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INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

NOTIFICATION OF AN APPEAL BY INDIA UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 20 April 2016, from the delegation of India, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6) ("Working Procedures"), India hereby notifies its decision to appeal certain issues of law covered by in the panel report in *India– Certain Measures relating to Solar Cells and Solar Modules* (WT/DS456/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute.

Pursuant to Rules 20(1) and 21(1) of the Working Procedures, India files this Notification together with its Appellant's Submission with the Appellate Body Secretariat.

For the reasons to be elaborated in its submissions to the Appellate Body, India appeals the following errors of law and legal interpretation contained in the Panel Report and requests the Appellate Body to reverse the related findings, conclusions and recommendations of the Panel, and where indicated, to complete the analysis.¹

I THE PANEL ERRED IN ITS FINDING THAT ARTICLE III:8(A) OF THE GATT 1994 IS NOT APPLICABLE TO THE DCR MEASURES

1. India appeals the Panel's conclusion that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994 for the following reasons:
 - i. The Panel erred in not considering India's arguments that solar cells and modules are indistinguishable from solar power generation², and that in its factual and legal assessment, it is not necessary to consider whether solar cells and modules qualify as "inputs" for solar power generation. The basis for the Panel's reasoning was that the Appellate Body in *Canada – Renewable Energy / Feed-In Tariff Program*, did not consider this issue³, while ignoring the fact that this issue was not presented for consideration before the Appellate Body in that dispute.

¹ Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel in its report, without prejudice to India's ability to rely on other paragraphs of the Panel Report in its appeal.

² Panel Report, paras. 6.24, 7.114 and 7.116.

³ Panel Report, paras. 7.116-7.135, particularly paras. 7.116, 7.118, 7.123, 7.125, 7.126, 7.128.

- ii. The Panel erred in its conclusion that discrimination relating to solar cells and modules under the DCR measures is not covered by the derogation under Article III:8(a) of the GATT 1994.⁴
2. India requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU in failing to consider and to make an objective assessment of India's arguments that:
 - (i) solar cells and modules are indistinguishable from solar power generation, and
 - (ii) solar cells and modules can be characterized as inputs for generation of solar power.⁵
3. India further requests the Appellate Body to reverse the Panel's findings that the derogation under Article III:8(a) of the GATT 1994 is not available for solar cells and modules since what the Government purchases is electricity generated from such cells and modules⁶ and instead complete the analysis to find that the DCR measures are covered by the derogation under Article III:8(a) of the GATT 1994.
4. Should the Appellate Body hold that the DCR measures are covered by the derogation under Article III:8(a) of the GATT 1994, India requests the Appellate Body to complete the analysis under Article III:8(a) of the GATT 1994 and find that:
 - i. The DCR measures are laws, regulations or requirements governing procurement;
 - ii. The procurement under the DCR measures is made by governmental agencies;
 - iii. The procurement under the DCR measures is of products purchased for governmental purposes;
 - iv. The procurement and purchase of products under the DCR measures is not with a view to commercial resale.
5. Based on the above, India requests the Appellate Body to find that the DCR measures are not inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

II THE PANEL ERRED IN ITS FINDING THAT THE EXCEPTION UNDER ARTICLE XX(J) OF THE GATT 1994 IS NOT APPLICABLE TO THE DCR MEASURES

1. Should the Appellate Body uphold the Panel's finding that the DCR measures are not covered by the derogation of Article III:8(a) of the GATT 1994, India requests the Appellate Body to find that the Panel erred in its conclusion that the DCR measures are not justified under the general exception in Article XX(j) of the GATT 1994.⁷
2. India also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU in its assessment of India's arguments on "sufficient manufacturing capacity"⁸; by disregarding India's justification with regard to the DCR measures, and substituting it with one which had no basis in India's submissions⁹; and in arriving at various conclusions based on a piecemeal and selective analysis of two reports without providing India due process rights to respond to its conclusions.¹⁰

⁴ Panel Report, paras. 7.100-7.187, particularly paras. 7.135 and 7.187.

⁵ Panel Report, para. 6.24, paras. 7.116-7.135, particularly paras. 7.116, 7.118, 7.123, 7.125, 7.126, 7.128.

⁶ Panel Report, paras. 7.135 and 7.187.

⁷ Panel Report, paras. 6.30-6.31, paras. 7.188-7.265, paras. 7.337-7.390, particularly paras. 7.189, 7.190, 7.207, 7.218, 7.236, 7.237, 7.265, 7.337-7.342, 7.346, 7.350, 7.354, 7.360-7.368, 7.380, 7.382, 7.389 and 7.390.

⁸ Panel Report, para. 7.226.

⁹ Panel Report, paras. 7.189, 7.190, 7.237, 7.337-7.342, 7.350, 7.351, 7.354, 7.360-7.363, 7.366-7.368 and 7.380.

¹⁰ Panel Report, paras. 7.364-7.365 and para. 7.367.

3. India requests the Appellate Body to reverse the Panel's conclusion that the DCR measures are not justified under Article XX(j) of the GATT 1994 and to complete the analysis under Article XX(j) to find that:
 - i. India's lack of manufacturing capacity of solar cells and modules amounts to a situation of local and general short supply of such products in India, and that the defence under Article XX(j) is available to it;
 - ii. The DCR measures are essential for addressing the local and general short supply of solar cells and modules;
 - iii. The DCR measures are justified under Article XX(j) of the GATT 1994 because they meet with the requirements of the chapeau of Article XX.

III SUBSIDIARILY, THE PANEL ERRED IN ITS FINDING THAT THE DCR MEASURES ARE NOT JUSTIFIABLE UNDER ARTICLE XX(D) OF THE GATT 1994

1. Should the Appellate Body find that the derogation under Article III:8(a) of the GATT 1994 is not available for India, and that the DCR measures are not justifiable under Article XX(j) of the GATT 1994, then India requests the Appellate Body to find that the Panel erred in its conclusion that the DCR measures are not justified under the general exception in Article XX(d) of the GATT 1994.¹¹
2. India requests the Appellate Body to reverse the Panel's conclusion that the DCR measures are not justified under Article XX(d) of the GATT 1994 and to complete the analysis under Article XX(d) to find that:
 - i. The international and domestic laws and regulations identified by India, constitute laws and regulations for the purpose of Article XX(d);
 - ii. The DCR measures are necessary for securing compliance with the mandate under India's laws and regulations to achieve ecologically sustainable growth and sustainable development; and
 - iii. The DCR measures are justified under Article XX(d) of the GATT 1994 because they meet with the requirements of the chapeau of Article XX.

¹¹ Panel Report, paras. 7.284-7.333, paras. 7.337-7.390, particularly paras. 7.298-7.301, 7.318, 7.319, 7.333, 7.337-7.342, 7.350, 7.354, 7.360-7.368, 7.380, 7.382, 7.389 and 7.390.