



INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA

REQUEST FOR THE ESTABLISHMENT OF A PANEL

The following communication, dated 23 January 2018, from the delegation of India to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

India hereby requests the establishment of a panel pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), with respect to the issues identified below.

1. BACKGROUND TO THIS REQUEST

On 14 October 2016 the Dispute Settlement Body ("DSB") adopted the recommendations and rulings of the Appellate Body Report in *India – Certain Measures Relating to Solar Cells and Modules* (WT/DS456).¹

The Appellate Body Report (WT/DS456/AB/R dated 16 September 2016) addressed India's appeal on certain issues of law and legal interpretations developed in the Panel Report (WT/DS456/R dated 24 February 2016). The Panel was established on 23 May 2014 to consider a complaint by the United States against certain domestic content requirements ("DCR measures") imposed by India on solar power developers ("SPDs") selling electricity to governmental agencies under its Jawaharlal Nehru National Solar Mission ("NSM"). The DCR measures at issue, under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1-A) of India's National Solar Mission, required that certain types of solar cells and modules that are used by the SPDs, are made in India.

The Appellate Body upheld the finding of the Panel that the DCR measures were inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994, and were not covered by the derogation under Article III:8(a) of the GATT 1994, based on the reasoning that the procurement of solar cells and modules was not by the government, but by SPDs engaged in the generation of power. The Appellate Body concluded, in paragraph 6.2 of its Report, that under Article III:8(a) of GATT 1994, the product purchased by way of procurement (i.e., solar power), must necessarily be "like", or "directly competitive" with or "substitutable" for – in other words, in a "competitive relationship" with – the foreign product subject to discrimination (i.e., solar cells and modules). The Appellate Body also noted the findings of the Panel that the DCR measures are "laws, regulations or requirements governing the procurement" of electricity² and that the procurement of electricity is "by governmental agencies".³

After the adoption of the Appellate Body Report by the DSB on 14 October 2016, India issued a communication to the DSB dated 08 November 2016, and subsequently at the meeting of the DSB

¹ Action by the Dispute Settlement Body, WT/DS456/13 circulated on 14 October 2016.

² Appellate Body Report, *India-Solar Cells*, para 5.42 and fn. 152, referring to Panel Report, *India-Solar Cells*, para 7.145.

³ Appellate Body Report, *India-Solar Cells*, para 5.42 and fn. 153, referring to Panel Report, *India-Solar Cells*, para 7.151.

held on 23 November 2016, India announced its intention to implement the DSB's recommendations and rulings in this dispute and stated that it would need a reasonable period of time in which to do so.

On 16 June 2017, India and the United States informed the DSB that they had agreed that the reasonable period of time to implement the DSB's recommendations and rulings would be 14 months. Accordingly, the reasonable period of time ("RPT") was set to expire on 14 December 2017.⁴

On 14 December 2017, pursuant to Article 21.6 of the DSU, the delegation of India circulated a status report to the Chairperson of the DSB, in which it stated that India has ceased to impose any measures found inconsistent in the DSB's recommendations and rulings, and has complied with the said recommendations and rulings.⁵

On 20 December 2017, the United States made a request pursuant to Article 22.2 of the DSU seeking authorization from the DSB to suspend tariff concessions under the covered agreements.⁶ India objected to this request vide its communication dated 03 January 2018 to the Chairperson of the DSB, under Article 22.6 of the DSU.⁷ In its objection, India highlighted that the United States' request was not a valid request under Article 22.2 of the DSU in the absence of initiation of the negotiations on compensation, and its failure to specify either any specific element of non-compliance or the proposed level of suspension of concessions.

In the event of any disagreement between the parties with respect to "the consistency with a covered agreement of measures taken to comply with the recommendations and rulings",⁸ the logical course of action is first to have recourse to Article 21.5 of the DSU. Since India considers that it has brought itself into full compliance with its WTO obligations and the United States appears to disagree in its communication of 19 December, 2017, the issue of compliance must be decided following the procedures of Article 21.5 of the DSU. In the circumstances of this dispute, therefore, India seeks recourse to Article 21.5 of the DSU to resolve the disagreement over compliance.

2. IMPLEMENTATION ACTION BY INDIA

There is no law or regulation in India mandating DCRs for solar cells and modules. The Panel while analyzing the DCR measures at issue, noted that the NSM is being implemented in several successive "Phases" with each phase being further sub-divided into several "Batches."⁹ The United States had based its panel request on Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1-A) of India's NSM.

As noted by the Panel, the Ministry of New and Renewable Energy of India ("MNRE") is the Indian central government ministry responsible for "all matters relating to renewable energy."¹⁰ The Panel noted that with regard to the three Batches under its consideration, MNRE had issued the *Guidelines* documents setting forth the terms and conditions governing each of the three Batches. Under the first two Batches, i.e. Phase I (Batch 1) and Phase I (Batch 2), MNRE selected NTPC Vidyut Vyapar Nigam Limited ("NVVN") to act as the agency responsible for implementing the solar power project selection process, including but not limited to issuing the *Request for Selection* document governing selection of solar power projects. NVVN served as the government party in the individually executed PPAs. For Phase II (Batch 1), MNRE selected the Solar Energy Corporation of India ("SECI") to perform the same functions that NVVN performed in respect of Phase I.¹¹

⁴ Communication from India and the United States concerning Article 21.3(b) of the DSU, WT/DS456/16 dated 16 June 2017.

⁵ Status Report by India, WT/DS456/17 dated 14 December 2017.

⁶ Recourse to Article 22.2 of the DSU by the United States, WT/DS456/18 circulated on 20 December 2017.

⁷ Recourse to Article 22.6 of the DSU by India, WT/DS456/19 circulated on 08 January 2018.

⁸ Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

⁹ Panel Report, *India-Solar Cells*, para 7.3.

¹⁰ Panel Report, *India-Solar Cells*, para 7.4.

¹¹ Panel Report, *India-Solar Cells*, para 7.4.

The Panel noted that *the scope of the DCR measures varied across batches*.¹² The Panel also recorded in its Report that the *Guidelines* would have no legal impact if no action were taken after the Batch was initiated, i.e. if there were no subsequent bidding/selection processes.¹³

In this connection, India submits the following:

As recorded in paragraph 7.14 of the Panel Report (DS/456/R, dated 24 February 2016):

- (a) In Batches 1 and 2 of Phase I of the NSM, PPAs for 140 MW were entered into under the DCR measures, and PPAs of 330 MW were entered into with imported cells and modules.
- (b) In Batch 1A of Phase II of the NSM, PPAs for 375 MW were entered into under the DCR measures.

Of the above, in Batch 1A of Phase II, only PPAs for 355 MW were eventually commissioned under the DCR measures, and there were additional 325 MW which involved imported solar cells and modules.

At the time of the Panel and Appellate Body hearings, there were several other projects, in respect of which Guidelines and Request for Selection documents had been issued using the DCR measures, and which were at various stages of tendering and selection. The details of these projects are given below:

- a) On 10.03.2015, MNRE had issued the "*Guidelines for Selection of 3000 MW Grid-Connected Solar PV Power Projects under Batch-II for State Specific Bundling Scheme*." The implementing agency for these Guidelines was NTPC Ltd. (a Government owned company which is also the parent company of NRVN),¹⁴ and accordingly NTPC Ltd. issued the Request for Selection documents dated 21.05.2015,¹⁵ 03.07.2015,¹⁶ 09.10.2015¹⁷ and 16.06.2016¹⁸.
- b) On 04.08.2015 MNRE had issued the "*Guidelines for Implementation of Scheme for Setting up of 2000 MW Grid-connected Solar PV Power Projects under Batch-III – State Specific VGF Scheme*" pursuant to which SECI issued the Request for Selection documents dated 15.02.2016¹⁹ and 24.02.2016²⁰.
- c) On 14.03.2016, MNRE had issued the "*Guidelines for Implementation of Scheme for Setting up of over 5000 MW Grid-connected Solar PV Power Projects under Batch-IV*", pursuant to which SECI issued Request for Selection document dated 22.04.2016.²¹

Pursuant to the adoption of the DSB recommendations and rulings, India held stakeholder consultations and took steps to ensure swift compliance with the same. With regard to the Guidelines and Request for Selection documents identified above, which had been at various stages of tendering and selection at the time of the adoption of the DSB recommendations and rulings, the following PPAs were entered into:

¹² Panel Report, *India-Solar Cells*, para 7.7.

¹³ Panel Report, *India-Solar Cells*, para 7.11.

¹⁴ The Panel had noted in para 7.5 that NTPC is a state-owned entity of which NRVN is a wholly-owned subsidiary.

¹⁵ *Request For Selection Document For Grid Connected Solar Photo Voltaic Projects Under Batch-II Tranche-I Of National Solar Mission Phase- II (State Specific Bundling Scheme) For Gani-Sakunala Solar Park Phase-II in Andhra Pradesh*, NTPC Limited (21 May 2015).

¹⁶ *Request For Selection Document For Grid Connected Solar Photo Voltaic Projects Under Batch-II Tranche-I Of National Solar Mission Phase- II (State Specific Bundling Scheme) (Non Solar Park – DCR Category) in Rajasthan*, NTPC Limited (03 July 2015).

¹⁷ *Request For Selection Document For Grid Connected Solar Photo Voltaic Projects Under Batch-II Tranche-I Of National Solar Mission Phase- II (State Specific Bundling Scheme) (Non Solar Park – DCR Category) in Telangana*, NTPC Limited (09 October 2015).

¹⁸ *Request For Selection Document For Grid Connected Solar Photo Voltaic Projects Under Batch-II Tranche-I Of National Solar Mission Phase- II (State Specific Bundling Scheme) For Pavagada Solar Park (Under DCR Category) in Karnataka*, NTPC Limited (16 June 2016).

¹⁹ *Request For Selection Document For 1000 MW Grid Connected Solar Photo Voltaic Projects Under JNNSM Phase-II Batch-III Tranche-V in Karnataka*, Solar Energy Corporation of India Ltd. (15 February 2016).

²⁰ *Request For Selection Document For 50 MW Grid Connected Solar Photo Voltaic Projects Under JNNSM Phase-II Batch-III Tranche-I in Maharashtra*, Solar Energy Corporation of India Ltd. (24 February 2016).

²¹ *Request For Selection Document For 250 MW Grid Connected Solar Photo Voltaic Projects Under JNNSM Phase-II Batch-IV Tranche-I in Gujarat Solar Park at Charanka*, Solar Energy Corporation of India Ltd. (22 April 2016).

- (a) 150MW in the State of Andhra Pradesh (Kurnool Solar Park), in March 2016.
- (b) 100 MW in the State of Rajasthan, in June 2016.
- (c) 50 MW in the State of Maharashtra, in July 2016.
- (d) 50MW in the State of Telangana, in July 2016.
- (e) 50 MW in the State of Karnataka, in August 2016.
- (f) 25 MW in the State of Gujarat, in December 2016.
- (g) 100MW in the State of Karnataka, in December 2016.

India confirms that after December 2016, there have been no PPAs pursuant to Guidelines and Request for Selection documents requiring DCR measures determined to be inconsistent under the DSB recommendations and rulings.

Apart from the aforementioned projects, some projects which were initially envisaged under DCR measures, were cancelled by the MNRE on the basis of assessments that these may not be completed within the RPT. These include projects cumulating to capacity of 300 MW that were to be undertaken by SECI, and 250 MW that was to be undertaken by NTPC Limited.

Thus, India would like to state and affirm that in order to comply with the recommendations and rulings of DSB in this dispute, it has: (a) taken all appropriate steps to bring its measures into compliance with the DSB recommendations and rulings; (b) no PPAs under the DCR measures have been entered into after December 2016; (c) some projects that were initially contemplated with the DCR measures, have been cancelled; and (d) India no longer enters into any PPAs involving the DCR measures. This removes the basis for any inconsistency of India's measures, with Article III:4 of the GATT 1994 and Article 2.1 of TRIMs. Therefore, as of the date of expiry of the RPT on 14 December 2017, India is fully compliant with its WTO obligations.

As specified in India's communication under Article 21.6 of the DSU, India is fully compliant with the recommendations and rulings of the DSB.²²

3. REQUEST FOR THE ESTABLISHMENT OF PANEL UNDER ARTICLE 21.5 OF THE DSU

India requests that a Panel be established pursuant to Article 21.5 of the DSU, with the standard terms of reference as set forth in Article 7.1 of the DSU, to resolve the disagreement between India and the United States as regards India's compliance with the recommendations and rulings of the DSB. India also requests that the DSB refer the matter to the original Panel, if possible.

As India has complied with the DSB recommendations and rulings in this dispute, prompt findings by the DSB will assist the parties in securing a positive solution to the dispute.

²² Status Report by India, WT/DS456/17 dated 14 December 2017.