157.

dispute. Among those facts are the measure's application, policy objectives and underlying economic conditions.

6. The chapeau first of all entails a thorough examination of a challenged measure's actual application. According to the Appellate Body, "[t]he focus of the chapeau, by its express terms, is on the *application* of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX".<sup>7</sup> An analysis of this application necessarily entails the conditions in which a measure has been applied, not merely the measure in the abstract.

7. Furthermore, the Appellate Body has stated that a panel must determine a "line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement".<sup>8</sup> This "line of equilibrium" is not static but contextual; it may vary "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ".<sup>9</sup>

8. A contextual analysis also is inherent in one of the chapeau's express conditions: "arbitrary or unjustifiable discrimination between countries where the same conditions prevail".<sup>10</sup> The "line of equilibrium" therefore depends on the extent to which the conditions prevailing in different countries are "relevantly the same".<sup>11</sup> The Appellate Body has found that "the identification of the relevant 'conditions' under the chapeau should be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation has been found".<sup>12</sup> It is relevant then to consider "the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".<sup>13</sup>

9. The Kingdom is of the view that among the conditions related to whether "the same conditions prevail" include, for example, the structure of a Member's economy, that is, the level of development, diversification or industrialization of the economy. These conditions and others inform the contextual assessment to be made of the level of compliance with the chapeau in a particular case and therefore where the "line of equilibrium" should be established.<sup>14</sup>

10. These and other factors also inform a panel's assessment of whether discrimination is arbitrary or unjustifiable, which "usually involves an analysis that relates primarily to the cause or the rationale of the discrimination".<sup>15</sup> In this regard, one of the most important factors identified by the Appellate Body in the assessment of arbitrary or unjustifiable discrimination is "the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective

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<sup>7</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215. (emphasis added) See also Appellate Body Report, *US – Shrimp*, para. 160:

[T]he application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirements.

<sup>8</sup> Appellate Body Report, *US – Shrimp*, para. 159.

<sup>9</sup> *Ibid.*

<sup>10</sup> In order for a measure to be applied in a manner that would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", and thus fail to satisfy the chapeau, the Appellate Body has stated that three elements must exist: (i) the application of the measure must result in discrimination; (ii) the discrimination must be arbitrary or unjustifiable in character, and; (iii) the discrimination must occur between countries where the same conditions prevail. Appellate Body Report, *US – Shrimp*, para. 160.

<sup>11</sup> Appellate Body Report, *EC – Seal Products*, para. 5.299.

<sup>12</sup> *Ibid.* para. 5.301.

<sup>13</sup> *Ibid.* para. 5.302.

<sup>14</sup> The Kingdom notes that in *EC – Seal Products*, the Appellate Body did consider, although it did not retain, an argument by the EU related to "the different level of development in the organisation of the marketing structures achieved by the Inuit communities in Greenland as compared to the Canadian Inuit communities". See *ibid.* para. 5.317.

<sup>15</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225.

with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX".<sup>16</sup> The Appellate Body also has stressed, however, that a challenged measure's policy objective is not the sole factor to be examined, and that "depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to that overall assessment".<sup>17</sup>

11. The Kingdom is therefore of the view that specific circumstances of the Member imposing the measure – for example its level of economic development or the sophistication of its trade and regulatory regimes – may be relevant when assessing whether discrimination is "arbitrary or unjustifiable" and where the contextual "line of equilibrium" should be drawn in a dispute. Members' rights and obligations under the WTO Agreements, as well as their expectations toward other Members, vary according to both the Agreements' provisions and also the context in which those provisions are applied. This context necessarily informs a judgment as to whether a challenged measure satisfies the chapeau.

12. Taken together, the chapeau creates a strict but contextual standard – one that is higher than that of provisional justification under the Article's exceptions, and one that must be assessed independently of such justification.<sup>18</sup> The chapeau is a crucial element in verifying the legitimacy and ultimate WTO-consistency of a measure provisionally justified under one of the paragraphs of Article XX, that must be subject to a stand-alone assessment along the lines defined by the Appellate Body. At the same time, the chapeau's strict standard is not static and instead depends on a measure's context.

#### **IV. CONCLUSION**

13. This dispute addresses important interpretive issues under GATT Article XX which would benefit from further clarification in light of the present dispute. The Kingdom respectfully requests the Panel to consider its views on the interpretive issues set out above.

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<sup>16</sup> Appellate Body Report, EC – Seal Products, para. 5.306.

<sup>17</sup> Ibid. para. 5.321.

<sup>18</sup> Appellate Body Report, US – Gasoline, pp. 22-23 ("The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue").