# *United States – Certain Measures Relating to the Renewable Energy Sector*

# (DS510)

**Second Substantive Meeting of the Panel with the Parties**

**Closing Statement of the United States**

**January 22, 2018**

Mr. Chairman, Members of the Panel: Once again, the United States would like to thank you for your continued service on this Panel and the Secretariat staff assisting you.

1. India has failed to substantiate its assertion that the measures at issue in this dispute "incentivize" the purchase or use of domestic products. India's failure in this regard is not a mere technicality, because the contention that the measures at issue incentivize the purchase or use of domestic products is the key factual assertion underlying India's claim that the measures accord "less favorable" treatment to imported products within the meaning of Article III:4 of the GATT 1994.

2. India now states that it does not use the term "incentivize" as a "legal concept or standard." It is clear, however, that India does use the term "incentivize" to describe how the measures at issue purportedly operate – namely, by incentivizing the purchase or use of domestic products. But as the United States has explained, India has not provided a measure-by-measure analysis to support its contention with respect to the supposed "incentivizing" effects of the measures at issue. India's omission on this scope is notable in light of prior Appellate Body and panel reports that have that found that an allegation of "less favorable" treatment should be accompanied by "an analysis of the contested measures," including its "design, structure, and expected operation" on the relevant market.[1]

3. In its opening statement at today's meeting, India asserts that it "has adequately described the design, structure, and expected operation of each of the challenged measures…"[2] First, the United States notes that a "description" is *not* an analysis. The idea that India's "description" of the measures at issue amount to "analysis" of the measures is simply wrong on its face. Second, that India has failed provide an "adequate" analysis of the measures at issue is borne out by a review of India's first written submission.

4. In this regard, the United States notes that – in its opening statement today – India refers to paragraphs 48-50 of its first written submission to support the argument that India has

[1] *See*, U.S. First Written Submission, para. 81 (citing *US -FSC (Article 21.5 - EC) (AB)*, para. 215).
[2] *See*, India's Opening Statement at the Second Substantive Meeting of the Panel with the Parties (India's Opening Statement"), para. 7.

"adequately" described or analyzed the measures at issue.[3] However, a review of paragraphs 48-50 *confirms* that India has failed to provide any such analysis.

5. For example, at paragraph 48, India asserts that the measure at issue (i.e., measure 1) "affects" the "internal sale…" of imported "like products" within the meaning of Article III:4. At paragraphs 48 and 49, India cites Appellate Body and panel reports that have interpreted the meaning of relevant text in Article III:4. Then, at paragraph 50, India – *without providing an intervening analysis* – simply asserts that that it "has demonstrated that the measures" satisfy the relevant elements of Article III:4. In other words, paragraphs 48-50 typify the conclusory approach that India has taken with respect to making out the claims at issue in this dispute.

6. The United States has already explained why the measures at issue in this dispute fall outside the scope of the TRIMs Agreement, and why India's arguments to the contrary are without merit. We will not repeat those arguments here. Instead, the United State would like to respond to India's specific argument that a measure constitutes a TRIM if the measure has the stated aim or objective of "boosting local manufacturing" or "investments." First, India identifies no support for such an interpretation in the text of the TRIMs Agreement. Second, previous panels have found that the key question with respect to whether a measure is an "investment measure" for purposes of the TRIMs Agreement is the "manner" in which the measure "relate[s] to investment."[4] No panel has found that a measure's enunciated investment aims or objectives, standing alone, are sufficient to establish that the measure is an "investment measure" within the meaning of the TRIMs Agreement.

7. With respect to India's claims under the SCM Agreement, the United States recalls its prior explanations of why India has failed to establish the elements of "financial contribution" and "benefit." With respect to contingency, while the legal argumentation in India's first written submission devotes some discussion to the meaning of "contingent" within the meaning of Article 3.1(b) of the SCM Agreement, nowhere in its first written submission does India discuss what it means to "use" a good within the meaning of that provision.[5] Rather, India appears to

[3] *See*, India's Opening Statement, note 6.
[4] *See, Indonesia Autos (Panel)*, para. 14.80.
[5] *See, e.g.*, India's First Written Submission, para. 231.

presume in passing that each measure requires the "use" of a good within the meaning of Article 3.1(b). This sort of conclusory approach does not meet India's burden of argument.

8. This concludes the United States' closing statement. We look forward to providing responses to any written questions from the Panel. Thank you.