United States – Certain Measures Relating to the Renewable Energy Sector

(DS510)

Second Substantive Meeting of the Panel with the Parties

Opening Statement of the United States

January 22, 2018

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

I. INTRODUCTION

1. At the outset, the United States recalls that India has not brought this dispute to address an existing trade issue between the United States and India. India has not claimed any trade interest in exporting renewable energy products to the United States. Nor has India presented evidence that many of the measures at issue have been used, or even that these measures may be used in the future.[1] Given this, India certainly cannot argue that the state and local measures at issue in this dispute have any real world trade effects on India's economy.

2. As the United States has noted,[2] absent a trade interest, India is pursuing this dispute as a reaction to the successful dispute brought by the United States against a major federal Indian solar program involving over $90 billion of solar equipment purchases. That dispute remains unresolved. In December 2017, the United States noted its view that India had not complied with the rulings and recommendations of the DSB, and requested authorization to suspend concessions.[3] In January 2018, India submitted the U.S. request to arbitration under Article 22.6 of the DSU.[4] India also asserted compliance, and requested a panel under Article 21.5 of the DSU.[5] These matters are pending, although the parties hope to reach a mutually agreed solution. In short, India has brought this dispute not to enhance its ability to export products to the United

[1] *See*, U.S. First Written Submission paras, 1-2.

[2] *See*, U.S. First Written Submission, para. 2 (referencing *India –Certain Measures Relating to Solar Cells and Solar Modules* ("*India – Solar Cells*").

[3] *See,* Recourse to Article 22.2 of the DSU by the United States (WT/DS456/18).

[4] *See*, Recourse to Article 22.2 of the DSU by India (WT/DS456/19).

[5] *See*, Recourse to Article 21.5 of the DSU by India - Request for the Establishment of a Panel (WT/DS456/20).

States, but rather to enhance India's ability to maintain the discriminatory Indian solar measures that the DSB found to be inconsistent with India's WTO obligations.[6]

3. As the United States has also noted, for India to bring a dispute for this purpose amounts to a misuse of the dispute settlement system.[7] Nonetheless, the DSB has established this panel, with standard terms of reference, and the panel must issue a report in accordance with the DSU. At the same time, India's motivations have significance in terms of the course of these proceedings.

4. First, the lack of any real world trade interest helps explain how some of the issues have been framed by the parties. This is most clearly evident with respect to whether or not India has shown existence of financial contribution, which is a necessary element of any subsidy claim. In most subsidy disputes, the existence of an alleged grant is not in dispute. Instead, the government grants in a sense are the starting point of the dispute, and are evident. But here, India did not start with an important trade issue. Rather, India apparently sought to identify arcane U.S. state and local measures with respect to which India might obtain findings to influence the settlement of an unconnected dispute. In these circumstances, it is understandable why India's evidence of contribution is, at best, very sparse. Accordingly, this dispute unusually calls upon the Panel to make findings, and to fully explain them, on just how minimal the evidence may be to make out a *prima facie* case of contribution.

5. Furthermore, the Panel may consider the reasons behind this case in deciding on the extent to which the Panel exercises its discretion to use judicial economy. The United States recalls that rulings made by the DSB "shall be aimed at achieving a satisfactory settlement of the matter."[8] Particularly where there is no trade interest involved, the Panel should consider the

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[6] On October 26 2016, the DSB adopted the Appellate Body report on *India –Solar Cells* and the Panel report, as modified by the Appellate Body report. *See*, WT/DS456/13.

[7] *See*, U.S. Opening Statement at the First Meeting of the Panel with the Parties, para. 2.

[8] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article 3.4.

extent to which it needs to reach India's claims that raise the same basic issues under three different WTO agreements.

6. As the United State has explained in prior submissions and statements to the Panel, India has failed to make out a *prima facie* case that any of the measures at issue breach U.S. obligations under any covered agreement. In this Opening Statement, the United States will briefly summarize why India has failed to meet its burden of argument for each claim and respond to some of the new arguments in India's second written submission.

II. INDIA HAS NOT MADE OUT A CASE THAT THE MEASURES AT ISSUE BREACH ARTICLE III:4 OF THE GATT 1994

7. In its first written submission, India argued that the measures at issue in this dispute accord "less favorable" treatment to imported products within the meaning of Article III:4 of the GATT 1994 because they *incentivize* the "purchase" or "use" of locally manufactured renewable energy products.[9] Therefore, consistent with paragraph 3 of the Panel's Working Procedures, India – in its first written submission – was required to make out a *prima facie* case that the challenged measures meet the elements necessary to establish a breach of Article III:4. Moreover, having asserted that the challenged measures breach Article III:4 *by* incentivizing the purchase or use of locally made products, India bore the burden of demonstrating – as part of its *prima facie* case – that the measures have such incentivizing effects.

8. As the United States has explained, however, the argumentation in India's first written submission does <u>not</u> substantiate India's assertion that the measures incentivize the "purchase" or "use" of domestic products. Rather, the *incentivization* "arguments" advanced in India's first written submission consist of two elements. <u>First</u>, India made conclusory statements that are unsupported by any analysis of the challenged measures or the markets in which the measures operate.[10] <u>Second</u>, India presented arguments relating to supposed actual trade effects. The United States has shown that India's trade effects arguments are unsupported by the evidence upon which India relied. As the United States has explained, there is no single method to

[9] *See,* India's Second Written Submission, para. 14.

[10] *See*, U.S. Second Written Submission, paras. 6-12.

establishing a claim under Article III:4. However, India's reliance on conclusory allegations, and flawed evidence of supposed trade effects, does not meet India's burden of argument.

9. In its second written submission, India continues to mischaracterize the legal arguments of the United States. Once again – to be clear – the United States does not argue or suggest that a demonstration of "*actual* trade effects" is a required element of a claim under Article III:4 of the GATT 1994. In this regard, the United States does not argue that India must proffer empirical evidence or data that the measures *have* induced customers to purchase or use locally made renewable energy products. But because India chose to assert – and still appears to assert[11] – that the measures at issue incentivize the purchase or use of domestic products and attempted to support that argument by showing supposed trade effects, India bore the burden of demonstrating that the measures are likely to have such an incentivizing effect. That India has not done so means that India has failed to establish that the measure at issue are inconsistent with the United States' obligations under Article III:4 of the GATT 1994.

III. INDIA HAS NOT MADE OUT A CASE THAT THE MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLE 2 OF THE TRIMS AGREEMENT

10. As the United States explained, measures that are *not* inconsistent with Article III:4 of the GATT are necessarily *not* inconsistent with Article 2 of the TRIMs Agreement.[12] Therefore, having failed to make out a *prima facie* case that the measures at issue are inconsistent with Article III:4 of the GATT 1994, India has likewise failed to establish that the measures breach Article 2 of the TRIMs Agreement. For this reason, the Panel should find that India has not met is burden with respect to its claims under Article 2 of the TRIMs Agreement.

11. Moreover, India has failed to establish that the measures at issue even fall within the scope of the TRIMs Agreement. As the United States has explained, the text of the TRIMs Agreement makes clear that the Agreement's disciplines are concerned with measures that

[11] *See*, India's Second Witten Submission, para. 14.

[12] *See*, U.S. First Written Submission, para. 133.

impose requirements or conditions on *enterprises*.[13] Most of the measures at issue in this dispute thus fall outside the scope of the TRIMs Agreement because they are focused on final end-use consumers, *not* enterprises. In its first written submission, India did not address the Agreement's textual emphasis on "enterprises" and the preamble's focus on facilitating cross-border investment. Nor, did India otherwise explain why the TRIMs Agreement – notwithstanding this text – should be read as applying to measures that impose no requirements or conditions on enterprises or have no relationship to cross-border investment. In subsequent submissions to the Panel, India advanced three new arguments to support its view that the measures at issue fall within the scope of the TRIMs Agreement. Each of India's arguments on this score is without merit.

12. **First, India's argument that the term "enterprise" can refer to "any person…who engages in economic activity, such as purchasing renewable energy equipment" is without foundation.**[14] India contends that the Appellate Body Report in *US—Washing Machines* supports this expansive definition of the term "enterprise."[15] But as the United States has explained, India's reliance on *US—Washing Machines* is misplaced.

13. In *US—Washing Machines*, the Appellate Body did not interpret the meaning of the word "enterprise." Rather, the issue in *US—Washing Machines* was whether the phrase "certain enterprises" referred only to where a *company* was legally incorporated[16] or whether other parts of a business could be the recipient of a "subsidy" within the meaning of the SCM Agreement. The Appellate Body found that the term "certain enterprises" could encompass various parts of the company, including "its headquarters, branch offices, and manufacturing facilities."[17]

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[13] *See*, U.S. First Written Submission, paras. 138.

[14] *See,* India's Second Written Submission, para. 44; U.S. Second Written Submission, paras. 29-33.

[15] *See,* India's Second Written Submission, para. 44; U.S. Second Written Submission, paras. 29-33.

[16] *See*, *US – Washing Machines (AB)*, para. 5.224 ("[I]f accepted, Korea's interpretation of the term 'certain enterprises' would entail that a regional specificity analysis should focus solely on the place(s) where the recipient companies are incorporated, without regard to the place(s) where those companies effectively establish their commercial presence by, for instance, setting up sub-units such as branch offices or manufacturing facilities.")

[17] *See*, *US – Washing Machines (AB)*, para. 5.222.

Accordingly, the Appellate Body findings in *US—Washing Machines* are fully consistent with ordinary meaning of the term "enterprise": a "business firm" or "company."[18]

14. While the Appellate Body noted that a "wide variety of economic actors" could be the recipient of a "subsidy" within the meaning of Article 1 of SCM Agreement,[19] it did not – as India suggests[20] – state or imply that "any person…who engages in an economic activity in a market place is an enterprise" within the meaning of the SCM Agreement, the TRIMs Agreement, or any other covered agreement for that matter. Indeed, in the *US – Washing Machines* dispute, each one of the enterprises at issue was corporate facility. Simply put, *US—Washing Machines* does not support India's expansive definition of the term "enterprise." Accordingly, India's has given the Panel no reason to depart from the ordinary meaning of the term—that is, a "business firm" or "company."

15. **Second, the "object and purpose" of the TRIMs Agreement does not support India's argument that the scope of the Agreement extends to any measure that could have a restrictive, distortive, or discriminatory effect on trade, *even if* the measures impose no requirements or conditions on enterprises.**[21] In short, India mischaracterizes the "object and purpose" of the TRIMs Agreement.[22] As the United States has explained, the objective of the TRIMs Agreement – as reflected in its preamble – is "to facilitate investment across international frontiers."[23] Cross-border investments are typically made in the form of investment *in* enterprises, *not* though payments or incentives to home owners or other private persons like most of the measures at issue in this dispute. In this sense, the "object and purpose" of the TRIMs Agreement confirms that that Agreement is focused on disciplining measures that impose

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[18] *See*¸ U.S. Second Written Submission, para. 29 (citing U.S. First Written Submission, note 161, citing the The New Shorter Oxford English Dictionary (4th Edition), p. 828.).

[19] *See*, *US – Washing Machines (AB)*, para. 5.223.

[20] *See*, India's Second Written Submission, par. 44.

[21] *See,* India's Second Written Submission, paras 26 and 52; India's Opening Statement, paras. 40 and 46.

[22] *See,* India's Opening Statement, paras. 40 and 46; *see also,* India's Second Written Submission, para. 26.

[23] *See*, U.S. Second Written Submission, para. 26; U.S. Responses to Questions from the Panel, para. 29 (citing TRIMs Agreement, Preamble).

"purchase" or "use" requirements on *enterprises*. Put another way, interpreting the TRIMs Agreement in light of its object and purpose *contradicts* India's argument that the scope of the Agreement can extend to measures that impose no requirement or conditions on enterprises. For this reason, the Panel should rejected India's argument with respect to the object and purpose of the TRIMs Agreement.

16. To be clear, the United States does not dispute that disciplines of the TRIMs Agreement are aimed at discouraging Members from adopting trade-restrictive, trade-distortive, and discriminatory measures. [24] But this does not mean that the Agreement can be read to discipline *any* measures that may have such effects, as India appears to contend. This is because the aims of the TRIMs Agreement are not distinct from the aims of other WTO Agreements. For example, the preamble of the GATT 1994 – similar to TRIMs preamble – *also* refers to objectives such reducing "trade-barriers" (*i.e.,* trade restrictions) and "eliminate[ing] discriminatory treatment in international commerce." The national treatment provisions of Article III of the GATT 1994 of course generally prohibit measures that *distort* trade by discriminating against imported products.

17. Therefore, the logical import of India's "object and purpose" argument is that the scope of the TRIMs Agreement should be viewed as equally as broad as Article III of the GATT 1994 because both Agreements aim to discourage Members from adopting trade-restrictive, trade-distortive, and discriminatory measures. Indeed, by India's logic, any breach of a tariff binding under Article II of the GATT 1994 would be a TRIM. But of course, drafters of the TRIMs Agreement did not include breaches of Article II. The drafters similarly did not provide that any breach of Article III is a TRIM. Rather, the TRIMs Agreement, *by its terms*, covers a narrower subset of the measures that fall within the scope of Article III:4 of the GATT 1994.[25] Therefore, the Agreement cannot be read to address measures that impose no requirements or conditions on enterprises' purchases or use of goods.

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[24] *See,* India's Second Written Submission, paras 26 and 52; India's Opening Statement, paras. 40 and 46.

[25] *See*, U.S. Second Written Submission, para. 27.

18. **Third, India has not substantiated its theory that the measures at issue impose "indirect" or implicit requirements on manufacturing enterprises by "inducing" them to purchase or use locally-made inputs.**[26] Specifically, India has not shown that a manufacturing enterprise would – in fact – need to source *any* inputs used in the manufacturing process from local suppliers in order to "obtain an advantage" within the meaning of paragraph 1(a) of the Illustrative List of the Annex to the TRIMs Agreement.[27]

19. At most, India has shown that an enterprise may need to conduct its manufacturing activities *within* a certain jurisdiction in order to indirectly obtain an advantage; this does not mean, however, that the enterprise must "purchase" or "use" any products that are made in that jurisdiction.[28] Instead, an enterprise could presumably establish a manufacturing facility in one state, while sourcing the entirety of its inputs and capital equipment from another state or from overseas suppliers. Indeed, even India appears to acknowledge that a manufacturing enterprise could "shift[] investments" into a local jurisdiction instead of "purchasing" or "using" any "products of local origin" in the production process.[29]

20. In other words, India has not demonstrated that the measures at issue operate to such an effect. Accordingly, India has failed make out its claim that the measures at issue are covered by paragraph 1(a) of the Illustrative List of the Annex to the TRIMs Agreement.

[26] *See*, India's Second Written Submission, para. 56; India's Opening Statement, para. 54

[27] *See*, India's Second Written Submission, para. 56.

[28] *See*, U.S. Second Written Submission, para. 19.

[29] *See,* U.S. Second Written Submission, para. 22.

IV. INDIA HAS NOT DEMONSTRATED A BREACH OF THE SCM AGREEMENT

21. The United States recalls its prior arguments concerning India's failure to satisfy the elements of "financial contribution" and "contingency" under Articles 1.1(a) and 3.1 of the SCM Agreement, respectively.[30] In this statement, the United States will focus its remarks on the element of "benefit," including new arguments that India has made with respect to this element in its second written submission.

22. As the United States has explained in earlier submissions, India failed to put forward a specific, defined theory of how each one of the measures at issue confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. Instead, India has attempted to meet its burden by presenting various scenarios about how a benefit perhaps could be found with respect to some of the measures at issue in this dispute. First, in its first written submission, India argued that the measures may confer a "benefit" on (1) direct recipients in the amount of the payment received or revenue forgone under the measure at issue; and (2) indirect recipients in the form of "increased sales" enjoyed by local producers.[31] Then, in its opening statement at the first panel meeting, India posited that perhaps the entirety of "financial contribution" given to a direct recipient passes through to confer a "benefit" on local producers.[32] Finally, in its second written submission, India hypothesizes that "it is possible" that the "benefit" is shared or "distributed" between direct and indirect recipients.[33]

23. India's inability to articulate a coherent theory of "benefit" is fatal to its claims under SCM Agreement. This is because, as the complaining party, India bore the burden of establishing its *prima facie* case in its first written submission, by demonstrating what the facts *are*, and by explaining precisely how the relevant WTO disciplines apply to the specific measures at issue. This means that it is not sufficient for India to simply put forward different

[30] *See*, U.S. Second Written Submission, paras. 35- 41; 45-46.

[31] *See*, *e.g.*, India's First Written Submission, para. 112.

[32] *See*, India's Opening Statement, para. 81.

[33] *See*, India's Second Written Submission, para. 68.

versions of what the facts "may" [34] be. And, by introducing a third possible theory of "benefit" in its second written submission, India has further confirmed that it did not make out a *prima facie* case of "benefit" in its first written submission. Accordingly, there is no basis for the Panel to conclude that India has made a *prima facie* showing that the measures at issue confer a "benefit" within the meaning of Article 1.1(b).

24. In this regard, the United States take notes of the extraordinary statement from India's second written submission that "It does not matter which all economic actors may be the recipients of a benefit."[35] Of course, the question of *who* receives a "benefit" – far from being irrelevant, as India suggests – is fundamental to the inquiry of whether a "benefit" has been "conferred" within the meaning of Article 1.1(b). As the Appellate Body has stated, "A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient."[36] Therefore, India's continued failure to clarify the relevant "recipients" under the measures at issue means that India has *still* failed to establish that any of the measures confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

V. CONCLUSION

46. This concludes the U.S. opening statement. We look forward to answering any questions the Panel may have.

[34] *See*, India's Second Written Submission, para. 85.

[35] *See*, India's Second Written Submission, para. 85.

[36] *Canada – Aircraft (AB)*, para. 154.