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UNITED STATES — CERTAIN MEASURES RELATING TO THE RENEWABLE ENERGY SECTOR

REPORT OF THE PANEL

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Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Brazil – Taxation	Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
Canada – Dairy (Article 21.5 – New Zealand and US)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, p. 6829
Canada – Renewable Energy / Canada – Feed-in Tariff Program	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, DSR 2013:I, p. 7
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Agricultural Producers	Panel Report, *China – Domestic Support for Agricultural Producers*, WT/DS511/R and Add.1, adopted 26 April 2019
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
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China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535

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EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
EC – Export Subsidies on Sugar (Brazil)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Brazil*, WT/DS266/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, p. 6793
EC – Export Subsidies on Sugar (Thailand)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Thailand*, WT/DS283/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, p. 7071
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Sardines	Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, p. 3451
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EU – Fatty Alcohols (Indonesia)	Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R and Add.1, adopted 29 September 2017, DSR 2017:VI, p. 2613
EU – PET (Pakistan)	Appellate Body Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R and Add.1, adopted 28 May 2018
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
India – Solar Cells	Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Italy – Agricultural Machinery	GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833, adopted 23 October 1958, BISD 7S/60
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, p. 1179
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3

Short Title	Full Case Title and Citation
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, p. 43
Russia – Pigs (EU)	Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
Russia – Tariff Treatment	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Turkey – Rice	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, p. 2151
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
US – Clove Cigarettes	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012:XI, p. 5865
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union*, WT/DS353/RW and Add.1, adopted 11 April 2019, as modified by Appellate Body Report WT/DS353/AB/RW
US - Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, p. 2595
US – Section 337	GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit No.	Short title (where applicable)	Title
IND-1	Senate Bill 5101	Substitute Senate Bill No. 5191, 2005, c 300
IND-3	Washington Administrative Code, Section 458-20-273	Washington Administrative Code, WAC 458-20-273
IND-4	Senate Bill 5939	Substitute Bill 5939
IND-5		Revised Code of Washington, Chapter 82.16, revised by Senate Substitute Bill 5939
IND-13		Assembly Bill No. 2267, Chapter 537, 21 February 2008
IND-15	2017 SGIP Handbook	Self-Generation Incentive Program Handbook, Self-Generation Incentive Program, 18 December 2017
IND-16	2016 SGIP Handbook	Self-Generation Incentive Program Handbook, Self-Generation Incentive Program, 8 February 2016
IND-18		Self-Generation Incentive Program, SGIP Approved CA Suppliers, 22 April 2016
IND-31	Montana Annotated Code, Section 15-70-502	Montana Code Annotated, Title 15, Chapter 70, Part 5 (Ethanol Tax Incentives and Administration), 15-70-502
IND-32	Montana Annotated Code, Section 15-70-503	Montana Code Annotated, Title 15, Chapter 70, Part 5 (Ethanol Tax Incentives and Administration), 15-70-503
IND-33	Montana Annotated Code, Section 15-70-401	Montana Code Annotated, Title 15, Chapter 70, Part 4 (Gasoline and Special Fuel Tax), 15-70-401
IND-34	Montana Annotated Code, Section 15-70-522	Montana Code Annotated, Title 15, Chapter 70, Part 4 (Ethanol Tax Incentives and Administration), 15-70-522
IND-37	Montana Annotated Code, Section 15-70-433	Montana Code Annotated, Title 15, Chapter 70, 15-70-433
IND-42		Connecticut Green Bank, Request for Qualification and Program Guidelines, Residential Solar Investment Program
IND-43	Michigan Public Act No. 295	State of Michigan, Senate Bill No. 213
IND-44	Michigan Public Act No. 342	State of Michigan, Senate Bill No. 438
IND-48	Michigan Case No. U-15800, Temporary Order	State of Michigan, Case No. U-15800, Michigan Public Service Commission-Temporary Order
IND-54	Delaware Code, Title 26, Chapter 1, Subchapter III-A	Renewable Energy Portfolio Standards Act, 2005 as incorporated in Delaware Code, Title 26, Chapter 1, Subchapter III-A
IND-55		Rules and Procedures to Implement the Renewable Energy Portfolio Standard
IND-58	Recommendations of the Renewable Energy Taskforce	State of Delaware, Recommendations on the Renewable Energy, May 2011
IND-66	2016 Minnesota Statutes, Chapter 216C	Minnesota Statutes, Chapter 216C. Energy Planning and Conservation
IND-90	Michigan Case No. U-15900, Michigan Public Service Commission – Order and Notice of Hearing, 27 April 2010	State of Michigan, Case No. U-15900, Michigan Public Service Commission – Order and Notice of Hearing, 27 April 2010
IND-91	Rate Book for Electric Service adopted by Consumers Energy Company and approved by the Michigan Public Service Commission	Consumer Energy Company, "Rate Book for Electric Service" Fourth Revised Sheet No. C-48.10, MPSC No.13 at Sheet Number C-48-10
IND-95		PJM GATS, How do I sell RECs?
IND-100		Senate Session Laws, Chapter 94, S.F. 1456
IND-110		2016 Minnesota Statutes, Chapter 216C, Section 216C.416
IND-116		Assembly Bill 2267 Sec. 5. (Amends) - Chaptered (Stats.2008 Ch.537)
IND-117	California Assembly Bill No. 1637	Assembly Bill 1637 Section 1. (Amends) - Chaptered (Stats.2016 Ch.658)
IND-123	Montana Annotated Code, Section 15-70-434	15-70-434. Approval or rejection of claim, Montana Annotated Code
IND-124	General Statutes of Connecticut, Section 16-245ff	Section 16-245 - Licensing of electric suppliers. Procedures. Penalties. Registration of electric aggregators. Procedures. Penalties. 2016 Connecticut General Statutes

Exhibit No.	Short title (where applicable)	Title
IND-127	Application for Certification	Application for Certification of BONUS(es) to an existing Eligible Energy Resource Under the Delaware Renewable Energy Portfolio Standard
IND-132		Amended version of Chapter 82.16 of the Revised Code of Washington
US-10		Montana Department of Transportation Records
US-11		Montana Code Annotated, 15-32-703 (2017)
US-12		Montana Department of Revenue Memorandum on Biodiesel Blending and Storage Tax Credit (April 19, 2018)
US-20		Michigan Public Service Commission, Annual Report of Implementation of PA 295 Renewable Energy Standard and the Cost-Effectiveness of the Energy Standards (February 15, 2017)
US-28		Minnesota Department of Commerce Guidance for Completing the Made in Minnesota Solar Incentive Application - A 2017 Reference Guide for Applicants (December 30, 2016)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AES	Advanced Energy Storage Technologies
CPUC	California Public Utilities Code
CRSIP	Connecticut Residential Solar Investment Program
CSHWP	Massachusetts Clean Energy Centre's Commonwealth Solar Hot Water Program
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EPBB	Expected Performance-Based Buydowns
GATT 1994	General Agreement on Tariffs and Trade 1994
LADWP	Los Angeles Department of Water and Power
LAMC Adder	Los Angeles Manufacturing Credit Adder
MCA	Montana Annotated Code
MSIP	Made in Minnesota Solar Incentive Program
MWhs	Megawatt-hours
NAICS	North American Industry Classification System
PBI	Performance-Based Incentives
PO	Purchase Order
PPA	Power Purchase Agreement
PURA	Connecticut Public Utilities Regulatory Authority
PV	Photovoltaic
RCW	Revised Code of Washington
RECIP	Washington Renewable Energy Cost Recovery Incentive Payment Program
REC	Renewable Energy Credits
REPSA	Delaware Renewable Energy Portfolio Standards Act
RESPM	Renewable Energy Standards Program in the State of Michigan
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SEPI	Minnesota Solar Energy Production Incentive
SGIP	California Self-Generation Incentive Program
SREC	Solar Renewable Energy Credit
TIEP	Montana Tax Incentive for Ethanol Production
TRIMs	Trade-related investment measures
TRIMs Agreement	Agreement on Trade-Related Investment Measures
USD	United States Dollar
WAC	Washington Administrative Code
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by India

1.1. On 9 September 2016, India requested consultations with the United States concerning the measures and claims set out below. India's consultations request was made pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 8 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement), and Articles 4, 7 and 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[1]

1.2. Consultations were held on 16 and 17 November 2016 between India and the United States. These consultations failed to resolve the dispute.[2]

1.2 Panel establishment and composition

1.3. On 17 January 2017, India requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Articles 4.4 and 30 of the SCM Agreement, and Article 8 of the TRIMs Agreement.[3] At its meeting on 21 March 2017, the Dispute Settlement Body (DSB) established a panel pursuant to the request by India, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by India in document WT/DS510/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. Brazil, China, the European Union, Indonesia, Japan, the Republic of Korea, Norway, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, Chinese Taipei, and Turkey reserved their rights to participate in the proceedings as third parties.[6]

1.6. On 11 April 2018, India requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU.[7]

1.7. On 24 April 2018, the Director-General accordingly composed the panel as follows[8]:

Chairperson:	Mr Alberto Juan Dumont
Members:	Ms Penelope Jane Ridings Mr Miguel Rodriguez Mendoza

1.3 Panel proceedings

1.3.1 General

1.8. On 15 May 2018, the Panel transmitted draft working procedures and a draft timetable to the parties. The Panel held an organizational meeting with the parties on 22 May 2018.

1.9. Following consultations with the parties, the Panel adopted its Working Procedures and timetable on 6 June 2018. Upon India's request and in line with the United States' comments thereon, these Working Procedures were amended on 27 June 2018, to extend the deadlines for

[1] Request for consultations by India, WT/DS510/1 (India's consultation request).
[2] Request for the establishment of a panel by India, WT/DS510/2 (India's panel request).
[3] India's panel request, WT/DS510/2.
[4] DSB, Minutes of the meeting held on 21 March 2017, WT/DSB/M/394.
[5] Constitution note of the Panel, WT/DS510/3, para. 2.
[6] Constitution note of the Panel, WT/DS510/3, para. 5.
[7] Constitution note of the Panel, WT/DS510/3, para. 3.
[8] Constitution note of the Panel, WT/DS510/3, para. 4.

submitting non-confidential summaries of the parties' submissions by aligning the due dates with the due dates for submitting integrated executive summaries.[9] The Panel further amended its timetable on 31 January 2019, following consultations with the parties, in order to specify the dates for the final stages of the proceedings.

1.10. India and the United States submitted their first written submissions to the Panel on 26 June 2018 and 7 August 2018 respectively. India submitted a corrected version of its first written submission on 16 July 2018. The Panel also received third party written submissions from some of the third parties on 21 August 2018.[10]

1.11. The Panel held its first substantive meeting with the parties on 9 and 10 October 2018. A session with the third parties took place on the morning of 10 October 2018.

1.12. Following these meetings, the Panel sent written questions to the parties and third parties on 12 October 2018. The Panel received written responses from the parties and some of the third parties[11] on 20 October 2018.

1.13. The parties submitted their first integrated executive summaries on 6 November 2018. The third parties also submitted their integrated executive summaries on that day.[12]

1.14. The parties submitted their second written submissions on 27 November 2018.

1.15. The Panel held a second substantive meeting with the parties on 22 January 2019. Following this meeting, the Panel sent written questions to the parties on 25 January 2019. The Panel received written responses from the parties on 12 February 2019, and comments on each other's written responses on 26 February 2019.

1.16. The parties submitted their second integrated executive summaries on 5 March 2019.

1.17. On 8 March 2019, the Panel issued the draft descriptive part of its Report to the parties. The parties provided written comments on this document on 20 March 2019.

1.18. The Panel issued its Interim Report to the parties on 25 April 2019. The parties submitted written requests for the Panel to review precise aspects of the Interim Report on 9 May 2019, and on 23 May 2019 the United States submitted written comments on some of India's requests.

1.19. The Panel issued its Final Report to the parties on 6 June 2019.

1.3.2 Preliminary ruling on the Panel's terms of reference

1.20. On 7 August 2018, as part of its first written submission, the United States requested the Panel to make a preliminary ruling to exclude from the Panel's terms of reference four of the measures challenged by India.[13]

1.21. On 9 August 2018, the Panel provided the third parties with an opportunity to comment on the United States' request jointly with their third party written submissions. On 21 August 2018, the Panel received third party written submissions from some of the third parties addressing, *inter alia*, the preliminary issues raised by the United States.[14]

1.22. On 16 August 2018, India responded to the United States' preliminary ruling request.

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[9] See Panel's Working Procedures in Annex A-1.

[10] Specifically, the Panel received third party written submissions from Brazil, the European Union, and Japan.

[11] Specifically, the Panel received written responses from Brazil, the European Union, Japan, and Norway.

[12] Specifically, the Panel received executive summaries from Brazil, China, the European Union, Japan, and Norway.

[13] United States' first written submission, paras. 20-74.

[14] Specifically, the European Union and Japan commented on the United States' request in their third party written submissions.

1.23. On 20 August 2018, the Panel requested certain additional information and clarifications from India. On 23 August 2018, India responded to such request. On the same date, the United States commented on India's response to the United States' requests for a preliminary ruling.

1.24. On 27 September 2018, the Panel issued its preliminary ruling to the parties and the third parties, with an indication that the ruling would form an integral part of the Panel's report, subject to any editorial corrections. The Panel found that two of the measures challenged by India (the Los Angeles Manufacturing Credit Adder and Massachusetts Manufacturer Adder) do not fall within its terms of reference. The Panel also found that the two other measures challenged by India (the solar thermal and solar photovoltaic rebates under the Minnesota Solar Incentive Program) are within its terms of reference.[15] The Panel's preliminary ruling is reproduced in Annex D-1 of this Report.

2 FACTUAL ASPECTS

2.1. This section of the Report provides a descriptive overview of the factual aspects of the measures at issue in this dispute.

2.2. India identified 11 measures in its panel request, as follows:

1) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Renewable Energy Cost Recovery Incentive Payment Program ('RECIP') in the State of Washington";

2) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Self-Generation Incentive Program ('SGIP') in the State of California";

3) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Los Angeles Department of Water and Power's ('LADWP') Solar Incentive Program in the State of California";

4) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Montana Tax Incentive for Ethanol Production ('TIEP') in the State of Montana";

5) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Montana Tax Credit for Biodiesel Blending and Storage in the State of Montana";

6) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods through refund for Taxes paid on Biodiesel by Distributor or Retailer in the State of Montana";

7) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Connecticut Residential Solar Investment Program ('CRSIP') in the State of Connecticut";

8) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods through the Renewable Energy Credits in the State of Michigan";

9) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods through the Delaware Solar Renewable Energy Credits in the State of Delaware";

10) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Made in Minnesota Solar Incentive Program ('MSIP') in the State of Minnesota"; and

[15] Preliminary ruling of the Panel, paras. 3.49 and 4.37, Annex D-1.

11) "Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Massachusetts Clean Energy Centre's Commonwealth Solar Hot Water Program, ('CSHWP') in the State of Massachusetts".[16]

2.3. India's panel request also purports to cover, in respect of all the challenged measures, "any amendments, modifications, replacements, successor, and extensions thereto, and any implementing measure or any other related measures thereto".[17]

2.4. As noted above, we have found in our preliminary ruling that Measure 3 (Los Angeles Manufacturing Credit Adder) and Measure 11 (Massachusetts Manufacturer Adder) are outside our terms of reference. We do not cover those measures in the following description of the measures at issue.[18]

2.5. For ease of reference, as regards the measures at issue falling within our terms of reference, we use the following numbering and long and short titles, based on those used by India in its first written submission.[19]

No.	Full name	Short name
1	Washington Renewable Energy Cost Incentive Program (RECIP): Additional incentive for use of components manufactured in Washington State	Washington State additional incentive
2	California Self-Generation Incentive Program (SGIP): Additional benefits for use of equipment manufactured in California	California Manufacturer Adder
4	Montana tax incentive for ethanol production	Montana tax incentive
5	Montana tax credit for biodiesel blending and storage	Montana tax credit
6	Montana tax refund for biodiesel	Montana tax refund
7	Connecticut Residential Solar Investment Program (CRSIP): Additional incentives for use of components manufactured in Connecticut	Connecticut additional incentive
8	Renewable Energy Standards Program in the State of Michigan (RESP): Additional benefits for use of equipment manufactured in Michigan or using workforce from residents in Michigan	Michigan Equipment Multiplier / Michigan Labour Multiplier
9	Delaware Renewable Energy Portfolio Standards Act (REPSA): Additional benefits for use of equipment manufactured in Delaware or using workforce from residents in Delaware	Delaware Equipment Bonus / Delaware Workforce Bonus
10	Minnesota solar energy production incentive	SEPI
	Minnesota solar thermal rebate	Minnesota solar thermal rebate
	Minnesota solar photovoltaic rebate	Minnesota solar PV rebate

2.6. We now turn to describe the pertinent factual aspects of each of these measures in detail.

2.1 Measure 1: Washington State additional incentive

2.7. The Washington Renewable Energy Cost Recovery Incentive Program (RECIP)[20] provides "incentive payments[s] based on production to offset the costs associated with the purchase of renewable energy systems … that generate electricity".[21] Under the program, individuals, businesses, local government entities (other than entities in the light and power or gas distribution

[16] India's panel request, WT/DS510/2.
[17] India's panel request, WT/DS510/2, pp. 2-10.
[18] For a description of each of the 11 measures challenged in India's panel request, see the preliminary ruling of the Panel, Annex D-1.
[19] These names are used without prejudice to the legal characterization of any of the measures under any of the WTO covered agreements. For ease of reference, we refer to the three programs comprising Measure 10 collectively as the "Minnesota production incentives and rebates".
[20] Senate Bill 5101, Section 3(1) (Exhibit IND-1), as extended by Senate Bill 5939, Section 3(1)(a) (Exhibit IND-4).
[21] Washington Administrative Code, Section 458-20-273(1) (Exhibit IND-3).

business[22]), and participants in community solar projects[23] are eligible to receive annual payments for energy they produce through a customer-generated electricity renewable energy system.[24] These payments are paid out by the light and power business serving the area where the customer-generated electricity renewable energy system is located.[25] The light and power business is then entitled to a credit against its public utility taxes equal to the amount paid out in incentives, subject to certain conditions.[26] Participation by light and power businesses in RECIP is voluntary.[27] Between 2005 and 2017, the program was administered by the Washington Department of Revenue. In October 2017, program management, technical review, and tracking responsibilities of the Department of Revenue were transferred to the Washington State University extension energy program.[28]

2.8. Within the context of the RECIP, additional incentives are provided to customer-generated electricity produced using solar inverters[29], solar modules[30], stirling converters[31], or wind blades[32] manufactured in Washington State.

2.9. In order to qualify for the Washington State additional incentive, relevant manufacturers must make a request to the Department of Revenue. Following a field visit to the manufacturing facilities, the Department of Revenue will approve or disapprove the manufacturer's certification of a product qualifying as "made in Washington" State.[33] In determining whether "a person combining various items into a single package is engaged in a manufacturing activity" in Washington State, the

[22] "Light and Power Business" is defined as "the business of operating a plant or system of generation, production or distribution of electrical energy for hire or sale and/or for the wheeling of electricity for others". See Washington Administrative Code, Section 458-20-273, Part I, Sub-Section 107 (Exhibit IND-3).

[23] "Community Solar Project" means any one of the three definitions contained in Section 458-20-273, Part I, Sub-Section 103 of the Washington Administrative Code: "(a) A solar energy system located in Washington State that is capable of generating up to seventy five kilowatts of electricity and is owned by local individuals, households, nonprofit organizations, or nonutility businesses that is placed on the property owned in fee simple by a cooperating local governmental entity that is not in the light and power business or in the gas distribution business; (b) A utility owned solar energy system located in Washington State that is capable of generating up to seventy five kilowatts of electricity and that is voluntarily funded by the utility's ratepayers where, in exchange for their financial support, the utility gives contributors a payment or credit on their utility bill for their share of the value of the electricity generated by the solar energy system; (c) A solar energy system located in Washington State, placed on the property owned in fee simple by a cooperating local governmental entity that is not in the light and power business or in the gas distribution business, that is capable of generating up to seventy five kilowatts of electricity, and that is owned by a company whose members are each eligible for a cost recovery incentive payment for the same customer generated electricity as defined in (105) of this part".

[24] "Customer-generated electricity" is defined as "a community solar project or the current generated from a renewable energy system located in Washington State and installed on an individuals', business', or local government's property". See Washington Administrative Code, Section 458-20-273, Part I, Sub-Section 105 (Exhibit IND-3).

[25] Senate Bill 5101, Section 3(1) (Exhibit IND-1), as extended by Senate Bill 5939, Section 3(1)(a) (Exhibit IND-4).

[26] Senate Bill 5101, Section 4 (Exhibit IND-1), and Washington Administrative Code, Section 458-20-273, Part VII, Sub-Section 710 (Exhibit IND-3).

[27] Washington Administrative Code, Section 458-20-273, Part II, Sub-Sections 204 and 205 (Exhibit IND-3).

[28] Senate Bill 5939, Section 3(9) (Exhibit IND-4).

[29] "Solar inverter" is defined in as "a device used to convert direct current to alternating current in a solar energy system". See Washington Administrative Code, Section 458-20-273, Part VI, Sub-Section 601(a) (Exhibit IND-3).

[30] "Solar module" is defined as "the smallest non-divisible self-contained physical structure housing interconnected photovoltaic cells and providing a single direct current electrical output. The lamination of the modules must occur in Washington state". See Washington Administrative Code, Section 458-20-273, Part VI, Sub-Section 601(a) (Exhibit IND-3).

[31] "Stirling converter" is defined as "a device that produces electricity by converting heat from a solar source utilizing a stirling engine". See Washington Administrative Code, Section 458-20-273, Part VI, Sub-Section 601(a) (Exhibit IND-3).

[32] "Wind blade" is defined as "the portion of the rotor component of wind generator equipment that converts wind energy to low speed rotational energy". See Washington Administrative Code, Section 458-20-273, Part VI, Sub-Section 601(a) (Exhibit IND-3).

[33] Washington Administrative Code, Section 458-20-273, Part VI, Sub-section 601(b) (Exhibit IND-3).

Department of Revenue considers various factors, no one of which is conclusive evidence of a manufacturing activity.[34]

2.10. The amount of the incentive payment is calculated in two steps. First, the incentive payment rate must be determined by multiplying the relevant base rate[35] by the applicable "economic development factors".[36] Second, once the incentive payment rate has been calculated, the incentive payment is determined by multiplying the kilowatt-hours generated through the relevant renewable energy system by the incentive payment rate.[37]

2.11. The "economic development factors" applied on the relevant base rate in order to determine the incentive payment rate are as follows:

	Equipment	Factor applied on the base rate
For energy produced using …	…solar modules or solar stirling converters manufactured in Washington State	2.4
	…solar or wind generator equipped with an inverter manufactured in Washington State	1.2
	…an anaerobic digester, or by other solar equipment or using a wind generator equipped with blades manufactured in Washington State	1
	…wind with any other equipment other than those mentioned above	0.8

2.12. The applicable economic development factors are added together if a renewable energy system has (i) both a module and an inverter manufactured in Washington State; (ii) both a stirling converter and an inverter made in Washington State; or (iii) both blades and an inverter made in Washington State.[38] For electricity produced using solar modules or stirlings manufactured out-of-state, no economic development factor is applied.

2.13. The Washington State additional incentive challenged by India is provided for in Section 82.16.110 to 82.16.130 of the Revised Code of Washington (RCW)[39], and Section 458-20-273 of the Washington Administrative Code (WAC)[40]. Certain parts of Chapter 82.16 of the Revised Code of Washington were modified by Senate Bill 5939 in July 2017, following the establishment of the Panel.[41] In particular, following our first substantive meeting with the parties, India brought to our attention Section 6(12) of the Senate Bill 5939, which adds a new section to Chapter 82.16 of the Revised Code of Washington.[42] This new section, incorporated as Section 82.16.165, provides for "[a] made-in-Washington bonus rate … for a renewable energy system or a community solar project with solar modules made in Washington or with a wind turbine or tower that is made in

[34] The factors are the following: (i) The ingredients are purchased from various suppliers; (ii) The person combining the ingredients attaches his or her own label to the resulting product; (iii) The ingredients are purchased in bulk and broken down to smaller sizes; (iv) The combined product is marketed at a substantially different value from the selling price of the individual components; and (v) The person combining the items does not sell the individual items except within the package. See Washington Administrative Code, Section 458-20-273, Part VI, Sub-section 601(b) (Exhibit IND-3).

[35] For community solar projects, the base rate is 30 cents per kilowatt-hour generated by the relevant renewable energy system. For all others, 15 cents per kilowatt-hour generated by the relevant renewable energy system, up to USD 5000 per year. See Washington Administrative Code, Section 458-20-273, Part V, Sub-Section 501(a) (Exhibit IND-3).

[36] For details concerning the value of the applicable economic development factors, see paragraph 2.11 below.

[37] Washington Administrative Code, Section 458-20-273, Part V, Sub-Section 501 (Exhibit IND-3).

[38] Washington Administrative Code, Section 458-20-273, Part V, Sub-Section 501(c) (Exhibit IND-3).

[39] Revised Senate Bill 5939 (Exhibit IND-5).

[40] Washington Administrative Code, Section 458-20-273 (Exhibit IND-3).

[41] Senate Bill 5939 (Exhibit IND-4).

[42] India's response to Panel question No. 1. See also Senate Bill 5939 (Exhibit IND-4) and amended version of Chapter 82.16 of the Revised Code of Washington (Exhibit IND-132).

Washington".[43] The extent to which this incentive is distinct[44] from the Washington State additional benefit identified by India in its panel request is unclear.[45] We discuss the relevance of this amendment to Chapter 82.16 of the Revised Code of Washington, if any, in further detail in our findings.

2.2 Measure 2: California Manufacturer Adder

2.14. The California Self-Generation Incentive Program (SGIP) provides for the payment of financial incentives for the installation of qualifying new technologies that are installed to meet all or a portion of the electric energy needs of a facility.[46] It was approved by the California Public Utilities Commission and is administered by four investor-owned utilities, which issue a handbook from time to time establishing the policies and procedures of the SGIP.[47] Within the context of the SGIP, an additional incentive of 20% is provided to any retail electric or gas distribution customer (industrial, agricultural, commercial, or residential) of certain providers for the installation of eligible distributed generation resources "from a California Supplier"[48] or "manufactured in California".[49]

2.15. The 2016 SGIP Handbook was replaced by the 2017 SGIP Handbook following the establishment of the Panel.[50] The 2017 SGIP Handbook introduced two main changes with respect to the measure at issue: (i) it replaced the "California Supplier"[51] requirement with a "California Manufacturer" requirement, and (ii) it modified the specific renewable energy technology types eligible for the incentive.

2.16. The 2016 SGIP Handbook defines the term "California Supplier" as follows:

> Any sole proprietorship, partnership, joint venture, corporation, or other business entity that manufactures eligible distributed generation resources in California and that meets either of the following criteria:
>
> A. The owners or policymaking officers are domiciled in California and the permanent principal office, or place of business from which the supplier's trade is directed or managed, is located in California;
>
> B. A business or corporation, including those owned by, or under common control of, a corporation, that meets all of the following criteria continuously during the five years

[43] Amended version of Chapter 82.16 of the Revised Code of Washington, Section 82.16.165 (12) (Exhibit IND-132).

[44] The Washington State additional benefit identified by India in its panel request is provided for in Sections 82.16.110 to 82.16.130 of the Revised Code of Washington, whereas the "made-in-Washington bonus" is contained in a different section of that Code (i.e. Section 82.16.165), and was inserted by Senate Bill 5939 (Exhibit IND-5).

[45] The incentive in Section 82.16.165 of the Revised Code of Washington "beg[a]n" on 1 July 2017, i.e. following India's panel request. It relates to solar modules and wind turbine or towers made in Washington State, as opposed to the Washington State additional incentive that relates to solar inverters, solar modules, stirling converters, or wind blades manufactured in Washington State. The bonus rates set forth in Section 82.16.165 of the RCW range from US$0.05 in 2018 to US$0.02 in 2021, "depending on the fiscal year in which the system is certified". Also, pursuant to paragraph 3(a) of Section 82.16.165, "[n]o new certification may be issued under this section to an applicant who submits a request for or receives an annual incentive payment for a renewable energy system that was certified under RCW 82.16.120 …". See also amended version of Chapter 82.16 of the Revised Code of Washington, Section 82.16.165 (12) (Exhibit IND-132).

[46] 2016 SGIP Handbook, p. 8 (Exhibit IND-16) and 2017 SGIP Handbook, p. 9 (Exhibit IND-15).

[47] Pacific Gas and Electric, Southern California Edison, the Southern California Gas Company, and the Center for Sustainable Energy®. See 2016 SGIP Handbook, p. 8 (Exhibit IND-16) and 2017 SGIP Handbook, p. 9 (Exhibit IND-15).

[48] See Assembly Bill No. 2267, Chapter 537, 21 February 2008 (Exhibit IND-13) and that same bill chaptered into California's Public Utility Code in 2008. See Assembly Bill 2267 Sec. 5. (Amends) - Chaptered (Stats.2008 Ch.537) (Exhibit IND-116).

[49] California Assembly Bill No. 1637 (Exhibit IND-117).

[50] We discuss the significance of this below in our findings.

[51] The 2016 SGIP Handbook refers to "California Supplier", which was the term used in a prior version of Section 379.6 of the California Public Utilities Code. See Assembly Bill No. 2267, Chapter 537, 21 February 2008 (Exhibit IND-13).

prior to providing eligible distributed generation resources to a self-generation incentive program recipient:

- Owns and operates a manufacturing facility located in California that builds or manufactures eligible distributed generation resources.
- Is licensed by the state to conduct business within the state.
- Employs California residents for work within the state.[52]

2.17. The 2017 SGIP Handbook establishes that, for distributed generation resources to qualify as manufactured in California, at least 50% of their capital equipment value must be manufactured by an approved "California Manufacturer".[53] The term "California Manufacturer" is defined as a manufacturer who: (i) operates a manufacturing facility in California; (ii) is licensed to conduct business in California; and (iii) is registered with a primary or secondary manufacturing North American Industry Classification System (NAICS) Code.[54]

2.18. Under the 2016 SGIP Handbook, the term "eligible distributed generation resources" encompasses "distributed generation or Advanced Energy Storage (AES) technologies".[55] The 2017 SGIP Handbook refers, instead, to "generation equipment (Generator/Prime Mover and ancillary equipment) and energy storage equipment (storage medium -i.e. battery-, inverter, controller)."[56]

2.19. The California Manufacturer Adder challenged by India is provided for in Section 379.6 of the California Public Utilities Code and developed in the relevant SGIP Handbook.[57]

2.3 Measure 4: Montana tax incentive

2.20. The Montana tax incentive is a program that provides a "tax incentive for the production of ethanol to be blended for ethanol-blended gasoline".[58] More specifically, it provides that "ethanol distributors", defined as "any person who, for the purpose of making ethanol-blended gasoline, engages in the business of producing ethanol for sale, use, or distribution"[59], may receive "tax incentives"[60] on ethanol[61] produced "in Montana from Montana agricultural products, including Montana wood or wood products"[62], where such ethanol[63]:

a) is to be blended with gasoline for sale as an ethanol-blended gasoline[64] in Montana;

[52] Assembly Bill No. 2267, Chapter 537, 21 February 2008, Section 5 (Exhibit IND-13). See also 2016 SGIP Handbook, pp. 34-35. A list of approved "California Suppliers" for SGIP purposes is available in Self-Generation Incentive Program, SGIP Approved CA Suppliers, 22 April 2016 (Exhibit IND-18).

[53] 2017 SGIP Handbook, p. 25 (Exhibit IND-15).

[54] 2017 SGIP Handbook, p. 25 (Exhibit IND-15).

[55] 2016 SGIP Handbook, p. 34 (Exhibit IND-16). AES technologies are defined as those technologies able to store energy that can be discharged as useful energy at another time in order to directly supply electricity or offset electricity consumption. Unless specified otherwise, AES in the 2016 SGIP Handbook applies to all eligible storage technologies, including mechanical, chemical, or thermal energy storage. See 2016 SGIP Handbook, p. 76 (Exhibit IND-16).

[56] 2017 SGIP Handbook, p. 26 (Exhibit IND-15). See also India's response to Panel question No. 109.

[57] Assembly Bill No. 2267, Chapter 537, 21 February 2008 (Exhibit IND-13), Assembly Bill 2267 Sec. 5. (Amends) - Chaptered (Stats.2008 Ch.537) (Exhibit IND-116), and California Assembly Bill No. 1637 (Exhibit IND-117).

[58] Montana Annotated Code, Section 15-70-502 (Exhibit IND-31).

[59] Montana Annotated Code, Section 15-70-503 (Exhibit IND-32).

[60] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).

[61] "Ethanol" is defined as "nominally anhydrous ethyl alcohol that has been denatured as specified in 27 CFR, parts 20 and 21, and that meets the standards for ethanol adopted pursuant to [Section] 82-15-103 [of the Montana Annotated Code]". See Montana Annotated Code, Section 15-70-401(9) (Exhibit IND-33).

[62] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).

[63] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).

[64] "Ethanol-blended gasoline" is defined as "gasoline blended with ethanol. The percentage of ethanol in the blend is identified by the letter 'E' followed by the percentage number. A blend that is 10% denatured

b) was exported[65] from Montana to be blended with gasoline for sale as ethanol-based gasoline; or

c) is to be used in the production of ethyl butyl ether for use in reformulated gasoline.

2.21. The incentive is also payable on ethanol made using non-Montana agricultural products "when Montana products are not available".[66]

2.22. The incentive is available to a "facility" for six years from the date on which it begins producing ethanol, subject to certain administrative and documentary requirements.[67] It is payable at the rate of 20 cents per gallon of distilled ethanol that is 100% produced from Montana products. The amount of the incentive is reduced proportionately based on the amount of agricultural or wood products not produced in Montana.[68] However, to receive the incentive, the ethanol must be made from at least the following minimum percentages of Montana products[69]:

a) 20% Montana product in the first year of production;

b) 25% Montana product in the second year of production;

c) 35% Montana product in the third year of production;

d) 45% Montana product in the fourth year of production;

e) 55% Montana product in the fifth year of production; and

f) 65% Montana product in the sixth year of production.

2.23. The Montana tax incentive is administered by the Montana Department of Transportation.[70] It is set out in Sections 15-70-502[71], 15-70-503[72], and 15-70-522 of the Montana Annotated Code.[73] Further details concerning the administration and implementation of the incentive, including with respect to the application form, are set out at Sections 18.15.701 to 18.15.703 and 18.15.710 to 18.15.712 of the *Administrative Rules of Montana*.

2.4 Measure 5: Montana tax credit

2.24. The Montana tax credit provides for an "individual, corporation, partnership, or small business corporation" to receive a "credit against [certain] taxes … for the costs of investments in depreciable property used for storing or blending biodiesel with petroleum diesel for sale".[74] The credit may be claimed for such costs "incurred in the 2 tax years before the taxpayer begins blending biodiesel fuel

ethanol and 90% gasoline would be reflected as E10. A blend that is 85% denatured ethanol and 15% gasoline would be reflected as E85". See Montana Annotated Code, Section 15-70-401(10) (Exhibit IND-33).

[65] "Export" is defined as "to transport out of Montana, by any means other than in the fuel supply tank of a motor vehicle, gasoline or special fuel received from a refinery or pipeline terminal within Montana". See Montana Annotated Code, Section 15-70-401(11) (Exhibit IND-33).

[66] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).

[67] Montana Annotated Code, Section 15-70-522(2) (Exhibit IND-34). The term "facility" is not defined in the relevant sections of the Montana Annotated Code submitted to the Panel.

[68] Montana Annotated Code, Section 15-70-522(2) (Exhibit IND-34).

[69] Montana Annotated Code, Section 15-70-522(3)(c) (Exhibit IND-34).

[70] Montana Annotated Code, Section 15-70-502 (Exhibit IND-31).

[71] Montana Annotated Code, Section 15-70-502 (Exhibit IND-31).

[72] Montana Annotated Code, Section 15-70-503 (Exhibit IND-32).

[73] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).

[74] Montana Annotated Code, Section 15-32-703(1) (Exhibit US-11). "Biodiesel" as used in this Section is defined as meaning "a fuel produced from monoalkyl esters of longchain fatty acids derived from vegetable oils, renewable lipids, animal fats, or any combination of those ingredients. The fuel must meet the requirements of ASTM D6751, also known as the Standard Specification for Biodiesel Fuel (B100) Blend Stock for Distillate Fuels, as adopted by the American society for testing and materials". See Montana Annotated Code, Section 15-32-703(9) (Exhibit US-11) (providing that the term "biodiesel" shall have the same meaning as it has in Montana Annotated Code, Section 15-70-401 (Exhibit IND-33)).

for sale, or in any tax year in which the taxpayer is blending biodiesel fuel for sale".[75] Any credit not used in the year in which it is received may be carried forward for up to seven years, subject to certain requirements.[76]

2.25. Two categories of applicants are eligible to receive the credit: (i) special fuel distributors; and (ii) owners or operators of a motor fuel outlet. To be eligible for the credit, applicants must own, lease, or otherwise have a beneficial interest in a business that blends biodiesel.[77] The former category of applicant is eligible to receive a maximum tax credit in the amount of 15% of the costs of investments in depreciable property used for storing or blending biodiesel with petroleum diesel for sale, up to a total of USD 52,500. The latter category is eligible to receive a maximum tax credit in the amount of 15% of the relevant costs, up to a total of USD 7,500.[78]

2.26. Importantly, a special fuel distributor or owner or operator of a motor fuel outlet will only be eligible to receive the tax credit if, *inter alia*[79], the investment in respect of which the credit is claimed is "used primarily to blend petroleum diesel with biodiesel made entirely from Montana-produced feedstocks".[80]

2.27. The Montana tax credit is administered by the Montana Department of Revenue.[81] It is set out in section 15-32-703 of the Montana Annotated Code.[82]

2.5 Measure 6: Montana tax refund

2.28. The Montana tax refund establishes two tax refund programs.

2.29. First, it provides for "licensed distributors"[83] who pay a "special fuel tax"[84] on biodiesel[85] to receive a refund equal to two cents per gallon on biodiesel sold during the previous quarter if such

[75] Montana Annotated Code, Section 15-32-703(2) (Exhibit US-11).
[76] Montana Annotated Code, Section 15-32-703(6) (Exhibit US-11).
[77] Montana Annotated Code, Section 15-32-703(4)(c)(i) and (d) (Exhibit US-11).
[78] Montana Annotated Code, Section 15-32-703(3) (Exhibit US-11). "If more than one person has an interest in a business with qualifying property, they may allocate all or any part of the investment cost among themselves and their successors or assigns [*sic*]." Montana Annotated Code, Section 15-32-703(4)(c)(ii) (Exhibit US-11). However, "where the applicant is a shareholder of an electing small business corporation, the credit must be computed using the shareholder's pro rata share of the corporation's cost of investing in the biodiesel blending facility". Montana Annotated Code, Section 15-32-703(8) (Exhibit US-11).
[79] Certain additional requirements not relevant to the present dispute are further enumerated in Montana Annotated Code, Section 15-32-703(4) (Exhibit US-11).
[80] Montana Annotated Code, Section 15-32-703(4)(a) (Exhibit US-11).
[81] Montana Annotated Code, Section 15-32-703(10); Montana Department of Revenue, Memorandum on Biodiesel Blending and Storage Tax Credit (19 April 2018) (Exhibit US-12).
[82] Montana Annotated Code, Section 15-32-703 (Exhibit US-11).
[83] The term "distributor" is defined as:

> (i) a person who engages in the business in this state of producing, refining, manufacturing, or compounding gasoline or special fuel for sale, use, or distribution;
> (ii) an importer who imports gasoline or special fuel for sale, use, or distribution;
> (iii) a person who engages in the wholesale distribution of gasoline or special fuel in this state and chooses to become licensed to assume the Montana state gasoline tax or special fuel tax liability;
> (iv) an exporter;
> (v) a dealer licensed as of January 1, 1969, except a dealer at an established airport; or
> (vi) a person in Montana who blends ethanol with gasoline.

See Montana Annotated Code, Section 15-70-401 (Exhibit IND-33). See also India's first written submission, para. 532.
[84] The relevant tax is specified in Montana Annotated Code, Section 15-70-403. See Montana Annotated Code, Section 15-70-433(1) (Exhibit IND-37).
[85] "Biodiesel" is defined as "a fuel produced from monoalkyl esters of longchain fatty acids derived from vegetable oils, renewable lipids, animal fats, or any combination of those ingredients. The fuel must meet the requirements of ASTM D6751, also known as the Standard Specification for Biodiesel Fuel (B100) Blend Stock for Distillate Fuels, as adopted by the American society for testing and materials". See Montana Annotated Code, Section 15-70-433(1) (providing that the term "biodiesel" shall have the same meaning as it has in Montana Annotated Code, Section 15-70-401 (Exhibit IND-33)).

biodiesel is "produced entirely from biodiesel ingredients produced in Montana".[86] The term "produced in Montana" is not further defined.

2.30. Second, it provides for "owners and operators of retail motor fuel outlets"[87] to receive a tax refund equal to one cent per gallon "on biodiesel on which the special fuel tax has been paid and that is purchased from a licensed distributor if the biodiesel is produced entirely from biodiesel ingredients produced in Montana".[88] Again, the term "produced in Montana" is not further defined.

2.31. The Montana tax refund is set out in section 15-70-433 of the Montana Annotated Code[89], and is administered by the Montana Department of Transportation.[90]

2.6 Measure 7: Connecticut additional incentive

2.32. The Connecticut Residential Solar Investment Program (CRSIP) is a "residential solar investment program" designed to "result in a minimum of three hundred megawatts of new residential solar photovoltaic installations".[91] Specifically, it makes available, through the Connecticut Green Bank[92], "direct financial incentives, in the form of performance-based incentives or expected performance-based buydowns, for the purchase or lease of qualifying residential solar photovoltaic systems".[93]

2.33. Two types of financial incentives are available under the CRSIP: (i) performance-based incentives (PBI); and (ii) expected performance-based buydowns (EPBB).[94]

2.34. The first type of incentive, PBI, is available to a homeowner who acquires a solar photovoltaic (PV) system under a third-party financing structure (i.e. by way of a lease or a power purchase agreement (PPA)), rather than by purchasing it. The PBI itself is not paid to the homeowner installing the PV system, but rather to the owner of the PV system (the System Owner) that is being leased. It is paid over the course of 24 calendar quarters[95], and is calculated based on actual production on a per-kilowatt-hour basis.[96] System Owners are expected to build the expected total PBI amount into the lease or PPA rate charged to the homeowner.[97] System Owners are required to use Eligible Contractors to install their systems. However, a System Owner may itself apply to be an Eligible Contractor.[98]

[86] Montana Annotated Code, Section 15-70-433(1) (Exhibit IND-37).
[87] This term is not defined in the relevant sections of the Montana Annotated Code submitted to the Panel.
[88] Montana Annotated Code, Section 15-70-433(2) (Exhibit IND-37).
[89] Montana Annotated Code, Section 15-70-433 (Exhibit IND-37).
[90] Montana Annotated Code, Section 15-70-434 (Exhibit IND-123).
[91] General Statutes of Connecticut, Section 16-245ff(b) (Exhibit IND-124).
[92] General Statutes of Connecticut, Section 16-245ff(b) (Exhibit IND-124). The Connecticut Green Bank is established in General Statutes of Connecticut, Section 16-245n(d)(1)(A) as a "a body politic and corporate, constituting a public instrumentality and political subdivision of the state of Connecticut established and created for the performance of an essential public and governmental function". General Statutes of Connecticut, Section 16-245n(d) (Exhibit IND-124).
[93] General Statutes of Connecticut, Section 16-245ff(c) (Exhibit IND-124). The term "qualifying residential solar photovoltaic system" is defined as "solar photovoltaic project that receives funding from the Connecticut Green Bank, is certified by the authority as a Class I renewable energy source, as defined in subsection (a) of section 16-1, emits no pollutants, is less than twenty kilowatts in size, is located on the customer-side of the revenue meter of one-to-four family homes and serves the distribution system of an electric distribution company". See General Statutes of Connecticut, Section 16-245ff(a)(3) (Exhibit IND-124).
[94] General Statutes of Connecticut, Section 16-245ff(c) (Exhibit IND-124).
[95] Connecticut Green Bank, "Request for Qualifications and Program Guidelines for Eligible Contractors and Third Party Photovoltaic (PV) System Owners to Participate in the Residential Solar Investment Program" (Exhibit IND-42), p. 3.
[96] General Statutes of Connecticut, Section 16-245ff(a)(1) (Exhibit IND-124).
[97] Connecticut Green Bank, "Request for Qualifications and Program Guidelines for Eligible Contractors and Third Party Photovoltaic (PV) System Owners to Participate in the Residential Solar Investment Program", p. 3 (Exhibit IND-42).
[98] Connecticut Green Bank, "Request for Qualifications and Program Guidelines for Eligible Contractors and Third Party Photovoltaic (PV) System Owners to Participate in the Residential Solar Investment Program", p. 3 (Exhibit IND-42).

2.35. The second type of financial incentive, EPBB, is available to a homeowner who purchases a solar PV system from an Eligible Contractor. The contractor is required to present the EPBB as an upfront cost reduction to the customer. The Connecticut Green Bank then issues the EPBB payment directly to the contractor upon completion of the installation.[99] Homeowners are required to work with Eligible Contractors to qualify for CRSIP incentives.[100]

2.36. The incentives are paid at rates determined and published by the Connecticut Green Bank[101], subject to necessary application formalities.[102] PBI and EPBB payments cannot be combined for a single project under the CRSIP, and no homeowner purchasing a solar PV system (and therefore eligible to receive EPBB) is allowed to claim or receive PBI. Likewise, no System Owner offering third-party financing will be allowed to claim or receive an EPBB for the same project.[103]

2.37. Within the context of the CRSIP, additional incentives of up to 5% of the ordinarily available incentive may be made available for the use of "major system components manufactured or assembled in Connecticut"[104], and another additional incentive of up to 5% of the ordinarily available incentive may be made available "for the use of major system components manufactured or assembled in a distressed municipality … or a targeted investment community".[105]

2.38. The CRSIP, including the additional incentives challenged by India, is set out in section 16-245ff of the General Statutes of Connecticut.[106]

2.39. As a general matter, the CRSIP is administered by the Connecticut Green Bank.[107] However, Section 245ff(i) of the General Statutes of Connecticut indicates that the additional incentives available for use of major system components manufactured or assembled in Connecticut shall be "provide[d]" by the Public Utilities Regulatory Authority (PURA).[108] On the basis of legislation submitted by the parties, it is unclear whether the Green Bank is involved in the disbursement of these payments. Although Section 245ff(i) of the General Statutes of Connecticut does not mention the Green Bank, that provision is a subsection of Section 245ff, which establishes the CRSIP and does mention the Green Bank, charging it with "structur[ing]" and "implement[ing]" the CRSIP.[109]

[99] Connecticut Green Bank, "Request for Qualifications and Program Guidelines for Eligible Contractors and Third Party Photovoltaic (PV) System Owners to Participate in the Residential Solar Investment Program", p. 3 (Exhibit IND-42). See also General Statutes of Connecticut, Section 16-245ff(1)(b) (Exhibit IND-124).

[100] Connecticut Green Bank, "Request for Qualifications and Program Guidelines for Eligible Contractors and Third Party Photovoltaic (PV) System Owners to Participate in the Residential Solar Investment Program", p. 3 (Exhibit IND-42). Details concerning Eligible Contractors are set out in pp. 4-6 of the same document.

[101] General Statutes of Connecticut, Section 16-245ff(f) (Exhibit IND-124).

[102] For details of the application process, see Connecticut Green Bank, "Request for Qualifications and Program Guidelines for Eligible Contractors and Third Party Photovoltaic (PV) System Owners to Participate in the Residential Solar Investment Program", pp. 6-14 (Exhibit IND-42).

[103] Connecticut Green Bank, "Request for Qualifications and Program Guidelines for Eligible Contractors and Third Party Photovoltaic (PV) System Owners to Participate in the Residential Solar Investment Program", p. 3 (Exhibit IND-42).

[104] The term "major system components" is not defined in the relevant legal instruments.

[105] Connecticut General Statutes, Section 16-245ff(i) (Exhibit IND-124).

[106] Connecticut General Statutes, Section 16-245ff (Exhibit IND-124).

[107] Connecticut General Statutes, Section 16-245ff(b) (Exhibit IND-124).

[108] Connecticut General Statutes, Section 16-245ff(i) (Exhibit IND-124).

[109] Connecticut General Statutes, Section 16-245ff(b) (Exhibit IND-124). We also observe that Section 16-245aa of the General Statutes of Connecticut empowers the Green Bank, *inter alia*, to "establish a renewable energy and efficient energy finance program" and to give preference in this connection to "projects that use major system components manufactured or assembled in Connecticut".[109] This corresponds to the criterion for the availability of the additional incentives under the CRSIP. Despite these connections, the specific relationship between Sections 245aa and 245ff of the General Statutes of Connecticut remains unclear. We discuss these issues further in our findings below as necessary.

2.7 Measure 8: Michigan Equipment Multiplier / Michigan Labour Multiplier

2.40. The Renewable Energy Standards Program in the State of Michigan (RESPM) comprises a range of regulations and programs designed to "promote the development of clean energy, renewable energy, and energy optimization through the implementation of a clean, renewable, and energy efficient standard".[110]

2.41. *Inter alia*, the RESPM requires "electric providers"[111] to "achieve a renewable energy credit portfolio" at levels specified by legislation.[112] A "renewable energy credit portfolio" consists of "the renewable energy credits achieved by a provider for a particular year".[113] Subject to certain exceptions[114], electric providers obtain renewable energy credits either by generating electricity from renewable energy systems for sale to retail customers, or by purchasing or otherwise acquiring renewable energy credits with or without the associated renewable energy.[115]

2.42. As a general rule[116], electricity providers generate one renewable energy credit[117] for each megawatt hour of electricity generated from each of their renewable energy systems.[118] However, additional credits are provided to electricity providers in certain circumstances.[119] Notably, electricity providers receive, in addition to the standard one credit for one megawatt hour of electricity generated by a renewable energy system:

a) 1/10 renewable energy credit for each megawatt hour of electricity generated from a renewable energy system constructed using equipment made in Michigan[120]; and

b) 1/10 renewable energy credit for each megawatt hour of electricity from a renewable energy system constructed using a workforce composed of residents of Michigan.[121]

2.43. Additional details concerning the calculation of these additional benefits are contained in Michigan Case No. U-15800, Temporary Order.[122] According to that document, the following rules

[110] Michigan Public Act No. 295, Section 1(2) (Exhibit IND-43). The instrument was amended in 2017 by Michigan Public Act No. 342 (Exhibit IND-44), which we describe below.

[111] "Electricity provider" is defined as any of the following: "(i) Any person or entity that is regulated by the [Michigan Public Service Commission] for the purpose of selling electricity to retail customers in [Michigan]; (ii) a municipally-owned electric utility in [Michigan]; (iii) a cooperative electric utility in [Michigan]; (iv) Except as used in subpart B of part 2, an alternative electric supplier licensed under section 10a of 1939 PA 3, MCL 460.10a". See Michigan Public Act No. 295, Section 5(a) (Exhibit IND-43).

[112] Michigan Public Act No. 295, Section 27(3) (Exhibit IND-43).

[113] Michigan Public Act No. 295, Section 11(e) (Exhibit IND-43). The method for calculating a renewable energy credit portfolio is set out at Michigan Public Act No. 295, Section 27(3)(a)-(c) (Exhibit IND-43).

[114] See Michigan Public Act No. 295, Sections 27(6) and 27(7) (Exhibit IND-43). Neither party has raised or discussed the relevance of this provision, if any, for the claims at issue in this dispute.

[115] Michigan Public Act No. 295, Section 27(5) (Exhibit IND-43).

[116] Michigan Public Act No. 295, Section 39(1) (Exhibit IND-43).

[117] The expiry of credits, as well as rules concerning trade, sale, and transfer of credits, are contained in Michigan Public Act No. 295, Sections 39(3) and (4) (Exhibit IND-43).

[118] The term "renewable energy system" means "a facility, electricity generation system, or set of electricity generation systems that use 1 or more renewable energy resources to generate electricity", subject to certain exclusions. Michigan Public Act No, 295, Section 9(k) (Exhibit IND-43).

[119] Michigan Public Act No. 295, Section 39(2) (Exhibit IND-43).

[120] This additional credit is only available for the first three years after the renewable energy system first produces electricity on a commercial basis. Michigan Public Act No. 295, Section 39(2)(d) (Exhibit IND-43).

[121] This additional credit is only available for the first three years after the renewable energy system first produces electricity on a commercial basis. Michigan Public Act No. 295, Section 39(2)(e) (Exhibit IND-43).

[122] India has submitted a document entitled "State of Michigan, Case No. U-15900, Michigan Public Service Commission – Order and Notice of Hearing, 27 April 2010" (Exhibit IND-90). This appears to be a set of proposed final rules concerning the implementation of Michigan Public Act No. 295. It appears that these proposed rules were intended to replace Michigan Case No. U-15800, Temporary Order (Exhibit IND-48). It is unclear whether these final rules were in force at the time the Panel was established. Panel question Nos. 41 and 114 asked the parties to clarify whether these final rules were in force at the time the Panel was established. Responses by the parties failed to clarify the issue. At any rate, we note that the relevant sections of Michigan Case No. U-15800, Temporary Order are repeated in identical terms in the proposed final rules. Thus, the above description covers both the Temporary Order and the proposed final rules. Neither party has suggested that any other orders or rules may have been in force at the relevant time. See Michigan Case No. U-15900, Michigan Public Service Commission – Order and Notice of Hearing, 27 April 2010, R 460.219, Rule 19, p. 6 (Exhibit IND-90).

apply in respect of electricity generated by a renewable energy system "constructed using equipment made in Michigan".

2.44. First, Michigan-made equipment is calculated by dividing the USD cost of all equipment and materials made (defined as manufactured or assembled) in the State of Michigan by the total USD cost of all equipment and materials used to construct the renewable energy system.

2.45. Second, the annual number of incentive credits granted to the owner of the renewable energy system is determined by multiplying the percentage calculated in step one above by the result of 1/10 multiplied by the number of MWhs produced by the renewable energy system in that year. 100% of the incentive credits are granted to the owner of the renewable energy system if the percentage calculated above equals or exceeds 50%.[123]

2.46. The following principles apply in respect of electricity generated by a renewable energy system "constructed using a workforce composed of residents of Michigan".

2.47. First, Michigan labour is calculated by dividing the number of labour hours attributed to the construction (defined as in-field labour) of the renewable energy system performed by residents of the State of Michigan by the total labour hours attributed to the construction of the renewable energy system.

2.48. Second, the annual number of incentive credits granted to the owner of the renewable energy system is determined by multiplying the percentage calculated in step one above by the result of 1/10 multiplied by the number of MWhs produced by the renewable energy system in that year.[124] 100% of the credits are granted to the owner of the renewable energy system if the percentage calculated in accordance with the equation above equals or exceeds the following:

a) 60% for renewable energy systems with a commercial operation date from 6 October 2008 through 31 December 2012;

b) 65% for renewable energy systems with a commercial operation date from 1 January 2013 through 31 December 2014; or

c) 70% for renewable energy systems with a commercial operation of 1 January 2015 or after.

2.49. Following the Panel's establishment on 21 March 2017, Michigan Public Act No. 342, which amended and replaced Michigan Public Act No. 295, entered into force on 20 April 2017.[125] Michigan Public Act No. 342 contains the same rules as Michigan Public Act No. 295 concerning the availability of additional credits for renewable energy generated by a renewable energy system that is constructed using equipment made in Michigan or by a workforce composed of residents of Michigan.[126]

2.50. The version of the RESPM in force at the time of the Panel's establishment was set out in Michigan Public Act No. 295. Following the Panel's establishment, the amended version of the RESPM entered into force, and is contained in Michigan Public Act No. 342.[127] The program is administered by the Michigan Public Services Commission.[128]

[123] Michigan Case No. U-15800, Temporary Order, p. 27 (Exhibit IND-48).
[124] Michigan Case No. U-15800, Temporary Order, pp. 27-28 (Exhibit IND-48).
[125] Michigan Public Act No. 342 (Exhibit IND-44). We note that Michigan Public Act No. 342 was "[a]pproved by the Governor" on 21 December 2016, prior to the Panel's establishment, but it did not become "effective" until 20 April 2017.
[126] Michigan Public Act No. 342, Sections 39(2)(d) and (e) (Exhibit IND-44).
[127] We discuss this amendment in further detail in our findings.
[128] Michigan Public Act No. 295, Section 21 (Exhibit IND-43) and Michigan Public Act No. 342, Section 22 (Exhibit IND-44).

2.8 Measure 9: Delaware Equipment Bonus / Delaware Workforce Bonus

2.51. The Delaware Renewable Energy Portfolio Standards Act (REPSA) provides that retail electricity suppliers and municipal electric companies must sell a certain percentage of electricity generated using "eligible energy resources" and solar photovoltaics. Compliance with these targets is tracked and verified through the use of "renewable energy credits" (REC)[129] and "solar renewable energy credits" (SREC)[130]. RECs and SRECs are tradable instruments on an electronic market system.[131]

2.52. Within the context of REPSA, an additional 10% credit is provided to retail electricity suppliers[132] towards meeting the renewable energy portfolio standards[133] for solar or wind energy installations sited in Delaware provided that: (i) a minimum of 50% of the cost of renewable energy equipment, inclusive of mounting components, are manufactured in Delaware (Delaware Equipment Bonus); or (ii) the facility is constructed or installed with a minimum of 75% in-state workforce (Delaware Workforce Bonus).[134] This means that workforce must consist of at least 75% Delaware residents or the installing company must employ in total a minimum of 75% workers who are Delaware residents.

2.53. The Delaware Public Service Commission verifies that the required percentages of manufacture and workforce in Delaware are met.[135] According to India, the Commission carries out the verification of the cost of the equipment based on the copy of the supplier's invoice which is required together with the "Application for Certification". The invoice must show Delaware manufactured equipment with the facility identified. If the supplier's invoice shows only a coded Purchase Order (PO) number, a copy of the company's matching PO that includes the address where the materials were used/installed must also be supplied. If a master invoice is submitted, a record of the draws against the purchased quantity, on the master invoice, must show the address of each use and the quantity of material used.[136]

2.54. The Delaware Equipment and Workforce Bonuses, which can be added together[137], are provided for in Section 356(d) and (e) of the REPSA[138], and developed in the Rules and Procedures to Implement the Renewable Energy Portfolio Standard by the Delaware Public Service Commission.[139] The REPSA is administered by the Delaware Public Services Commission.

[129] One REC is "equal to 1 megawatt-hour of retail electricity sales … derived from eligible energy resources". See Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 352(18) (Exhibit IND-54).

[130] One SREC is "equal to 1 megawatt-hour of retail electricity sales … derived from solar photovoltaic energy resources". See Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 352(25) (Exhibit IND-54).

[131] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 352(18) and (25) (Exhibit IND-54).

[132] "Retail electricity supplier" is defined as "a person or entity that sells electrical energy to end use customers in Delaware, including but not limited to nonregulated power producers, electric utility distribution companies supplying standard offer, default service, or any successor service to end use customers". The term does not cover a municipal electric company for the purposes of the measure at issue. See Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 352(22) (Exhibit IND-54).

[133] "Renewable energy portfolio standard" and "RPS" means "the percentage of electricity sales at retail in the state that is to be derived from eligible energy resources". See Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 352(19) (Exhibit IND-54).

[134] Rules and Procedures to Implement the Renewable Energy Portfolio Standard, Rule 3.2.16 (Exhibit IND-55).

[135] Recommendations of the Renewable Energy Taskforce, Section 2.3 (Exhibit IND-58).

[136] India's response to Panel question No. 115 (referring to the Application for Certification in Exhibit IND-127). See also India's response to Panel question No. 47, and first written submission, fns 656 and 688.

[137] Recommendations of the Renewable Energy Taskforce, Section 2.3 (Exhibit IND-58).

[138] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 356(d) and (e) (Exhibit IND-54).

[139] Rules and Procedures to Implement the Renewable Energy Portfolio Standard (Exhibit IND-55).

2.9 Measure 10: Minnesota production incentives and rebates

2.55. India refers to three programs under the general umbrella term "Minnesota Solar Incentive Program"[140]:

a) performance-based financial incentives offered to owners of grid-connected solar photovoltaic (PV) modules if the solar PV modules qualify as "Made in Minnesota" (SEPI);

b) rebates offered for the installation of "Made in Minnesota" solar thermal systems (Minnesota solar thermal rebate); and

c) rebates offered to owners of a qualified property for installing solar PV modules manufactured in Minnesota (Minnesota solar PV rebate).

2.56. The Minnesota legislature repealed the first two programs, i.e. the SEPI, and the rebate program on the installation of solar thermal systems, on 22 May 2017, after the Panel was established.[141] Payments of incentives pursuant to the SEPI are permitted until 31 October 2028.[142] The parties disagree on whether rebate payments are ongoing under the Minnesota[143] solar thermal rebate.[144]

2.9.1 Minnesota solar energy production incentive (SEPI)

2.57. The Minnesota solar energy production incentive (SEPI) is open to owners of grid-connected solar photovoltaic (PV) modules[145] of a total nameplate capacity of less than 40 kilowatts who submitted to the Commissioner of Commerce an application to receive the incentive that has been approved by the Commissioner and received a "Made in Minnesota" certificate for the module under section 216C.413 of the 2016 Minnesota Statutes. The solar PV modules certified as "Made in Minnesota" must have been installed on either residential[146] or commercial[147] premises and must generate electricity.[148]

[140] India's first written submission, para. 939.
[141] Senate Session Laws, Chapter 94, S.F. 1456 (Exhibit IND-100). We discuss the relevance of this repeal in our findings below.
[142] United States' response to Panel question No. 117, and India's comments on the United States' response to Panel question No. 117.
[143] India's response to Panel question No. 102 and comments on the United States' response to Panel question No. 117; United States' response to Panel question No. 117. We discuss the relevance of this information in our findings below.
[144] India's response to Panel question No. 102 and comments on the United States' response to Panel question No. 117; and United States' response to Panel question No. 117. We discuss the relevance of this information in our findings below.
[145] "Solar photovoltaic module" is defined as the smallest, nondivisible, self-contained physical structure housing interconnected photovoltaic cells and providing a single direct current of electrical output. See 2016 Minnesota Statutes, Chapter 216C, Section 216C.411 referring to 2016 Minnesota Statutes, Section 116C.7791, subdivision 1, paragraph (e) (Exhibit IND-66).
[146] "Residential property" is defined as "residential real estate that is occupied and used as a homestead by its owner or by a renter and includes 'multifamily housing development' as defined in section 462C.02, subdivision 5, except that residential property on which solar photovoltaic modules (i) whose capacity exceeds 10 kilowatts is installed; or (ii) connected to a utility's distribution system and whose electricity is purchased by several residents, each of whom own a share of the electricity generated, shall be deemed commercial property". See 2016 Minnesota Statutes, Chapter 216C, Section 216C.415, subdivision 5 (Exhibit IND-66).
[147] "Commercial property" is defined as "real property on which is located a business, government, or nonprofit establishment". See 2016 Minnesota Statutes, Chapter 216C, Section 216C.415, subdivision 5 (Exhibit IND-66).
[148] 2016 Minnesota Statutes, Chapter 216C, Section 216C.415, subdivision 1 (Exhibit IND-66).

2.58. To receive the "Made in Minnesota" certificate by the Commissioner of Commerce, solar PV modules must:

a) be manufactured at a manufacturing facility located in Minnesota that is registered and authorized to manufacture and apply the UL 1703 certification mark to solar PV modules by Underwriters Laboratory (UL), CSA International, Intertek, or an equivalent UL-approved independent certification agency;

b) be manufactured in Minnesota by manufacturing processes that must include tabbing, stringing, and lamination; or by interconnecting low-voltage direct current photovoltaic elements that produce the final useful photovoltaic output of the modules; and

c) bear UL 1703 certification marks from UL, CSA International, Intertek, or an equivalent UL-approved independent certification agency, which must be physically applied to the modules at a manufacturing facility described in subparagraph a) above.[149]

2.59. Incentive payments under this program are made only for electricity generated from new solar PV module installations commissioned between 1 January 2014 and 31 December 2023. An owner of solar PV modules may, in principle, receive payments under this program for a particular module for a period of ten years, provided that sufficient funds are available.[150]

2.60. The SEPI is provided for in Sections 216C.411 – 216C.415 of the 2016 Minnesota Statutes.[151]

2.9.2 Minnesota solar thermal rebate

2.61. The Minnesota solar thermal rebate provides rebates upon the installation of solar thermal systems[152] "Made in Minnesota" in residential or commercial premises.[153]

2.62. For solar thermal systems to qualify as "Made in Minnesota", their components must be manufactured in Minnesota and the solar thermal system must be certified by the Solar Rating and Certification Corporation.[154]

2.63. The rebates, which are granted by the Commissioner of Commerce following an application, vary depending on whether applications relate to a single family residential dwelling installation, a multiple family residential dwelling installation, or a commercial installation.[155] Section 216C.416 provides that, "[t]o the extent there are sufficient applications, the commissioner shall annually spend for rebates under this [program] from 2014 to 2023, for a total of ten years, approximately $250,000 per year."[156]

2.64. The Minnesota solar thermal rebate is provided for in Section 216C.416 of the 2016 Minnesota Statutes.[157]

[149] A solar photovoltaic module that is manufactured by attaching microinverters, direct current optimizers, or other power electronics to a laminate or solar photovoltaic module that has received UL 1703 certification marks outside Minnesota from UL, CSA International, Intertek, or an equivalent UL-approved independent certification agency is not "Made in Minnesota". See 2016 Minnesota Statutes, Section 216C.411(a) (Exhibit IND-66).

[150] 2016 Minnesota Statutes, Chapter 216C, Section 216C.415, subdivision 4 (Exhibit IND-66).

[151] 2016 Minnesota Statutes, Chapter 216C, Sections 216C.411 – 216C.415 (Exhibit IND-66).

[152] "Solar thermal system" is defined as "a flat plate or evacuated tube that meets the requirements of section 216C.25 with a fixed orientation that collects the sun's radiant energy and transfers it to a storage medium for distribution as energy to heat or cool air or water". See 2016 Minnesota Statutes, Chapter 216C, Section 216C.416, Subdivision 1 (Exhibit IND-110).

[153] 2016 Minnesota Statutes, Chapter 216C, Section 216C.416, Subdivision 1 (Exhibit IND-110).

[154] 2016 Minnesota Statutes, Chapter 216C, Section 216C.416, Subdivision 1 (Exhibit IND-110).

[155] 2016 Minnesota Statutes, Chapter 216C, Section 216C.416, Subdivision 3 (Exhibit IND-110).

[156] 2016 Minnesota Statutes, Chapter 216C, Section 216C.416, Subdivision 2(c) (Exhibit IND-110).

[157] 2016 Minnesota Statutes, Chapter 216C, Section 216C.416 (Exhibit IND-110).

2.9.3 Minnesota solar photovoltaic (PV) rebate

2.65. The Minnesota solar photovoltaic (PV) rebate provides rebates to owners of qualified properties[158] who install[159] solar PV modules[160] manufactured in Minnesota after 31 December 2009.[161]

2.66. For solar PV modules to be considered as manufactured in Minnesota, the material production of solar PV modules, including the tabbing, stringing, and lamination processes must take place in Minnesota; or the production of interconnections of low-voltage photoactive elements that produce the final useful PV output must be carried out by a manufacturer operating in Minnesota on 18 May 2010.[162]

2.67. To be eligible for this rebate:

a) A solar PV module must (i) be manufactured in Minnesota; (ii) be installed on a qualified property as part of a system whose generating capacity does not exceed 40 kilowatts; (iii) be certified by Underwriters Laboratory, must have received the ETL listed mark from Intertek, or must have an equivalent certification from an independent testing agency; and (iv) be installed, or reviewed and approved, by a person certified as a solar photovoltaic installer by the North American Board of Certified Energy Practitioners. In addition, the solar PV module (i) may or may not be connected to a utility grid; and (ii) may not be used to sell, transmit, or distribute the electrical energy at retail, nor to provide end-use electricity to an offsite facility of the electrical energy generator (on-site generation being allowed to the extent provided for in section 216B.1611)[163]; and

b) An applicant must have applied for and received a rebate or other form of financial assistance available exclusively to owners of properties on which solar PV modules are installed, and provided by either the State of Minnesota or the utility company serving the applicant's property (unless the applicant's failure to receive the rebate or financial assistance was due to lack of funds).[164] However, the Minnesota solar energy production incentive (SEPI) does not count in this respect, as a person receiving the SEPI is not entitled to receive a Minnesota solar PV rebate for the same solar PV modules.[165]

2.68. The amount of a rebate under this program is the difference between the sum of all rebates described in subparagraph b) above awarded to the applicant and $5 per watt of installed generating capacity.[166] The amount of all rebates or other forms of financial assistance awarded to an applicant by a utility or the State, including any rebate paid under this program (net of applicable federal income taxes applied at the highest applicable income tax rates) is capped at 60% of the total installed cost of the solar PV modules.[167]

2.69. The Minnesota solar PV rebate is provided for in Section 116C.7791 of the 2016 Minnesota Statutes.[168]

[158] "Qualified property" is defined as "a residence, multifamily residence, business, or publicly owned building located in the assigned service area of the utility subject to section 116C.779". See 2016 Minnesota Statutes, Section 116C.7791, Subdivision 1(d) (Exhibit IND-66).
[159] "Installation" is defined as "an array of solar photovoltaic modules attached to a building that will use the electricity generated by the solar photovoltaic modules or placed on a facility or property proximate to that building". See 2016 Minnesota Statutes, Section 216C.7791, Subdivision 1(a) (Exhibit IND-66).
[160] "Solar photovoltaic module" is defined as "the smallest, nondivisible, self-contained physical structure housing interconnected photovoltaic cells and providing a single direct current of electrical output." See 2016 Minnesota Statutes, Section 116C.7791, Subdivision 1(e) (Exhibit IND-66).
[161] 2016 Minnesota Statutes, Section 216C.7791, Subdivision 2 (Exhibit IND-66).
[162] 2016 Minnesota Statutes, Section 216C.7791, Subdivision 1(b) (Exhibit IND-66).
[163] 2016 Minnesota Statutes, Section 216C.7791, Subdivision 3(a) (Exhibit IND-66).
[164] 2016 Minnesota Statutes, Section 216C.7791, Subdivision 3(b) (Exhibit IND-66).
[165] 2016 Minnesota Statutes, Section 216C.415, Subdivision 6 (Exhibit IND-66).
[166] 2016 Minnesota Statutes, Section 216C.415, Subdivision 4(a) (Exhibit IND-66).
[167] 2016 Minnesota Statutes, Section 216C.415, Subdivision 4(b) (Exhibit IND-66).
[168] 2016 Minnesota Statutes, Section 216C.7791 (Exhibit IND-66).

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. India requests that the Panel find that the measures at issue are inconsistent with the United States' obligations under the GATT 1994, the TRIMs Agreement, and the SCM Agreement. India further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the United States bring its measures into conformity with its WTO obligations.[169]

3.2. The United States requests the Panel to find that India has failed to meet its burden to show that the measures at issue are inconsistent with the provisions of the GATT 1994, the TRIMs Agreement, and the SCM Agreement cited by India.[170]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, submitted in accordance with paragraph 23 of the Panel's Working Procedures (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, China, the European Union, Japan, and Norway are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, and C-5). Indonesia, the Republic of Korea, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, Chinese Taipei, and Turkey did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. The Panel issued its Interim Report to the parties on 25 April 2019. On 9 May 2019, both parties submitted written requests for the Panel to review precise aspects of the Interim Report, and neither party requested an interim review meeting. On 23 May 2019, the parties submitted written comments on each other's written requests for review. The parties' requests, made at the interim review stage, as well as the Panel's discussion and disposition of these requests are set out in Annex E-1.

7 FINDINGS

7.1 Measures amended or repealed following the establishment of the Panel

7.1. Before proceeding to the substance of India's claims, we address a threshold issue arising from the fact that several instruments underlying the measures challenged by India in this dispute were amended or repealed following the establishment of this Panel on 21 March 2017.

7.2. Specifically, Measures 1 (Washington State additional incentive), 2 (California Manufacturer Adder) and 8 (Michigan Equipment Multiplier and Michigan Labour Multiplier) have been amended.[171] Additionally, two of the three programs identified by India under Measure 10, namely the Minnesota solar energy production incentive (SEPI) and the Minnesota solar thermal rebate, were repealed following the Panel's establishment.[172]

7.3. In light of these changes, India requested that we make findings and recommendations on the amended versions of Measures 1 and 8[173]; on both the original and amended version of Measure 2[174]; and on the two repealed programs under Measure 10.[175] While the United States does not object to the Panel considering either Measure 8 as amended or the two repealed programs

[169] India's first written submission, para. 1178 and second written submission, para. 99.
[170] United States' first written submission, para. 257 and second written submission, para. 47.
[171] See paras. 2.13, 2.15, and 2.49 above.
[172] See para. 2.56 above.
[173] India's response to Panel question No. 102, paras. 4 and 7.
[174] India's response to Panel question No. 102, para. 5.
[175] India's response to Panel question No. 102, para. 8.

under Measure 10[176], it has submitted that the amended versions of Measures 1 and 2 do not fall within the Panel's terms of reference.

7.4. These circumstances raise the following questions: are the amended measures (i.e. Measures 1, 2, and 8), on the one hand, and the repealed programs (under Measure 10), on the other hand, within our terms of reference[177]; and can or should we make findings and recommendations on these amended measures and repealed programs?[178] Additionally, with respect to the amended measures, should we also make findings and recommendations on these measures as they existed at the time the Panel was established? We will examine these questions separately in respect of the amended measures (Measures 1, 2, and 8) and the two repealed programs under Measure 10.

7.1.1 Measures amended following the establishment of the Panel

7.5. To better understand India's position in respect of Measures 1, 2, and 8, we asked India to explain the legal basis for its request that the Panel examine the WTO-consistency of these measures as amended following panel establishment. In response, India explained that past panels have made findings on measures amended following panel establishment where a panel's terms of reference were broad enough to encompass the amendments, the amendments did not change the essence of the challenged measure, and addressing the amended measure as amended was necessary to resolve the dispute.[179] In support of this proposition, India relies on the panel report in *EC – IT Products*.[180] According to India, applying these criteria in the present dispute leads to the conclusion that the amendments to Measures 1, 2, and 8 are within the Panel's terms of reference. India also submits that the United States has not contested the Panel's ability to make findings on the measures as amended.[181]

7.6. In its comments on India's responses to our questions, the United States indicated its disagreement with India's position that we can or should examine the WTO-consistency of measures amended after the Panel's establishment. According to the United States, "the measures within a panel's terms of reference are defined by the complainant's panel request, and the relevant time for defining the measures within the panel's terms of reference is the time of the DSB's establishment of the panel".[182] In the United States' view, "nothing in the text of Articles 6.2 or 7.1 of the DSU supports the view that measures enacted after the date of panel establishment (including amendments) are within a panel's terms of reference", "[n]or has India identified any other text in

[176] United States' comments on India's response to Panel question No. 102, para. 8. We note that "the United States continues to maintain [following the preliminary ruling of the Panel] that the Rebate for Solar Thermal Systems is *not* within the Panel's terms of reference because it was not identified in India s request for consultations". United States' comments on India's response to Panel question No. 102, fn 9. See also the United States' first written submission, paras. 66-74. We recall, however, the finding in our preliminary ruling that the Minnesota solar thermal rebate is within our terms of reference. See preliminary ruling of the Panel, para. 4.37, Annex D-1.

[177] We note that the issues raised in this section of our Report are distinct from those discussed in our preliminary ruling. The latter concerned, *inter alia*, whether we had jurisdiction over measures that had expired *prior* to the Panel's establishment. The question here concerns measures that were amended or repealed *following* the establishment of the Panel. As we explained in our Preliminary Ruling, amendment or repeal of a measure *prior* to the establishment of a panel may have implications for that panel's terms of reference that are quite different from the implications of an amendment or repeal *subsequent* to panel establishment. See preliminary ruling of the Panel, paras. 3.28-3.29, Annex D-1.

[178] We note that these fundamental issues, which ultimately go to our jurisdiction, were not addressed directly in the parties' first or second written submissions. Rather, we addressed questions to the parties on this issue, mindful of the Appellate Body's guidance that "panels cannot simply ignore issues which go to the root of their jurisdiction [but must] deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed" (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36. See also Appellate Body Report, *US – 1916 Act*, para. 54; Panel Reports, *EC – IT Products*, para. 7.196 and *US – Clove Cigarettes*, para. 7.134). See Panel questions Nos. 40, 102-104, 106, 113, and 116-117.

[179] India's response to Panel question No. 102, para. 1.

[180] India's response to Panel question No. 102, para. 1 (referring to Panel Reports, *EC – IT Products*, para. 7.139).

[181] India's responses to Panel question No. 102, para. 2, and No. 103, para. 9.

[182] United States' comments on India's response to Panel question No. 102, para. 2. See also United States' response to Panel question No. 103 and comments on India's response to Panel question No. 102.

the DSU that would otherwise support such a view".[183] The United States adds that India's reference to what is necessary to secure a positive solution to the dispute is misplaced, as nothing in Article 6.2 or 7.1 of the DSU "suggests that a panel may review a measure that otherwise falls outside of its terms of reference … because – in the view of the complaining Member – doing so is necessary to secure a positive solution to the dispute".[184] Additionally, the United States argues that the "certain reports" relied upon by India are "not persuasive", because they did "not start with or even consider the relevant text of the DSU".[185] On the basis of these considerations, the United States submits that we should only review the WTO-consistency of measures that existed at the time of panel establishment.[186]

7.1.1.1 Overview of applicable principles

7.7. Neither party has engaged in detail with past cases that have dealt with the issue of a panel's jurisdiction over measures amended after panel establishment. India's argumentation on this specific issue cites one panel report[187], whereas the United States' mentions – generally and without any specific references – "certain reports" that, in the United States' view, are "not persuasive".[188]

7.8. There are, however, several relevant past cases that, in our view, provide guidance on the issue before us. Indeed, although "[a]s a general rule, the measures included in a panel's terms of reference must be measures in existence at the time of the establishment of the panel "[189], the Appellate Body has indicated that "Article 6.2 does not set out an express temporal condition or limitation on the measures that can be identified in a panel request"[190]: "measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference".[191]

7.9. In this connection, we recall that in *Chile – Price Band System*, the Appellate Body stated that:

> If the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute.[192]

7.10. Additionally, in *EC – Selected Customs Matters*, the Appellate Body explained that "a panel has the authority to examine 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".[193]

7.11. These basic principles – that a panel has jurisdiction to examine amendments made to measures in existence at the time of panel establishment if (i) the terms of reference are broad enough to include such amendments; (ii) the amendments do not change the essence of the measures identified in the panel request; and (iii) such examination is necessary to secure a positive

[183] United States' comments on India's response to Panel question No. 102, para. 5.
[184] United States' comments on India's response to Panel question No. 102, para. 6.
[185] United States' comments on India's response to Panel question No. 102, para. 5.
[186] United States' comments on India's response to Panel question No. 103.
[187] India's response to Panel question No. 102, para. 1(ii) (referring to Panel Reports, *EC – IT Products*, para. 7.139).
[188] United States' comments on India's response to Panel question No. 102, para. 5.
[189] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[190] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 121.
[191] Appellate Body Report, *EC – Chicken Cuts*, para. 156. See also Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 121.
[192] Appellate Body Report, *Chile – Price Band System*, para. 144 (emphasis original). See also Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[193] Appellate Body Report, *EC – Selected Customs Matters*, para. 184 (footnote omitted, referring to Appellate Body Report, *Chile – Price Band System*, para. 139).

solution to the dispute – have also been applied by several panels, including in *EC – IT Products*[194] and *China – Raw Materials*.[195]

7.12. Therefore, we are of the view that India's statement of the applicable principles concerning a panel's jurisdiction over measures amended after panel establishment is supported by several panel and Appellate Body reports.

7.13. As noted above[196], the United States argues that India has relied on "certain reports" which, in the United States' view, are not persuasive because they did not "start with or even consider the relevant text of the DSU".[197] However, as also noted above, the notion that a panel may, in certain circumstances, examine the WTO-consistency of an amended measure subsequent to panel establishment is supported not only by the *EC – IT Products* panel report cited by India, but by several other reports, including Appellate Body reports, which either explicitly or implicitly base their findings on DSU provisions, including Articles 3 and 6.2.

7.14. Indeed, when assessing whether amendments to measures identified in the panel request fall within a panel's terms of reference, both panels and the Appellate Body have found guidance in the requirement in Article 6.2 of the DSU that the panel request identify the "specific measures at issue".[198] Further, in some instances, both panels and the Appellate Body have reviewed this issue in light of the principles and objectives in Article 3 of the DSU.[199]

7.15. We therefore disagree with the United States' argument that past cases are not persuasive because they did not "start with or even consider the relevant text of the DSU".[200] Accordingly, and since the United States has not further clarified why it considers that certain reports are "not persuasive", we see no reason to depart from the relevant guidance summarized above.

7.16. Therefore, in considering whether we can and should assess the WTO-consistency of Measures 1, 2, and 8 as amended, we will have regard to whether (i) the terms of India's panel request are broad enough to cover the measures as amended; (ii) the amendments in question change the essence of the measures as identified in India's panel request; and (iii) whether assessing the measures as amended is necessary to secure a positive solution to the dispute.

7.17. As an additional and closely related issue, we note that, even if an amendment falls within a panel's terms of reference, the panel retains jurisdiction over the measure as it existed at the time of panel establishment.[201] In principle, therefore, a panel with jurisdiction over amended measures could address the measure as they existed at the time of panel establishment as well. The question of which version or versions of an amended measure a panel addresses, and the precise

[194] Panel Reports, *EC – IT Products*, para. 7.139.

[195] Panel Reports, *China – Raw Materials*, para. 7.15. See also Panel Report, *Indonesia – Autos*, fn 642, listing numerous GATT panel reports deciding to consider measures as amended following panel establishment.

[196] See para. 7.6 above.

[197] United States' comments on India's response to Panel question No. 102, para. 5. According to the United States, "nothing in the text of Articles 6.2 or 7.1 of the DSU supports the view that measures enacted after the date of panel establishment (including amendments) are within a panel's terms of reference". See United States' comments on India's response to Panel question No. 102, para. 5.

[198] See, for example, Appellate Body Reports, *Chile – Price Band System*, paras. 126-144; *EC – Chicken Cuts*, para. 156; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 121; and Panel Reports, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.534; and *EC – IT Products*, paras. 7.135-7.139.

[199] The Appellate Body in *Chile – Price Band System* and the panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* referred to Articles 3.4 and 3.7 of the DSU; the panel in *Colombia – Ports of Entry* referred to Article 3.7 of the DSU; the panel in *EC – Fasteners (China)* referred to Article 3.3 of the DSU; and the panel in *Russia – Pigs (EU)* referred to Article 3.3 and 3.7 of the DSU. See Appellate Body Reports, *Chile – Price Band System*, paras. 140-141; *EC – Chicken Cuts*, para. 161, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122; and panel Reports, *Colombia – Ports of Entry*, para. 7.52, *EC – Fasteners (China)*, para. 7.34, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.542, and *Russia – Pigs (EU)*, para. 7.151.

[200] United States' comments on India's response to Panel question No. 102, para. 5.

[201] Appellate Body Reports, *EC – Selected Customs Matters*, para. 187.

recommendations that it makes, will depend first and foremost on the complainant's specific request[202] and on what is necessary to secure a positive solution to the dispute.[203]

7.1.1.2 Measure 1: Washington State additional incentive

7.18. Senate Bill 5939 of July 2017[204] amended certain parts of Chapter 82.16 of the Revised Code of Washington (RCW) following the establishment of the Panel.

7.19. India argues that these amendments to Chapter 82.16 of the RCW "do not impact India's claims"[205] and fall "within the terms of reference of the Panel"[206] for two reasons. First, in India's view, the amendments do not "'change the essence' of the original measure"; and second, according to India, India's panel request is "broad enough to include any subsequent amendments, replacements, or extensions thereto".[207] India requests the Panel to make both findings and recommendations on the measure as amended in 2017, including on the 'made in Washington' bonus introduced by the amendment and codified in RCW 82.16.165[208], since, in its view, such findings and recommendations are necessary to achieve a positive solution to the dispute.[209] India does not specifically request that we make findings and recommendations on the original version of Measure 1.

7.20. The United States responds that Measure 1 as amended is not within the Panel's terms of reference because it did not exist at the time of the Panel's establishment. In the United States' view, it follows that "there is no basis for the Panel to issue legal findings or recommendations with respect to" the amended measure.[210] In respect of the factual aspects of the amendment, the United States observes that Senate Bill 5939 "reduced the level of incentives previously available under RECIP".[211]

7.21. In order to determine whether we should assess the WTO-consistency of the Washington State additional incentive as amended by Senate Bill 5939, we will examine (i) whether India's panel request is broad enough to encompass the relevant amendment; (ii) whether there has been any change in the essence of the measure at issue as a result of the amendment; and (iii) whether our findings and, if relevant, recommendations are necessary to secure a positive resolution to the dispute. We will do so by looking at Sections 82.16.110 - 82.16.130 of the RCW as amended by Senate Bill 5939, followed by Section 82.16.165 of the RCW which was introduced by Senate Bill 5939.

7.22. We consider that India's panel request is broad enough to encompass the amendments to Sections 82.16.110 - 82.16.130 of the RCW introduced by Senate Bill 5939. In fact, although India's panel request does not reference Senate Bill 5939, which was adopted only at a later stage, it explicitly identifies as part of Measure 1 "any amendments, modifications, replacements, successor, and extensions thereto, and any implementing measure or any other related measures thereto".[212]

7.23. With respect to the essence of the measure at issue, we note that although the United States submits that Senate Bill 5939 "reduced the level of incentives previously available under RECIP"[213], the key subsection of the original measure providing for the economic development factors under the additional incentive remains unchanged.[214] The changes to Section 82.16.120 introduced by Senate Bill 5939 relate to other subsections and mostly concern administrative issues, such as the transfer of certain responsibilities from the Washington Department of Revenue to the Washington

[202] Panel Report, *Russia – Tariff Treatment*, para. 7.84.
[203] Appellate Body Report, *Chile – Price Band System*, para. 144.
[204] Senate Bill 5939 (Exhibit IND-4).
[205] India's response to Panel question No. 1.
[206] India's response to Panel question No. 102, para. 3.
[207] India's response to Panel question No. 102, para. 3.
[208] India's responses to Panel question Nos. 1 and 102.
[209] India's response to Panel question No. 102, para. 3.
[210] United States' comments on India's response to Panel question No. 102, para. 4.
[211] United States' response to Panel question No. 2.
[212] India's panel request, WT/DS510/2, p. 2.
[213] United States' response to Panel question No. 2.
[214] Senate Bill 5939, Section 3 (Exhibit IND-4).

State University extension energy program[215], the deadline for participants in the RECIP to receive payments[216], and the establishment of certain procedures to manage the payment of incentives.[217] As these amendments did not change the essential design or operation of the incentive in question, we do not consider that the amendment effected by Senate Bill 5939 changed the essence of the measure as contained in Sections 82.16.110 - 82.16.130 of the RCW.

7.24. As regards the need to make findings and recommendations in order to ensure a positive solution to this dispute, we note that Sections 82.16.110 - 82.16.130 of the RCW, as amended by Senate Bill 5939, embody the version of the measure that is currently in force, and therefore the version of the measure to which any meaningful findings of WTO-inconsistency and concomitant recommendations would need to be directed, and in respect of which such findings and recommendations would need to be implemented. We also recall that India requests us to make findings and recommendations only on the measure as amended in 2017.[218] Accordingly, we conclude that addressing the WTO-consistency of Sections 82.16.110 - 82.16.130 of the RCW as amended by Senate Bill 5939 is necessary to ensure a positive solution to this dispute, and hence it is appropriate for us to make findings and recommendations on these Sections as amended.

7.25. Turning to the question of whether we should make findings and recommendations on the original version of Sections 82.16.110 - 82.16.130 of the RCW as they existed at the time of panel establishment, we note that India has not specifically requested us to do so.[219] Further, as noted above, the key subsection of the original measure providing for the economic development factors under the additional incentive remains unchanged. Accordingly, any findings or recommendations on Sections 82.16.110 - 82.16.130 of the RCW as amended would necessarily address the WTO-consistency of the additional incentive at issue, including as set forth prior to Senate Bill 5939. Findings on the original version of Sections 82.16.110 - 82.16.130 of the RCW would therefore be duplicative and hence unnecessary to secure a positive solution to this dispute.

7.26. As noted above[220], India has also requested us to make findings and recommendations on the 'made-in-Washington' bonus set out in 82.16.165 of the RCW, which it considers to be part of Measure 1 as amended.[221] India argues that Section 82.16.165 of the RCW falls within our terms of reference because it provides incentives "similar to RCW 82.16.120 in terms of their design and structure and the manner in which they operate and are mere extensions of the original measure".[222] India explains that the key differences relate to the scope of products subject to the incentive[223], the incentive rates and calculation methods[224], and the entity providing the certification.[225] In India's view, "[t]he analysis presented by India with respect to [M]easure 1 as it existed at time of the establishment of the Panel also applies to and covers, *mutatis mutandis*, RCW 82.16.165 read with WAC 504-49".[226]

7.27. The United States is silent on Section 82.16.165 of the RCW introduced by Senate Bill 5939. The United States merely refers to Senate Bill 5939 in general, stating that "[a]s a factual matter, [Senate] Bill [] 5939 reduced the level of incentives previously available under RECIP".[227]

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[215] Senate Bill 5939, Section 3(9) (Exhibit IND-4).
[216] Senate Bill 5939, Section 3(10) (Exhibit IND-4).
[217] Senate Bill 5939, Section 3(11) and (12) (Exhibit IND-4).
[218] See para. 7.19 above.
[219] See para. 7.19 above.
[220] See para. 7.19 above.
[221] India's responses to Panel question Nos. 1 and 102.
[222] India's response to Panel question No. 104.
[223] India's response to Panel question No. 104, para. 13(i): "RCW 82.16.165 provides additional incentives for two specific types of products if they qualify as 'made in Washington'. These are solar modules and wind turbine or tower". See also India's response to Panel question No. 104, fn 27.
[224] India's response to Panel question No. 104, para. 13(ii): "[F]or each fiscal year beginning 2018 through 2021 it provides for certain base rates (for each type of project) and a made in Washington bonus rate" (fn omitted).
[225] India's response to Panel question No. 104, para. 13(iii) ("[U]nlike RCW 82.16.120 where the Department of Revenue issued certifications, the 2017 Amendment provides that the certifications under RCW 82.16.165 would be issued by Washington State University extension energy program").
[226] India's response to Panel question No. 104, para. 14.
[227] United States' response to Panel question No. 2.

7.28. We do not exclude that the "made in Washington" bonus may be similar in some respects to the Washington State additional incentive. However, we consider that the two incentives are distinct from each other. Indeed, the text of Section 82.16.165(3)(a) indicates that the two incentives preclude each other, as "[n]o new certification may be issued under this section to an applicant who submits a request for or receives an annual incentive payment for a renewable energy system that was certified under RCW 82.16.120 …".[228] We also note that the Washington State additional incentive and the "made in Washington" bonus are stipulated in different provisions of Chapter 82.16 of the RCW. They have different product coverage and calculation methods[229], and became operative at different times.[230] In our view, these considerations indicate that the "made in Washington" bonus is not a "mere extension[] of the original measure"[231], as India argues, but a distinct incentive resulting from the several amendments to Chapter 82.16 introduced by Senate Bill 5939.

7.29. Accordingly, we conclude that the "made in Washington" bonus is not an amendment to the Washington State additional incentive but a distinct measure introduced by Senate Bill 5939 following the establishment of the Panel and, therefore, falls outside our terms of reference. We therefore see no basis to examine further whether we need to issue findings and recommendations on the "made in Washington" bonus.

7.1.1.3 Measure 2: California Manufacturer Adder

7.30. As noted above[232], the California Manufacturer Adder that India challenges is provided for in Section 379.6 of the California Public Utilities Code (CPUC). Rules and procedures concerning its implementation and administration are set out in the relevant California Self-Generation Incentive Program (SGIP) Handbook. The 2016 version of the SGIP Handbook was replaced by the 2017 SGIP Handbook of 18 December 2017, following the establishment of the Panel.

7.31. India argues that "the discriminatory element (through local content requirements) of the measure in question continues to be retained in 2017 SGIP Handbook".[233] According to India, "the only difference [between the 2016 and the 2017 SGIP Handbook], for the purposes of the dispute, is that the 'California Supplier' requirement under the 2016 SGIP Handbook has been replaced by 'California Manufacturer' requirement under the 2017 SGIP Handbook".[234] India considers that "the relevant parent legislation[] together with the handbooks constitute a 'series of measures' or successors in series and the Panel should issue findings and recommendations on the 'series of measures' taken together".[235]

7.32. The United States responds that Measure 2 as amended is not within the Panel's terms of reference because it did not exist at the time of panel establishment and, therefore, "there is no basis for the Panel to issue legal findings or recommendations with respect to" it.[236]

7.33. In light of India's arguments, we understand India's request for findings and recommendations to encompass the relevant parent legislation, i.e. Section 379.6 of the CPUC, as well as both the 2016 SGIP Handbook and the 2017 SGIP Handbook.[237] In deciding whether to assess the WTO-consistency of the California Manufacturer Adder as implemented through the 2016 or the 2017 SGIP Handbook, or both, we will examine three issues: (i) whether India's panel request

[228] Amended version of Chapter 82.16 of the Revised Code of Washington, Section 82.16.165 (3)(a) (Exhibit IND-132).

[229] India's response to Panel question No. 104. We note that India identifies a third difference which relates to the entity issuing the certification. We are unclear about the validity of this statement since, as noted in the descriptive part, certain responsibilities of the Department of Revenue with respect to the Washington State additional incentive were transferred to the Washington State University extension energy program since October 2017. See para. 2.13 above.

[230] Section 82.16.165 provides that the period for filing applications under that provision started on 1 July 2017, whereas the Washington State additional incentive was already in force by then. See Amended version of Chapter 82.16 of the Revised Code of Washington, Section 82.16.165 (1) (Exhibit IND-132).

[231] India's response to Panel question No. 104.

[232] See para. 2.19 above.

[233] India's response to Panel question No. 8.

[234] India's response to Panel question No. 8.

[235] India's response to Panel question No. 102, para. 5.

[236] United States' comments on India's response to Panel question No. 102, paras. 4 and 8. See also United States' response to Panel question No. 103.

[237] India's response to Panel question No. 8.

is broad enough to encompass the relevant amendment; (ii) whether there has been any change in the essence of the measure at issue as a result of the replacement of the 2016 SGIP Handbook by the 2017 SGIP Handbook; and (iii) whether findings and, if relevant, recommendations are necessary to secure a positive resolution to the dispute.

7.34. We consider that India's panel request is broad enough to encompass the replacement of the 2016 SGIP Handbook by the 2017 SGIP Handbook. In fact, although India's panel request does not refer to the 2017 SGIP Handbook, which was published only at a later stage, it explicitly identifies as part of Measure 2 "any amendments, modifications, replacements, successor, and extensions thereto, and any implementing measure or any other related measures thereto".[238]

7.35. With respect to the essence of the measure at issue, we note that, even though the 2017 SGIP Handbook provides for a different product coverage and replaces the California Supplier requirement of the 2016 SGIP Handbook with a California Manufacturer requirement[239], the 2017 SGIP Handbook does not modify the key features of the California Manufacturer Adder. Indeed, there continues to be an additional incentive of 20% for the installation of eligible distributed generation resources manufactured in California, as stipulated in Section 379.6 of the CPUC. In fact, we note that the text of Section 379.6 of the CPUC remains identical after the replacement of the 2016 SGIP Handbook with the 2017 version. As the changes introduced by the 2017 SGIP Handbook did not modify the essential design or operation of the California Manufacturer Adder, we do not consider that the essence of this measure at issue was changed.

7.36. As regards the need to make findings and recommendations in order to ensure a positive solution to this dispute, we note that the California Manufacturer Adder, as implemented through the 2017 SGIP Handbook, is the version of the measure currently in force, and therefore the version of the measure to which any meaningful findings of WTO-inconsistency and concomitant recommendations would need to be directed, and in respect of which such findings and recommendations would need to be implemented. We also recall that India requests us to make findings and recommendations on the relevant parent legislation, i.e. Section 379.6 of the CPUC, as well as the 2016 SGIP Handbook and the 2017 SGIP Handbook.[240] Accordingly, we conclude that addressing the WTO-consistency of California Manufacturer Adder as implemented through the 2017 SGIP Handbook is necessary to ensure a positive solution to this dispute, and hence it is appropriate for us to make findings and recommendations on this measure as amended.

7.37. Turning to the question of whether we should also make findings and recommendations on the California Manufacturer Adder as implemented through the 2016 SGIP Handbook, that is, as it existed at the time of panel establishment, we first note that India has requested us to do so.[241]

7.38. We also recall that one of the criteria past panels have invoked in deciding whether to issue findings and recommendations on the version of a measure that existed at the time of panel establishment has been if that version of the measure continues to impair a Member's benefits under a covered agreement.[242]

7.39. To explore this issue, we asked the parties to clarify whether the 2016 SGIP Handbook continued to have an effect following its replacement by the 2017 SGIP Handbook.[243] The United States did not address this issue. For its part, India submitted that the 2017 SGIP Handbook addresses the issue of migration from one Handbook to the other under the California Manufacturer Adder as follows:

> Beginning June 23, 2017, Program Administrators will deny requests for California Manufacturer status for manufacturers that have not met the above requirements, including suppliers which were previously approved. Also, beginning June 23, 2017, projects will receive the adder only when using equipment from an approved California

[238] India's panel request, WT/DS510/2, p. 3.
[239] See para. 2.15 above.
[240] See para. 7.31 above.
[241] See para. 7.19 above.
[242] Panel Report, *China – Agricultural Producers*, para. 7.85 (referring to Panel Reports, *Indonesia – Autos*, para. 14.206 and *US – Upland Cotton*, para. 7.1201).
[243] Panel question No. 110.

> Manufacturer under the above requirements. New projects that apply before June 23, 2017 with a previously approved "California Supplier" may retain the adder only if that manufacturer is re-approved under the above requirements by the Incentive Claim stage.[244]

7.40. We understand from the above that, beginning 23 June 2017, manufacturers applying for California Manufacturer status as well as previously approved "California Supplier[s]" under the 2016 SGIP Handbook will have to fulfil the requirements set out in the 2017 SGIP Handbook if they want to start or continue benefiting from the California Manufacturer Adder. This raises the prospect that while incentives are being made available under the 2017 SGIP Handbook, some benefits may continue to flow from the 2016 SGIP Handbook.

7.41. India has thus demonstrated that the 2016 SGIP Handbook may continue to be operative in certain circumstances. Bearing in mind our duty to secure a positive solution to the dispute, we conclude that addressing the WTO-consistency of the California Manufacturer Adder as implemented through the 2016 SGIP Handbook is also necessary to ensure a positive solution to this dispute. Therefore, it is appropriate for us to make findings and recommendations on the California Manufacturer Adder as it existed at the time of panel establishment.

7.1.1.4 Measure 8: Michigan Equipment Multiplier / Michigan Labour Multiplier

7.42. The Michigan Equipment Multiplier and the Michigan Labour Multiplier were contained in Act No. 295 of 2008 at the time the Panel was established.[245] This Act was amended by Act No. 342 of 2016[246] on 21 December 2016. The text of Public Act No. 342[247] indicates that the law was "[a]pproved by the Governor" of Michigan on 21 December 2016, prior to panel establishment. However, it also states that the legislation's "effective date" is 20 April 2017, after the Panel was established. We understand, therefore, that although Public Act No. 342 was formally enacted prior to panel establishment on 21 March 2017, it was not yet in force on that date. Instead, on 21 March 2017, Public Act No. 295 remained in operation.

7.43. As noted above[248], India requests us to make findings on the amended version of the Michigan Equipment and Labour Multipliers, as contained in Michigan Public Act No. 342.[249]

7.44. For its part, the United States "does not dispute that the amended version of Measure 8 is properly within the Panel's terms of reference" because, in the United States' view, the amended version of the measure was enacted prior to panel establishment, even though it only entered into force after that date.[250]

7.45. We note that, as the United States recognizes, the amendment to Measure 8 was enacted prior to the Panel's establishment, but only entered into force *after* that date. It is, therefore, not entirely clear to us whether Measure 8 should properly be understood as having been amended before or after the Panel's establishment. On the one hand, it could be argued that, insofar as the legislation was enacted prior to establishment, it was "in existence"[251] on that date, even if it was not yet in force. On the other hand, it might be thought that, because the amendment only entered into force after the Panel's establishment, it did not exist on that date. In this view, the measure "in existence" at the time of the Panel's establishment would be the original version of the measure contained in Public Act No. 295.

7.46. Ultimately, however, we do not consider it necessary in this case to resolve this issue or to determine whether Public Act No. 342 was in existence at the time the Panel was established. This is because even if Public Act No. 342 was not in existence when the Panel was established, it clearly falls within our terms of reference on the basis of the three principles set out above. As regards the

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[244] India's response to Panel question No. 110, para. 28.
[245] Public Act No. 295 of 2008 (Exhibit IND–43).
[246] Public Act No. 342 of 2016 (Exhibit IND–44).
[247] Michigan Public Act No. 342 (Exhibit IND-44).
[248] See para. 7.1 above.
[249] India's response to Panel question No. 102, para. 7.
[250] United States' comments on India's response to Panel question No. 102, para. 8.
[251] Appellate Body Report, *EC – Chicken Cuts*, para. 156.

scope of India's panel request, we note that while that document does not reference Public Act No. 342, which entered into force only at a later stage, it explicitly identifies as part of Measure 8 "any amendments, modifications, replacements, successor, and extensions thereto, and any implementing measure or any other related measures thereto".[252] In our view, India's panel request is therefore broad enough to encompass Public Act No. 342, which in effect "replaces" and succeeds, without changing, the provisions relating to the two Multipliers originally contained in Public Act No. 295.

7.47. With respect to the essence of the measure at issue, the relevant text in Public Act No. 295 establishing the Equipment and Labour Multipliers is repeated word for word in Public Act No. 342, without modification. We therefore, see no basis to conclude that Public Act No. 342 changed the essence of the two Multipliers in any way.

7.48. As regards the need to make findings and recommendations in order to ensure a positive solution to this dispute, we note that Public Act No. 342 is the version of the measure currently in force, and therefore the version of the measure to which any findings of WTO-inconsistency and concomitant recommendations would need to be directed, and in respect of which such findings and recommendations would need to be implemented. We also recall that India requests us to make findings and recommendations only on Public Act No. 342, and that the United States does not object to this.[253] Accordingly, we conclude that addressing the WTO-consistency of the two Multipliers as contained in Public Act No. 342 is necessary to ensure a positive solution to this dispute, and hence that it is appropriate for us to make findings and recommendations on these Multipliers as set forth in Public Act No. 342.

7.49. Turning to the question of whether we should make findings and recommendations on the version of the measure (i.e. Public Act No. 295) that applied at the time of panel establishment, we note that India has not requested us to do so. Further, as noted above, the relevant parts of Public Act No. 342 reproduce exactly the relevant parts of Public Act No. 295, and thus, any findings on the former would necessarily clarify the WTO-consistency of the latter. Therefore, we conclude that findings or recommendations on the two Multipliers as contained in Public Act No. 295 would be duplicative and hence unnecessary to secure a positive solution to this dispute.

7.50. Accordingly, we will review the WTO-consistency of, and make findings and, if relevant, recommendations on, the two Multipliers as contained in Public Act No. 342, and not on the original version of these two Multipliers as contained in Public Act No. 295.

7.1.1.5 Conclusion on measures amended following panel establishment

7.51. For the foregoing reasons, we will examine Measures 1, 2, and 8 as amended.

7.52. We have explained that, in our view, an examination of Measures 1 and 8 as they were in force at the time the Panel was established would be duplicative and unnecessary, especially bearing in mind our duty to secure a positive resolution to this dispute and the fact that India has not requested us to conduct such examination. Accordingly, we will make findings and, depending on our findings, also recommendations only on the amended versions of Measures 1 and 8.

7.53. Conversely, as regards Measure 2, and in light of both India's request and the possibility that benefits under the 2016 SGIP Handbook continue to exist in certain circumstances, we find it necessary to examine the California Manufacturer Adder as implemented through both the 2016 and 2017 SGIP Handbooks in order to secure a positive resolution to this dispute. Accordingly, we will make findings on both the original and the amended versions of Measure 2. Further, depending on our findings, we will make recommendations on the California Manufacturer Adder as implemented through the 2017 SGIP Handbook, and – to the extent the 2016 SGIP Handbook continues to govern certain aspects of the California Manufacturer Adder for past applicants – also as implemented through the 2016 SGIP Handbook.

[252] India's panel request, WT/DS510/2, p. 8.
[253] India's response to Panel question No. 102, para. 7; and United States' comments on India's response to Panel question No. 102, para. 8.

7.1.2 Measures repealed following the establishment of the Panel

7.54. We now turn to consider whether we can and should make findings and recommendations in respect of the Minnesota solar energy production incentive (SEPI) and the Minnesota solar thermal rebate, two programs identified by India as part of Measure 10 that were repealed following the Panel's establishment.

7.1.2.1 Overview of applicable principles

7.55. As we explained in our preliminary ruling[254], *EU – PET (Pakistan)* is the most recent Appellate Body report addressing a panel's role in respect of expired or repealed measures. That report distinguishes between two different scenarios depending on whether measures expire or are repealed before or after panel establishment. We are faced here with the second situation since, as noted above[255], the Minnesota solar energy production incentive (SEPI) and the Minnesota solar thermal rebate were repealed *after* the Panel was established.

7.56. In *EU – PET (Pakistan)*, the Appellate Body considered, in respect of measures that have expired or been repealed following panel establishment, that "[t]he fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure".[256] Rather, according to the Appellate Body, "where a measure expires in the course of the panel proceedings, the panel should, in the exercise of its jurisdiction, objectively assess whether the 'matter' before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined".[257] In this regard, the Appellate Body emphasized that "the repeal of a measure [does not] necessarily constitute[], without more, a 'satisfactory settlement of the matter' within the meaning of Article 3.4 [of the DSU], or a 'positive solution to the dispute' within the meaning of Article 3.7" of the DSU.[258]

7.57. As we understand it, then, the fact that a measure was repealed after panel establishment does not, by itself, answer the question of whether a panel should make findings on that measure. Rather, the central question is whether there remains an unresolved "matter" that needs to be addressed in order to provide a positive solution to the dispute.

7.58. When might a "matter" continue to exist notwithstanding the repeal of a challenged measure? Past cases provide some guidance on this issue. One of the central considerations is whether the effects of a measure continue to impair the benefits for a Member under a covered agreement.[259] In light of the parties' arguments, we will have regard to this factor in assessing whether to make findings on the two repealed programs under Measure 10.

7.59. Turning to the issue of recommendations, we note that the expiry of a measure may affect whether a panel can make recommendations and, if so, the kind of recommendations it makes.[260] Depending on the circumstances, it may or may not be appropriate for a panel that has made findings on a measure that was repealed after panel establishment to make recommendations in respect of that measure.[261] Indeed, the Appellate Body has held that it may amount to legal error for a panel to recommend that a Member bring into conformity a measure that the Panel has found to have been repealed.[262] In our view, therefore, a panel's decision whether to make recommendations in respect of a repealed measure must depend on a careful examination of the nature of the subsisting "matter", and whether there are concrete actions or steps that a respondent could take, beyond repeal, to ensure that the repealed measure is no longer impairing benefits accruing to a Member under the covered agreements.

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[254] Preliminary ruling of the Panel, paras. 3.27-3.28, Annex D-1.
[255] See para. 2.56 above.
[256] Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.25 and 5.27 (referring to Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179).
[257] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.43.
[258] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.27 (fns omitted).
[259] Panel Report, *China – Agricultural Producers*, para. 7.85 (fns omitted).
[260] Appellate Body Report, *US – Upland Cotton*, para. 272.
[261] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.200 and cases cited therein.
[262] Appellate Body Report, *US – Certain EC Products*, para. 81.

7.60. Bearing these considerations in mind, we now turn to examine whether we can and should examine the WTO-consistency of the SEPI and the Minnesota solar thermal rebate, even though both programs were repealed after the Panel was established.

7.1.2.2 Minnesota solar energy production incentive (SEPI) under Measure 10

7.61. As noted above[263], the Minnesota legislature repealed the Minnesota solar energy production incentive program on the installation of solar photovoltaic (PV) modules (SEPI) on 22 May 2017, after the Panel was established.[264]

7.62. India requests that we nonetheless issue both findings and recommendations on this program, arguing that "the measure continues to be in operation and has an ongoing effect".[265] India recalls in this regard that the SEPI explicitly provides that "[w]hile the last date for approval of an application for SEPI was fixed at May 1, 2017, the incentives payment may continue up to 10 years".[266]

7.63. The United States does not explicitly address India's request for findings and recommendations with respect to this program; it merely asserts that "[it] does not dispute that those measures were in existence on the date of panel establishment".[267] Moreover, the United States does not contest that "[o]wners whose applications were approved by May 22, 2017, are eligible to receive annual incentive payments under the Minnesota Solar Energy Production Incentive for a period of ten years from the time their installed solar energy system begins generating electricity". The United States adds that "[n]o further payments, however, are permitted after October 31, 2028".[268] We understand this as indicating that the United States does not contest India's assertion that incentive payments under the SEPI may continue even though the program has been repealed.

7.64. We note that both parties agree that payments under the SEPI may continue, even after repeal, for those applicants whose applications were approved prior to May 2017.[269] We understand this as confirming that the SEPI has ongoing effects, in the form of potential payments, that continue to exist even after the program's repeal. As noted above, past cases have indicated that it may be appropriate for a panel to assess the WTO-consistency of an expired measure if that measure may continue to have effects.

7.65. In light of the above, we consider it appropriate to make findings on this program, even though it was repealed during these proceedings.

7.66. Turning to the question of whether we should make recommendations if we find that the SEPI is WTO-inconsistent, we recall that the Appellate Body has indicated that "the fact that a measure has expired 'may affect' what recommendation a panel may make".[270] We are of the view that, given the potential continuing effects of the SEPI program, a finding of inconsistency would warrant a qualified recommendation that the United States bring itself into compliance, to the extent that the incentives under this program may continue to be paid following its repeal, and thus may continue to impair benefits accruing to India under a covered agreement.

[263] See para. 2.56 above.
[264] Senate Session Laws, Chapter 94, S.F. 1456 (Exhibit IND-100). We discuss the relevance of this repeal in our findings below.
[265] India's response to Panel question No. 102, para. 8.
[266] India's response to Panel question No. 102, para. 8 (referring to 2017 Minnesota Session Laws, S. F. No. 1456, Chapter 94, Article 10, Section 22, Subdivision 1 (Exhibit IND-100)).
[267] United States' comment on India's response to Panel question No. 102.
[268] United States' response to Panel question No. 117, para. 8.
[269] We nonetheless note that India and the United States do not agree on the deadline for approving applications and the last day of payment. The disagreement between the parties on these particular issues is irrelevant for the purposes of our analysis.
[270] Appellate Body Reports, *China – Raw Materials*, para. 264.

7.1.2.3 Minnesota solar thermal rebate under Measure 10

7.67. As noted above[271], the Minnesota legislature repealed the rebate program on the installation of solar thermal systems on 22 May 2017, after the Panel was established.[272] We recall that, following a request for a preliminary ruling by the United States, we found that the Minnesota solar thermal rebate is within our terms of reference.[273] Our preliminary ruling addressed the evolution of India's case from its consultations request to its panel request in regard to the Minnesota solar thermal rebate[274], not the fact that the Minnesota solar thermal rebate was repealed following panel establishment. The United States did not contest the latter issue in its preliminary ruling request, and indeed it arose only at a later stage in these proceedings.

7.68. In response to a question from the Panel, India clarified that, despite the repeal of the Minnesota solar thermal rebate following panel establishment, it is seeking both findings and recommendations on this program because, in India's view, it "continues to be in operation and has an ongoing effect".[275] In particular, according to India, "applications which were approved prior to the effective date of Senate File [*sic*] No. 1456 w[ill] continue to receive incentives until the year 2023".[276]

7.69. The United States does not explicitly address India's request for findings and recommendations with respect to this program; it merely asserts that "[it] does not dispute that those measures were in existence on the date of panel establishment".[277] However, the United States submits that, as a matter of fact, "[r]ebate payments are not ongoing" under this program. According to the United States, the legislation that repealed the Minnesota solar thermal rebate (i.e. Senate Bill No. 1456) provides that "no rebate payments would be paid to owners whose applications were approved after May 30, 2017".[278] Senate Bill No. 1456 further clarifies that "[s]ystem owners were required to install the approved solar thermal system by December 31, 2017, to remain eligible for the rebate payment [and] [t]he Minnesota Department of Revenue was required to release rebate payments by July 1, 2018, at the latest".[279] Therefore, the United States contends that "the latest-in-time payment under the Minnesota Solar Thermal Rebate would have occurred no later than July 1, 2018".[280]

7.70. India responds that the United States has wrongly relied upon evidence, namely certain excerpts from the 2017 Guide for Applicants, which does not seem to be applicable to the Minnesota solar thermal rebate program.[281] India further states that, even if the Guide were applicable to the solar thermal rebate, it would not override the provisions of the parent statute, in particular Article 10, Section 28 of the Senate Bill No. 1456, which provides that no rebate will be paid to applications approved after its effective date. To the contrary, according to India, the Guide indicates that "applications which were approved prior to the effective date of Senate File [*sic*] No. 1456 would continue to receive incentives until the year 2023".[282]

7.71. We note that Section 28 of Senate Bill No. 1456 provides as follows with respect to the repeal of the Minnesota solar thermal rebates:

> (a) No rebate may be paid under Minnesota Statutes 2016, section 216C.416, to an owner of a solar thermal system whose application was approved by the commissioner of commerce after the effective date of this act.

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[271] See para. 2.56 above.
[272] Senate Session Laws, Chapter 94, S.F. 1456 (Exhibit IND-100). We discuss the relevance of this repeal in our findings below.
[273] Preliminary ruling of the Panel, para. 4.37, Annex D-1.
[274] United States' first written submission, paras. 41-42.
[275] India's response to Panel question No. 102, para. 8.
[276] India's response to Panel question No. 102, para. 8.
[277] United States' comment on India's response to Panel question No. 102.
[278] United States' response to Panel question No. 117, para. 9.
[279] United States' response to Panel question No. 117, para. 9.
[280] United States' response to Panel question No. 117, para. 9.
[281] India's comment on the United States' response to Panel question No. 117 (referring to the Minnesota Department of Commerce Guidance for Completing the Made in Minnesota Solar Incentive Application - A 2017 Reference Guide for Applicants, 30 December 2016 (Exhibit US-28)).
[282] India's comments on the United States' response to Panel question No. 117, para. 6.

(b) Unspent money remaining in the account established under Minnesota Statutes 2014, section 216C.416, as of July 2, 2017, must be transferred to the C-LEAF account established under Minnesota Statutes 2016, section 116C.779, subdivision 1.

7.72. Section 28(a) refers to the point in time at which an application must be approved in order for the applicant to receive rebate payments. However, the provision does not address the issue of the timing of any final payment, in particular in respect of applications approved prior to the effective date of the repeal legislation. Likewise, Section 28(b) refers only to "unspent money" being transferred to another account, but it does not specify whether rebates will continue to be paid from this new account. Accordingly, in our view, the text of Section 28 of Senate Bill No. 1456 does not clearly answer the question whether rebate payments may continue following the repeal of the Minnesota solar thermal rebate, in particular with respect to previously approved recipients.

7.73. Turning to the section of the 2017 Guide for Applicants on which the United States relies as evidence that post-repeal incentive payments are not permitted, we note that it provides that the "[p]ayments will [be] allocated as provide[d] under Minnesota Statute 216C.415".[283] This section of the Guide seems to refer only to the SEPI program, as it deals with "[i]ncentive payments … to an owner of grid-connected *solar photovoltaic modules*…".[284] There is no mention in this section of solar thermal systems, which are the products at issue under the Minnesota solar thermal rebate program set out in Section 216C.416.

7.74. At the same time, other parts of the 2017 Guide for Applicants are, in our view, more ambiguous as concerns the Guide's scope. For instance, in one place the Guide indicates that applicants "will be able to select which Made in Minnesota Program [they] would like to apply for … PV Production Incentive, *Solar Thermal Rebate* or PV Community Solar Garden Program".[285] There are also other references to solar thermal systems throughout the Guide.[286]

7.75. Based on the evidence before us, it is unclear whether the above-referenced provisions on payments contained in the 2017 Guide for Applicants apply to the Minnesota solar thermal rebate and, if so, how this Guide relates to the relevant Sections of the 2016 Minnesota Statutes, particularly in light of their repeal on 22 May 2017 by Senate Bill No. 1456.

7.76. We recall that, having requested us to make findings and recommendations on the Minnesota solar thermal rebate, India bears the burden of showing that this repealed program has ongoing effects. In light of the limited evidence before us, we are not in a position to determine whether payments under the Minnesota solar thermal rebate program continue following its repeal. Accordingly, we find that India has not made a *prima facie* case that the Minnesota solar thermal rebate has ongoing effects, and therefore, constitutes a "matter" before us which "still requires to be examined" in order to provide a positive solution to the dispute.[287] As a result, we conclude that India has not demonstrated that we need to make findings and recommendations on the Minnesota solar thermal rebate in order to secure a positive resolution to this dispute.

7.1.2.4 Conclusion on measures repealed following the establishment of the Panel

7.77. For the foregoing reasons, we will not make any findings or recommendations on the Minnesota solar thermal rebate. As regards the SEPI, we will make findings and qualified recommendations to the extent that incentives granted under this program may continue to be paid following its repeal, and thus may continue to impair the benefits accruing to India under a covered agreement.

[283] Minnesota Department of Commerce Guidance for Completing the Made in Minnesota Solar Incentive Application - A 2017 Reference Guide for Applicants, 30 December 2016, p. 3 (Exhibit US-28).
[284] 2016 Minnesota Statutes, Section 216C.415 (Exhibits IND-66 and IND-100) (emphasis added).
[285] Minnesota Department of Commerce Guidance for Completing the Made in Minnesota Solar Incentive Application - A 2017 Reference Guide for Applicants, 30 December 2016, p. 9 (Exhibit US-28) (emphasis added).
[286] Minnesota Department of Commerce Guidance for Completing the Made in Minnesota Solar Incentive Application - A 2017 Reference Guide for Applicants, 30 December 2016, pp. 12 and 17 (Exhibit US-28).
[287] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.43.

7.2 Order of analysis

7.78. India presents its claims in this dispute beginning with Article III:4 of the GATT 1994, followed by Articles 2.1 and 2.2 of the TRIMs Agreement, Articles 3.1(b), 3.2, and 25 of the SCM Agreement, and, finally, Article XXIII:1(a) of the GATT 1994.[288] The United States has addressed India's claims in the same order.[289]

7.79. The parties suggest that the Panel follow the same order in its own analysis.[290]

7.80. According to the Appellate Body, "[a]s a general principle, panels are free to structure the order of their analysis as they see fit"; "[a]t the same time, panels must ensure that they proceed on the basis of a properly structured analysis to interpret the substantive provisions at issue."[291] More specifically, as regards the specific provisions invoked by India in this dispute, the Appellate Body has explained that "the national treatment obligations in Article III:4 of the GATT 1994 and the TRIMs Agreement, and the disciplines in Article 3.1(b) of the SCM Agreement, are cumulative", and that there is "nothing in these provisions to indicate that there is an obligatory sequence of analysis to be followed where claims are made under Article III:4 of the GATT 1994 and the TRIMs Agreement, on the one hand, and Article 3.1(b) of the SCM Agreement, on the other hand."[292] Thus, the order of analysis of claims under Article III:4 of the GATT 1994, the TRIMs Agreement, and Article 3 of the SCM Agreement falls "within the panel's margin of discretion".[293]

7.81. In considering how to exercise this discretion, we recall that for India, "the core of [its] claims lie[s] in the *discriminatory treatment* between the imported products and 'like' products of domestic origin"[294], and that, according to India, "[its] claims under the TRIMs Agreement and the SCM Agreement clearly emanate from the violation of Article III:4 of the GATT 1994".[295] In light of this position, and absent "a mandatory sequence of analysis" among these provisions "which, if not followed, would amount to an error of law"[296], we see no reason to depart from the sequence jointly advocated by the parties.[297] We also note that several panels facing similar claims have adopted this sequence.[298]

7.82. We will therefore start by reviewing India's claims under Article III:4 of the GATT 1994, before turning to India's additional, follow-on "discriminatory treatment" claims under Articles 2.1 and 2.2 of the TRIMs Agreement and Articles 3.1(b) and 3.2 of the SCM Agreement.

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[288] See India's first and second written submissions, and its opening and closing statements at the first and second meetings of the Panel.

[289] See the United States' first and second written submissions, and its opening and closing statements at the first and second meetings of the Panel. The United States has not specifically addressed India's claim under Article XXIII:1(a) of the GATT 1994.

[290] More specifically, India "invites the Panel to assess the claims in the following order of analysis for each of the measures at issue: (i) the Panel may first examine India's claims under Article III:4 of the GATT 1994; (ii) the Panel may then rule on India's claims with respect to Article 2.1 of the TRIMs Agreement followed by the claims under Article 2.2 of the TRIMs Agreement; (iii) the Panel may then rule on claims under Article 3.1(b) read with Article 3.2 of the SCM Agreement followed by claims under Article 25 of the SCM Agreement; and (iv) finally, the Panel may rule on claims under Article XXIII:1 of the GATT 1994". India's opening statement at the first meeting of the Panel, para. 16. As regards Article XXIII:1 of the GATT 1994, India specifies that it "has claimed that the measures at issue, individually and/or collectively, nullify or impair the benefits accruing to it under Article XXIII:1(a) of the GATT 1994". India's opening statement at the first meeting of the Panel, para. 15. See also the United States' response to Panel question No. 53.

[291] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126-127.

[292] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.5.

[293] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.8 (footnote omitted, referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126).

[294] India's opening statement at the first meeting of the Panel, para. 11 (emphasis original).

[295] India's opening statement at the first meeting of the Panel, para. 11.

[296] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109.

[297] According to the Appellate Body, "panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member". Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

[298] Several panels facing claims under Article III:4 of the GATT 1994, Article 2 of the TRIMs Agreement, and Article 3 of the SCM Agreement adopted an order of analysis that sequenced these three claims in the aforementioned order. See Panel Reports, *China – Auto Parts*; *Canada – Autos*; and *Brazil – Taxation*.

7.83. Following our analysis of India's claims concerning "discriminatory treatment", we will turn to India's notification claim under Article 25 of the SCM Agreement and its claim of nullification or impairment of benefits under Article XXIII:1(a) of the GATT 1994.

7.3 India's claims under Article III:4 of the GATT 1994

7.3.1 Introduction

7.84. According to India, each measure at issue[299] is inconsistent with the obligations of the United States' under Article III:4 of the GATT 1994 because they accord treatment less favourable to imported products than to like domestic products, i.e. products originating in specific municipalities or States of the United States.[300] According to the United States, India has failed to establish that the measures at issue breach Article III:4 of the GATT 1994.[301] In particular, according to the United States, India has not met its burden of demonstrating that these measures (i) affect the sale, purchase, transportation, distribution or use of products; or (ii) accord less favourable treatment to imported products within the meaning of that provision.[302]

7.85. To establish a violation of Article III:4 of the GATT 1994, the following three elements must be satisfied:

a) that the imported and domestic products at issue are like products;

b) that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and

c) that the imported products are accorded treatment less favourable than that accorded to like domestic products.[303]

7.86. We now turn to analyse each of these elements in respect of each of the measures at issue. As discussed above[304], Measures 1, 2, and 8, and two programs under Measure 10 were amended or repealed following panel establishment. We have concluded that we will make findings and, where appropriate, recommendations, on India's claims with respect to Measures 1, 2 and 8 as amended. In the case of Measure 2, we will also examine the original version as elaborated by the 2016 SGIP Handbook given that some of its aspects may continue to be operative. As regards the two programs under Measure 10 repealed following panel establishment, we have decided not to make any findings or recommendations on the Minnesota solar thermal rebate. We will only make findings on the Minnesota solar energy production incentive program on the installation of solar photovoltaic modules (SEPI), and issue recommendations on this program insofar as it has ongoing effects.

7.3.2 Products at issue and "likeness"

7.87. India argues that each of the measures at issue discriminates between like imported and domestic products. More specifically, according to India, the measures at issue provide for differential treatment based on where the products were manufactured or assembled, or based on the origin of the workforce used in their manufacture. India contends that because the origin of the

[299] India's first written submission, para. 5. See also India's first written submission, paras. 30, 150, 253, 346, 443, 543, 655, 752, 849, 991 and 1099.

[300] India's first written submission, paras. 31, 151, 254, 347, 444, 544, 656, 753, 850, 992 and 1100. In its panel request, India claims that the challenged measures "are inconsistent with the obligations of the U.S. under the … GATT 1994", "[i]n particular, … Article III:4 of the GATT 1994 because the measures provide less favourable treatment to imported products than that accorded to like products … originating in [relevant domestic territories, i.e. municipalities or States]". India's panel request, WT/DS510/2, pp. 2-11.

[301] United States' first written submission, para. 75.

[302] United States' first written submission, para. 75.

[303] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133, referenced in India's first written submission, paras. 33, 153, 256, 349, 446, 546, 658, 755, 852, 994 and 1102; and United States' first written submission, para. 77. See also European Union's third party written submission, para. 18.

[304] See Section 7.1 above.

relevant products is the "sole criterion" for differential treatment under the measures at issue, such products qualify as like products within the meaning of Article III:4 of the GATT 1994.[305]

7.88. The United States has not contested that the relevant domestic and imported products are like products within the meaning of Article III:4, nor does it challenge the legal standard for likeness relied upon by India.

7.89. The Appellate Body has stated that "a determination of 'likeness' under Article III:4 [of the GATT 1994] is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products".[306] Usually, assessing whether products are like requires a careful and holistic analysis of the evidence on the record, taking into account the four *Border Tax Adjustment* criteria.[307] However, several past cases support the proposition that where a measure distinguishes between products solely on the basis of origin, the likeness of the products so distinguished can be presumed.[308] Notably, in *Argentina – Financial Services*, the Appellate Body recognised that various "[p]anels have held that, rather than invariably establishing 'likeness' on the basis of the relevant criteria, a complainant may establish 'likeness' by demonstrating that the measure at issue makes a distinction based exclusively on the origin of the product."[309] As India argues[310], this indicates that where a measure distinguishes between products solely on the basis of origin, a detailed likeness analysis based on the *Border Tax Adjustment* criteria may not be necessary.

7.90. We now examine whether the relevant products under each measure at issue are like within the meaning of Article III:4 of the GATT 1994, and in particular whether, as India argues, each of the measures distinguishes between relevant products solely on the basis of origin.

7.3.2.1 Measure 1: Washington State additional incentive

7.91. As noted[311], the Washington State additional incentive is provided for customer-generated electricity produced using solar inverters, solar modules, stirling converters, or wind blades manufactured in Washington State.

7.92. India has identified the following products as relevant under the Washington State additional incentive: (i) solar modules; (ii) stirling converters; (iii) inverters used in a solar or wind generator; and (iv) blades used in a wind generator.[312] India argues that "the only distinguishing criteria for obtaining the additional/higher incentives is whether or not certain specified components are of Washington-origin."[313] India further argues that "RCW 82.16.120 (4) read with WAC 458-20-273 (501)(b) makes the origin of the specified products as the sole criteria for granting higher incentives upon production of electricity using a renewable energy system."[314]

7.93. The United States has not contested this aspect of India's claim under Article III:4 of the GATT 1994.

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[305] India's first written submission, paras. 35-40, 155-161, 258-264, 351-356, 448-453, 548-553, 660-666, 757-766, 854-862, 996-1001 and 1104-1109 (referring to Panel Reports, *India – Autos*, para. 7.174; *Canada – Wheat Exports and Grain Imports*, para. 6.164; *Argentina – Hides and Leather*, paras. 11.168-11.170; *Canada – Autos*, para. 10.74; and *Turkey – Rice*, para. 7.213-7.216).

[306] Appellate Body Report, *EC – Asbestos*, para. 99.

[307] Appellate Body Report, *EC – Asbestos*, paras. 101-103.

[308] See e.g. Panel Reports, *India – Autos*, para. 7.174; *Canada – Autos*, para. 10.74; and *Turkey – Rice*, paras. 7.214-7.216.

[309] Appellate Body Report, *Argentina – Financial Services*, para. 6.36.

[310] India's first written submission, paras. 35-40, 155-161, 258-264, 351-356, 448-453, 548-553, 660-666, 757-766, 854-862, 996-1001 and 1104-1109 (referring to Panel Reports, *India – Autos*, para. 7.174; *Canada – Wheat Exports and Grain Imports*, para. 6.164; *Argentina – Hides and Leather*, paras. 11.168-11.170; *Canada – Autos*, para. 10.74; and *Turkey – Rice*, para. 7.21).

[311] See para. 2.8 above.

[312] India's first written submission, para. 35.

[313] India's first written submission, para. 36.

[314] India's first written submission, para. 40.

7.94. Section 82.16.120(4) of the Revised Code of Washington (RCW)[315], which establishes the different economic development factors to be applied to the base rate in order to calculate the final incentive rate, refers to the same products as those identified by India.[316]

7.95. Section 458-20-273(601)(a) of the Washington Administrative Code (WAC) defines the products at issue.[317] Additionally, paragraph (b) of Section 458-20-273(601) of the WAC clarifies that "the [D]epartment of [R]evenue considers various factors in determining if a person combining various items into a single package is engaged in a manufacturing activity", and that "[a]ny single one of the … factors is not considered conclusive evidence of a manufacturing activity".[318] The WAC further provides that, following a request from the manufacturer addressed to the Department of Revenue, and a field visit by the Department of Revenue of the manufacturing facilities to view the manufacturing process for the product, the Department of Revenue will approve or disapprove the manufacturer's certification of a product as made in Washington State.[319]

7.96. Accordingly, to qualify for the differential treatment in Section 82.16.120(4) of the RCW, the products must comply with the definitions contained in Section 458-20-273(601)(a) of the WAC, and the manufacturer of the products must obtain a certification of a product qualifying as made in Washington State from the Department of Revenue. Imported products may meet the former but not the latter requirement.

7.97. Thus, we find that, as India has argued, the Washington State additional incentive distinguishes solely on the basis of origin with regard to solar modules, stirling converters, inverters used in a solar or wind generator, and blades used in a wind generator. In light of the above-cited guidance from past cases, and noting the absence of any rebuttal by the United States on this point, we find that the products at issue under Measure 1 are like for the purposes of Article III:4 of the GATT 1994.

7.3.2.2 Measure 2: California Manufacturer Adder

7.98. As noted[320], the California Manufacturer Adder consists of an additional 20% incentive payment for the installation of eligible distributed generation resources "from a California Supplier" (under the 2016 California Self-Generation Incentive Program (SGIP) Handbook) or generation and energy storage equipment "manufactured in California" (under the 2017 SGIP Handbook).

7.99. India has identified the relevant product under the California Manufacturer Adder as the "'eligible equipment' … as set out under the [SGIP] Handbooks".[321] In its responses to our questions, India clarified that the eligible products under the 2016 SGIP Handbook are "eligible distributed generation or [Advanced Energy Storage] AES technologies"[322], whereas the 2017 SGIP Handbook limits eligible products to certain generation equipment and certain storage equipment.[323] India argues that "[t]he text of the measures at issue under the Handbooks that infix the California Manufacturer Adder indicates that the determinant of the challenged additional incentive is based either on the specific eligible equipment having been manufactured in California or on the specified

[315] Revised Code of Washington, Chapter 82.16, revised by Revised Senate Bill 5939 (Exhibit IND-5).
[316] See also Washington Administrative Code, Section 458-20-273 (Exhibit IND-3).
[317] See para. 2.8 above.
[318] These factors are the following: (i) the ingredients are purchased from various suppliers; (ii) the person combining the ingredients attaches his or her own label to the resulting product; (iii) the ingredients are purchased in bulk and broken down to smaller sizes; (iv) the combined product is marketed at a substantially different value from the selling price of the individual components; and (v) the person combining the items does not sell the individual items except within the package. See Washington Administrative Code, Section 458-20-273 (601)(b) (Exhibit IND-3).
[319] Washington Administrative Code, Section 458-20-273 (602) (Exhibit IND-3).
[320] See para. 2.14 above.
[321] India's first written submission, para. 161. See also India's first written submission, paras. 155-156.
[322] India's response to Panel question No. 109, para. 26 (referring to the 2016 SGIP Handbook, para. 3.1 and p. 76 (Exhibit IND-16)).
[323] India's response to Panel question No. 109, para. 27 (referring to the 2017 SGIP Handbook, p. 26 (Exhibit IND-15)).

percentage of total value of the eligible equipment having been manufactured in California by a California Supplier or a California Manufacturer, as the case may be".[324]

7.100. The United States has not contested this aspect of India's claim under Article III:4 of the GATT 1994.

7.101. The 2016 and 2017 SGIP Handbooks define some of the products at issue.[325] As mentioned above[326], both the 2016 and 2017 SGIP Handbooks distinguish between, on the one hand, "eligible distributed generation or AES technologies *from a California Supplier*"[327] and "equipment … *manufactured in California*"[328], respectively, and, on the other hand, relevant distributed generation, and AES technologies and equipment of another origin.

7.102. Under both requirements, i.e. "California Supplier" in the 2016 SGIP Handbook and "manufactured in California" in the 2017 SGIP Handbook, the legislation distinguishes between the place where the products are manufactured. The definition of "California Supplier" under the 2016 SGIP Handbook explicitly requires that the supplier manufacture the relevant products in California, in addition to other requirements concerning the location in California of the owners or policymaking officers' domicile, and the permanent principal office or the manufacturing facility. It further includes references to the California residence of the workers and the need for the company to be licensed in California. In turn, the 2017 SGIP Handbook provides that the "manufactured in California" requirement will be fulfilled "if at least 50% of the value of the capital equipment has been made in a dedicated production line by an approved California Manufacturer".[329] The definition of California Manufacturer under the 2017 SGIP Handbook reiterates the link to the California origin of the equipment by requiring that the manufacturing facility be located in California, and the manufacturer be licensed to conduct business in that state.[330] It is therefore clear, in our view, that imported products could never qualify for the California Manufacturer Adder, either under the 2016 or the 2017 SGIP Handbook.

7.103. Accordingly, we find that, as India has argued, the California Manufacturer Adder distinguishes solely on the basis of origin with regard to the relevant distributed generation technologies. In light of the above-cited guidance from past cases, and noting the absence of any rebuttal by the United States on this point, we find that the products at issue under Measure 2 are like for the purposes of Article III:4 of the GATT 1994.

7.3.2.3 Measure 4: Montana tax incentive

7.104. As explained above[331], the Montana tax incentive for ethanol production provides "tax incentive[s] for the production of ethanol to be blended for ethanol-blended gasoline"[332], provided that production is in Montana and uses Montana agricultural products, including Montana wood or wood products.[333]

7.105. According to India, under the Montana tax incentive, "greater incentives are provided for ethanol which is produced from Montana agricultural products including Montana wood and wood-based products".[334] In India's view, "the tax incentive being provided to ethanol distributors is based solely on their usage of raw material sourced from Montana", and "[t]he incentive is, therefore, contingent on and proportionate to the origin of the raw material".[335] India concludes that because "the distinction between the ethanol produced is limited to their origin of the raw material used [*sic*]

[324] India's first written submission, para. 156.
[325] See para. 2.18 above. We recall that the 2016 SGIP Handbook does not define the term "eligible distributed generation technologies", and the 2017 SGIP Handbook provides a list of equipment covered under the term "generation and energy storage equipment" instead of providing a definition.
[326] See paras. 2.15 - 2.17 above.
[327] 2016 SGIP Handbook, p. 34 (Exhibit IND-16) (emphasis added).
[328] 2017 SGIP Handbook, p. 25 (Exhibit IND-15) (emphasis added).
[329] 2017 SGIP Handbook, p. 26 (Exhibit IND-15).
[330] 2017 SGIP Handbook, p. 102 (Exhibit IND-15).
[331] See para. 2.20 above.
[332] Montana Annotated Code, Section 15-70-502 (Exhibit IND-31).
[333] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).
[334] India's first written submission, para. 351.
[335] India's first written submission, para. 356.

… it will be held to be 'like' to those products of Montana-origin for the purposes of Article III:4 of the GATT 1994".[336]

7.106. The United States has not contested this aspect of India's claim under Article III:4 of the GATT 1994.

7.107. As we understand it, India's position is that there are potentially two sets of products that are like for the purposes of analysing the Montana tax incentive: (i) wood and wood-based products; and (ii) ethanol made from wood or wood-based products.

7.108. Section 15-70-522 of the Montana Annotated Code (MCA) provides for a tax incentive payable to ethanol distributors on "ethanol … produced in Montana from Montana agricultural products, including Montana wood or wood products".[337] The measure does not make provision for a tax incentive on ethanol produced outside of Montana. Similarly, ethanol produced in Montana from non-Montana wood or wood-based products is only eligible for the incentive "when Montana products are not available".[338] The measure does not suggest that there is any difference between Montana and non-Montana-origin ethanol and wood and wood-based products in terms of physical characteristics, consumer tastes and habits, tariff classification, end-uses, or any other criterion. Nor does it suggest that there is any difference between ethanol produced in Montana from Montana-origin wood or wood-based products, on the one hand, and ethanol produced outside of Montana or using non-Montana wood or wood-based products, on the other hand. Moreover, the United States has not argued that any such differences exist.

7.109. Accordingly, we find that, as India has argued, the Montana tax incentive distinguishes solely on the basis of origin with regard to ethanol and wood and wood-based products. In light of the above-cited guidance from past cases, and noting the absence of any rebuttal by the United States on this point, we find that the products at issue under Measure 4 are like for the purposes of Article III:4 of the GATT 1994.

7.3.2.4 Measure 5: Montana tax credit

7.110. As noted above[339], the Montana tax credit for biodiesel blending and storage provides for "special fuel distributors" and "owners or operators of a motor fuel outlet" to receive a "credit against [certain] taxes … for the costs of investments in depreciable property used for storing or blending biodiesel with petroleum diesel for sale".[340] This incentive is only available if the investment for which the credit is claimed is used primarily to blend petroleum diesel with biodiesel made entirely from Montana-produced feedstocks.[341]

7.111. India argues that the availability of the tax credit is "contingent on the use of biodiesel which is produced entirely from Montana-origin feedstock". Thus, in India's view, the measure creates a "distinction between the biodiesel and feedstock used to manufacture it … on the basis of the place of origin".[342]

7.112. The United States does not contest this aspect of India's claim under Article III:4 of the GATT 1994.

7.113. As we understand it, there are potentially two sets of products that, according to India, are like for the purposes of analysing Measure 5: feedstock from which biodiesel is made, and biodiesel itself.[343]

7.114. Section 15-32-703(4)(a) of the Montana Annotated Code (MCA) indicates that the tax incentives at issue are available only "for depreciable property used primarily to blend petroleum

[336] India's first written submission, para. 336.
[337] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).
[338] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).
[339] See para. 2.24 above.
[340] Montana Annotated Code, Section 15-32-703(1) (Exhibit US-11).
[341] Montana Annotated Code, Section 15-32-703(4)(a) (Exhibit US-11).
[342] India's first written submission, paras. 448 and 449.
[343] India's first written submission, para. 469.

diesel with biodiesel made entirely from Montana-produced feedstocks".[344] The measure does not make provision for incentives to be paid in respect of investments used to blend petroleum diesel with biodiesel made partly or wholly from non-Montana-produced feedstocks. However, the measure does not suggest, and the United States has not argued, that there is any difference between Montana-origin and non-Montana origin feedstock as an input into biodiesel. Neither is there any suggestion on the record that biodiesel made from Montana-origin feedstock is in any way different from biodiesel made from non-Montana-origin feedstock.

7.115. Accordingly, we find that, as India has argued, the Montana tax credit distinguishes solely on the basis of origin with regard to feedstock and biodiesel produced using feedstock. In light of the above-cited guidance from past cases, and noting the absence of any rebuttal by the United States on this point, we find that the products at issue under Measure 5 are like for the purposes of Article III:4 of the GATT 1994.

7.3.2.5 Measure 6: Montana tax refund

7.116. As explained above[345], the Montana tax refund provides that "licensed distributors" and "owners and operators of retail motor fuel outlets" may receive a tax refund on the sale of biodiesel "produced entirely from biodiesel ingredients produced in Montana".[346]

7.117. India submits that "the basis on which the biodiesel is differentiated for the purposes of the tax refund is the *place of origin of the raw material*, i.e. biodiesel ingredients".[347] In India's view, because "the only basis of distinction between the biodiesel as well as the ingredients used to manufacture it is on the basis of the place of production of the ingredients, the products, viz. biodiesel and the ingredients used to manufacture it" from Montana, on the one hand, and from outside Montana, on the other hand, are like for the purposes of Article III:4.[348]

7.118. The United States does not contest this aspect of India's claim under Article III:4 of the GATT 1994.

7.119. We recall that Sections 15-70-433(1) and (2) of the Montana Annotated Code (MCA) both specify that the relevant tax incentives are only available "if the biodiesel is produced entirely from biodiesel ingredients produced in Montana".[349] Under Measure 6, no incentive is available for biodiesel produced from ingredients made wholly or partly from ingredients produced outside Montana. The text of Measure 6 does not suggest, and the United States has not argued, that any qualitative difference exists between biodiesel produced from Montana-origin ingredients and biodiesel produced wholly or partly from ingredients originating outside Montana. Nor does the evidence indicate that the ingredients themselves may have different qualities depending on whether they are produced in Montana or somewhere else.

7.120. Accordingly, we find that, as India has argued, the Montana tax refund distinguishes solely on the basis of origin with regard to biodiesel and biodiesel ingredients. In light of the above-cited guidance from past cases, and noting the absence of any rebuttal by the United States on this point, we find that the products at issue under Measure 6 are like for the purposes of Article III:4 of the GATT 1994.

7.3.2.6 Measure 7: Connecticut additional incentive

7.121. As noted above[350], the Connecticut additional incentive makes available "direct financial incentives, in the form of performance-based incentives or expected performance-based buydowns, for the purchase or lease of qualifying residential solar photovoltaic systems" (solar PV systems).[351] Importantly, additional incentives of up to 5% of the ordinarily available incentive may be provided

[344] Montana Annotated Code, Section 15-32-703(4)(a) (Exhibit US-11).
[345] See paras. 2.29 and 2.30 above.
[346] Montana Annotated Code, Sections 15-70-433(1) and 15-70-433(2) (Exhibit IND-37).
[347] India's first written submission, para. 549 (emphasis original).
[348] India's first written submission, para. 533.
[349] Montana Annotated Code, Sections 15-70-433(1) and 15-70-433(2) (Exhibit IND-37).
[350] See para. 2.32 above.
[351] General Statutes of Connecticut, Section 16-245ff(c) (Exhibit IND-124).

for the use of "major system components manufactured or assembled in Connecticut", and another additional incentive of up to 5% of the ordinarily available incentive may be provided "for the use of major system components manufactured or assembled in a distressed municipality … or a targeted investment community".[352]

7.122. India argues that "major system components" "manufactured or assembled in Connecticut and those imported from outside Connecticut (including from the territory of other Members) are 'like' within the meaning of Article III:4 of the GATT".[353] According to India, "in so far as the only basis of distinction between products made in Connecticut and outside the state of Connecticut is their origin, the products should be held to be 'like' for the purposes of Article III:4 of the GATT 1994".[354]

7.123. The United States does not contest this aspect of India's claim under Article III:4 of the GATT 1994.

7.124. We recall that Section 16-245ff(i) of the Connecticut General Statutes provides as follows:

> The Public Utilities Regulatory Authority shall provide an additional incentive of up to five per cent of the then-applicable incentive provided pursuant to this section for the use of major system components manufactured or assembled in Connecticut, and another additional incentive of up to five per cent of the then-applicable incentive provided pursuant to this section for the use of major system components manufactured or assembled in a distressed municipality [within Connecticut]…[355]

7.125. The term "major system component" is not defined in the text of Measure 7. In response to a question from the Panel, India argued that the term "may be understood as key/major components of a [PV] system".[356] The United States has not contested India's definition. We therefore accept that the products at issue under Measure 7 are the key or major components necessary to construct a PV system.

7.126. The text of Section 16-245ff(i) of the Connecticut General Statutes provides that an additional incentive of up to 5% will be made available in respect of PV systems containing major system components manufactured or assembled in Connecticut, whereas the same incentive will not be made available in respect of PV systems that do not contain such major system components. However, the text does not suggest, and the United States has not argued, that there is any qualitative difference between major system components manufactured in Connecticut and those manufactured outside of Connecticut.

7.127. Accordingly, we find that, as India has argued, the Connecticut additional incentive distinguishes between key or major components of PV systems solely on the basis of origin, i.e. whether they are manufactured or assembled in Connecticut. In light of the above-cited guidance from past cases, and noting the absence of any rebuttal by the United States on this point, we find that the products at issue under Measure 7 are like for the purposes of Article III:4 of the GATT 1994.

7.3.2.7 Measure 8: Michigan Equipment Multiplier / Michigan Labour Multiplier

7.128. As explained above[357], the Renewable Energy Standards Program in the State of Michigan (RESPM) requires electric providers to achieve a "renewable energy credit portfolio"[358] by either generating or purchasing electricity produced using renewable energy systems.[359] One renewable energy credit (REC) is credited for each megawatt hour of electricity.[360] However, an additional 1/10

[352] General Statutes of Connecticut, Section 16-245ff(i) (Exhibit IND-124).
[353] India's first written submission, para. 660.
[354] India's first written submission, para. 666.
[355] General Statutes of Connecticut, Section 16-245ff(i) (Exhibit IND-124).
[356] India's response to Panel question No. 38.
[357] See para. 2.40 above.
[358] Michigan Public Act No. 342, Section 28(1) (Exhibit IND-44).
[359] Michigan Public Act No. 342, Section 28(3) (Exhibit IND-44).
[360] Michigan Public Act No. 342, Section 39(1) (Exhibit IND-44).

credit is awarded for every kilowatt hour produced using a renewable energy system that was either (i) constructed using equipment made in Michigan[361] (the Michigan Equipment Multiplier); or (ii) constructed using a workforce composed of residents of Michigan (the Michigan Labour Multiplier).[362]

7.129. India argues that "renewable energy systems constructed using the equipment made in Michigan or using the workforce composed of the Michigan residents … and [renewable energy systems] imported from outside the United States are 'like' within the meaning of Article III:4 of the GATT 1994".[363] More specifically, India submits that "the only distinguishing criteria for obtaining the additional incentives granted through the Michigan Equipment Multiplier is whether or not the equipment used in the 'renewable energy system' or as 'renewable energy system' as the final product [*sic*] are manufactured in Michigan".[364] Similarly, India argues that the "only distinguishing criteria for obtaining the additional incentives granted through the Michigan Labour Multiplier is whether or not the renewable energy system has been constructed using workforce composed of the Michigan-residents [*sic*]", and is therefore "based on the in-state manufacture level".[365] India concludes that "both … multipliers … make a distinction based on origin", and therefore renewable energy systems entitled to receive the additional credits are like renewable energy systems that are not entitled to receive the additional credits for the purposes of Article III:4 of the GATT 1994.[366]

7.130. The United States does not contest this aspect of India's claim under Article III:4 of the GATT 1994.

7.131. Section 39(2)(d) of Michigan Public Act No. 342 provides that an additional 1/10 credit is granted for each megawatt hour of electricity generated from a renewable energy system constructed using equipment made in Michigan.[367] Similarly, Section 39(2)(e) of the same Act provides that an additional 1/10 credit will be awarded for each megawatt hour of electricity from a renewable energy system constructed using a workforce composed of residents of Michigan.[368] These provisions make clear that energy produced from renewable energy systems not constructed using Michigan-made equipment or not constructed by a workforce composed of Michigan residents does not receive an additional 1/10 REC per megawatt hour. Notably, the text of Measure 8 does not suggest, and the United States has not argued, that there is any qualitative difference in renewable energy systems depending on whether they are made from Michigan-sourced equipment or constructed by a workforce composed of Michigan residents.

7.132. Accordingly, we find that, as India has argued, the Michigan Equipment Multiplier and the Michigan Labour Multiplier distinguish between renewable energy systems solely on the basis of origin. In light of the above-cited guidance from past cases, and noting the absence of any rebuttal by the United States on this point, we find that the products at issue under Measure 8 are like for the purposes of Article III:4 of the GATT 1994.

7.3.2.8 Measure 9: Delaware Equipment Bonus / Delaware Workforce Bonus

7.133. As noted above[369], the Delaware Renewable Energy Portfolio Standards Act (REPSA) provides retail electricity suppliers with an additional 10% credit toward meeting the renewable energy portfolio standards for solar or wind energy installations, provided that a minimum of 50% of the cost of renewable energy equipment, inclusive of mounting components, are manufactured in Delaware (the Delaware Equipment Bonus), or that the facility is constructed or installed with a minimum of 75% in-state workforce (the Delaware Workforce Bonus).

7.134. India has identified "renewable energy equipment", including "mounting components" as the products at issue under the Delaware Equipment Bonus.[370] India argues that "[t]he text of the

[361] Michigan Public Act No. 342, Section 39(2)(d) (Exhibit IND-44).
[362] Michigan Public Act No. 342, Section 39(2)(e) (Exhibit IND-44).
[363] India's first written submission, para. 757.
[364] India's first written submission, para. 761.
[365] India's first written submission, para. 761.
[366] India's first written submission, para. 761.
[367] Michigan Public Act No. 342, Section 39(2)(d) (Exhibit IND-44).
[368] Michigan Public Act No. 342, Section 39(2)(e) (Exhibit IND-44).
[369] See para. 2.52 above.
[370] India's first written submission, paras. 854 and 862.

measure in the REPSA indicates that the determinant of the challenged additional incentive is based upon either the percentage of total cost of renewable energy equipment and mounting component that should be manufactured in Delaware or upon the percentage of in-state workforce used in the construction and/ or installation of the facility."[371]

7.135. The United States has not contested this aspect of India's claim under Article III:4 of the GATT 1994.

7.136. We note that the relevant legal instruments support India's argument. Notably, none of the exhibits on the record define the terms "renewable energy equipment" or "mounting components", as used in the Delaware Equipment Bonus and the Delaware Workforce Bonus. We agree with India that "the[se] terms can be understood to mean any solar or wind renewable energy equipment, including its parts used for generating energy which would qualify for meeting renewable energy portfolio standard".[372]

7.137. We also note that Section 356(d) of the Delaware Code provides that an additional 10% credit is granted for solar or wind energy installations sited in Delaware provided that a minimum of 50% of the cost of renewable energy equipment, inclusive of mounting components, are manufactured in Delaware.[373] Similarly, Section 356(e) of the same Code provides that an additional 10% credit is granted for solar or wind energy installations sited in Delaware provided that the facility is constructed or installed with a minimum of 75% workforce from Delaware.[374] These provisions make clear that energy produced from renewable energy equipment not manufactured using Delaware-made equipment, or facilities not constructed by a workforce composed of Delaware residents does not receive an additional 10% credit. Notably, the text of the provision does not suggest, and the United States has not argued, that there is any qualitative difference in renewable equipment or facilities depending either on whether they are made from Delaware-sourced equipment or whether they are constructed by a workforce composed of Delaware residents.

7.138. Accordingly, we find that, as India has argued, the Delaware Equipment Bonus and the Delaware Workforce Bonus distinguish solely on the basis of origin with regard to renewable energy systems and facilities. In light of the above-cited guidance from past cases, and noting the absence of any rebuttal by the United States on this point, we find that the products at issue under Measure 9 are like for the purposes of Article III:4 of the GATT 1994.

7.3.2.9 Measure 10: Minnesota production incentives and rebates

7.139. As noted above[375], we will only examine two of the three programs identified by India under Measure 10, i.e. the Minnesota solar energy production incentive program on the installation of solar photovoltaic (PV) modules (SEPI), and the Minnesota solar photovoltaic (PV) rebate.

7.140. As explained above[376], these two programs grant financial incentives and rebates for the use of solar PV modules made in Minnesota.

7.141. India has identified solar PV modules as the relevant products under these two programs under Measure 10.[377] India argues that "the only basis on which the solar PV modules … manufactured within and outside Minnesota are differentiated is the place of origin".[378]

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[371] India's first written submission, para. 855.
[372] India's first written submission, para. 857.
[373] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 356(d) (Exhibit IND-54). In order to explain how the percentage of Delaware manufactured component is calculated, India submitted the application that must be filed to claim for additional credits.[373] Among the documents to be filed, there are the suppliers' invoices showing Delaware manufactured equipment with the facility identified. In certain cases, the address where the materials were used/installed as well as the quantity of material used, must also be supplied. See Application for Certification, p. 3 (Exhibit IND-127).
[374] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 356(e) (Exhibit IND-54).
[375] See para. 7.85 above.
[376] See para. 2.55 above.
[377] India's first written submission, para. 996.
[378] India's first written submission, para. 996.

7.142. The United States has not contested this aspect of India's claim under Article III:4 of the GATT 1994.

7.143. Under the SEPI, solar PV modules must have received a 'Made in Minnesota' certificate under Section 216C.413 of the 2016 Minnesota Statutes.[379] As noted above[380], to receive this certificate, solar PV modules must meet requirements relating to the location of the manufacturing facility in Minnesota, among others. Thus, imported solar PV modules cannot qualify for the "Made in Minnesota" certificate that gives access to the SEPI.

7.144. Under the Minnesota solar PV rebate, solar PV modules must be manufactured in Minnesota.[381] Section 116C.7791 of the 2016 Minnesota Statutes links the manufacturing process to Minnesota by requiring that the manufacturer of the solar PV modules operate in this State. Consequently, imported solar PV modules cannot qualify for the rebate under this program.

7.145. Accordingly, we find that, as India has argued, the SEPI and the Minnesota solar PV rebate distinguish between solar PV modules solely on the basis of origin. In light of the above-cited guidance from past cases, and noting the absence of any rebuttal by the United States on this point, we find that the products at issue under the SEPI and the Minnesota solar PV rebate under Measure 10 are like for the purposes of Article III:4 of the GATT 1994.

7.3.2.10 Conclusion on likeness

7.146. We find that, in the context of each of the measures at issue, the relevant imported and domestic products are like products within the meaning of Article III:4 of the GATT 1994.

7.3.3 "Laws, regulations and requirements affecting the[] internal sale, offering for sale, purchase, transportation, distribution, or use" of relevant products

7.147. The second element of the legal test under Article III:4 of the GATT 1994 raises two questions: (i) whether the measures are covered by the phrase "laws, regulations and requirements"; and, if so, (ii) whether they "affect the[] internal sale, offering for sale, purchase, transportation, distribution or use" of the products at issue. We examine these two issues in turn.

7.3.3.1 "Laws, regulations and requirements"

7.148. India argues that each of the measures at issue falls within the scope of the phrase "laws, regulations and requirements" in Article III:4 of the GATT 1994.[382] Recalling the statement by the panel in *Japan – Film* that "panels have taken a broad view of when a governmental measure is a law, regulation or requirement"[383], India submits that this phrase should be given a "broad interpretation".[384] India adds that "for a governmental policy or action to fall within the scope of 'laws, regulations and requirements', it need not necessarily have a substantially binding or compulsory nature".[385] Further, India recalls that the panel in *India – Autos* explained that GATT panel reports suggest two distinct situations that would satisfy the term "requirement" in Article III:4: (i) obligations which an enterprise is "legally bound to carry out"; and (ii) those that an enterprise voluntarily accepts to obtain an advantage from the government.[386]

[379] 2016 Minnesota Statutes, Section 216C.411 through 216C.415 (Exhibit IND-66).
[380] See para. 2.58 above.
[381] 2016 Minnesota Statutes, Section 216C.7791 (Exhibit IND-66).
[382] India's first written submission, paras. 42-47, 163-168, 358-365, 455-460, 555-562, 668-672, 768-774, 864-872, and 1003-1010.
[383] Panel Report, *Japan – Film*, para. 10.51.
[384] India's first written submission, paras. 44, 165, 360, 458, 557, 670, 770, 866, and 1005.
[385] India's first written submission, paras. 44, 165, 360, 458, 557, 670, 770, 866, and 1005.
[386] India's first written submission, paras. 45, 166, 361, 459, 558, 671, 771, 867, 1006 and 1114 (referring to Panel Report, *India – Autos*, para. 7.184).

7.149. The United States does not contest either India's articulation of the applicable legal standard or its assertion that the measures at issue constitute "laws, regulations and requirements".[387]

7.150. Leaving aside the original versions of Measures 1 and 8 and the repealed solar thermal rebate program under Measure 10, on which we have decided not to make findings[388], India has identified the following legal instruments in respect of each of the measures at issue:

No.	Name	Relevant legal instruments
1	Washington State additional incentive	- Revised Code of Washington, Renewable Energy System Cost Recovery, RCW 82.16.110 through 82.16.130; and - Washington Administrative Code, Renewable Energy System Cost Recovery, WAC 458-20-273
2	California Manufacturer Adder	- California Public Utilities Code, Sections 379.6; and - Self Generation Incentive Program Handbooks, 2016 and 2017
4	Montana tax incentive	- Montana Annotated Code, Sections 15-70-501 to 15-70-527 - Administrative Rules of Montana, Sections 18.15.701 – 18.15.703 and 18.15.710 – 18.15-712
5	Montana tax credit	- Montana Annotated Code, Section 15-32-703
6	Montana tax refund	- Montana Annotated Code, Section 15-70-433
7	Connecticut additional incentive	- General Statutes of Connecticut, Section 16-245ff - Request for Qualification for Eligible Contractors and Third Party PV System Owners
8	Michigan Equipment Multiplier / Michigan Labour Multiplier	- Michigan Public Act, No. 342
9	Delaware Equipment Multiplier / Delaware Labour Multiplier	- Renewable Energy Portfolio Standards Act, 2005 as incorporated in Delaware Code, Sections 356(d) and (e) 389; and - Rules and Procedure to Implement the Renewable Energy Portfolio Standard
10	Minnesota solar energy production incentive (SEPI)	- Minnesota Statute (2016), Sections 216C.411 through 216C.415
	Minnesota solar photovoltaic (PV) rebate	- Minnesota Statute (2016), Section 116C.7791

7.151. We note that past cases have consistently held that the scope of the phrase "laws, regulations and requirements" in Article III:4 of the GATT 1994 is broad.[390] The panel in *Japan – Film* considered that the phrase "laws, regulations and requirements" "should be interpreted as encompassing a … broad range of government action and action by private parties that may be assimilated to government action".[391] More specifically, the panel in *India – Solar Cells* noted, in the context of Article XX(d) of the GATT 1994, that "dictionary definitions make clear that 'laws' and 'regulations' refer to 'rules'".[392] More recently, the panel in *Brazil – Taxation* confirmed that the term "laws, regulations and requirements" "encompasses a variety of governmental measures, from mandatory rules which apply across the board, to government action that merely creates incentives

[387] There is no mention of this element of the legal standard in either of the two written submissions of the United States or in its opening and closing statements at the first and second meetings of the Panel.

[388] See paras. 7.52 and 7.76 above.

[389] Subchapter III-A in Chapter 1 of Title 26 of the Delaware Code governing the renewable energy portfolio Standards is known as the "Renewable Energy Portfolio Standards Act". See Delaware Code, Title 26, Chapter 1, Subchapter III-A (Exhibit IND-54).

[390] See e.g. Panel Report, *Japan – Film,* para. 10.376.

[391] Panel Report, *Japan – Film*, para. 10.376.

[392] Panel Report, *India – Solar Cells*, paras. 7.307-7.308 (fns omitted). The panel in that case referred to the Appellate Body statement in *Mexico – Taxes on Soft Drinks* that "the terms 'laws or regulations' refer to rules that form part of the domestic legal system of a WTO Member". See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 7.69.

or disincentives for otherwise voluntary action by private persons".[393] Notably, the term "requirement" has repeatedly been found to cover not just "mandatory measures but also [] conditions that an enterprise accepts in order to receive an advantage".[394]

7.152. All the measures identified by India and enumerated in the above table are embodied, wholly or at least partly, in formal legal instruments such as codes, rules, acts and statutes. These instruments clearly qualify as "laws" or "regulations" resulting from "governmental action"[395] and setting out rules with which compliance is necessary to obtain an advantage from a government.

7.153. In respect of Measure 2, India has also identified handbooks that develop and clarify certain rules and procedures set out in the related legislative instruments.[396] We consider that these documents may come within the broad definition of "regulation", understood as "[a] rule or principle governing behavior or practice; esp. such a directive established and maintained by an authority"[397], given that they essentially develop particular aspects of the California Manufacturer Adder as established in legislative acts, codes or statutes. In any case, we are of the view that these instruments qualify at least as "requirements" within the meaning of Article III:4, because they set out the conditions and procedures that need to be followed to benefit from the relevant advantages, and they are issued by public authorities responsible for administering these programs. In this regard, we recall the guidance by the panel in *India – Autos* referenced by India[398] that "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'; [and] (ii) those which an enterprise voluntarily accepts in order to obtain an advantage from the government".[399]

7.154. Thus, we find that each of the measures at issue falls within the scope of the phrase "laws, regulations and requirements" as used in Article III:4 of the GATT 1994.

7.3.3.2 "Affecting the[] internal sale, offering for sale, purchase, transportation, distribution or use" of relevant products

7.155. India submits that each of the measures at issue affects the sale, purchase, transportation, distribution or use of the imported like products because they "adversely modify the conditions of competition" between domestic and imported products by providing "incentives" or "higher incentives" based on domestic input.[400]

7.156. The United States submits that India has not met its burden of proof to show that each of the measures at issue "affect[s] the[] internal sale, offering for sale, purchase, transportation, distribution or use" of the relevant products. According to the United States, India, having alleged that the measures have "incentivizing" effects, was required, but failed, to demonstrate that the measures at issue incentivize the use of domestic over imported products.[401]

7.157. We recall the Appellate Body's statement that the word "affecting" has a broad scope of application, "wider in scope than such terms as 'regulating' or 'governing'".[402] According to the

[393] Panel Reports, *Brazil – Taxation*, para. 7.65 (referring to Panel Report, *China – Publications and Audiovisual Products*, para. 7.1512).

[394] Panel Report, *Canada – Autos*, para. 10.73. See also Panel Report, *India – Autos*, paras. 7.188-7.193.

[395] Panel Report, *Japan – Film*, para. 10.51

[396] 2016 SGIP Handbook (Exhibit IND-16) and 2017 SGIP Handbook (Exhibit IND-15) in the context of Measure 2; and Connecticut Green Bank, Request for Qualification and Program Guidelines, Residential Solar Investment Program (Exhibit IND-42) in respect of Measure 7.

[397] Oxford English Dictionary, definition of "regulation" http://www.oed.com/view/Entry/161427?redirectedFrom=regulation#eid (accessed 12 February 2019).

[398] India's first written submission, paras. 45, 166, 361, 459, 558, 671, 771, 867, 1006 and 1114 (referring to Panel Report, *India – Autos*, para. 7.184).

[399] Panel Report, *India – Autos*, para. 7.184. See also ibid., paras. 7.185-7.186.

[400] India's first written submission, paras. 50, 171, 273, 365, 463, 562, 675, 777, 871, 1010 and 1118.

[401] United States' first written submission, paras. 79 and 84.

[402] Appellate Body Report, *US – FSC (Article 21.5 – EC),* para. 209, quoting Appellate Body Report, *EC – Bananas III*, para. 220. With respect to the broad scope of application of Article III:4, the Appellate Body has recently clarified in a report issued on 13 December 2018 that "while Article III:8(a) precludes the application of the national treatment obligation in Article III to government procurement activities falling within its scope, Article III:8(b) provides a justification for measures that would otherwise be inconsistent with the national

Appellate Body, "[t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application".[403] Past panels have clarified that "the word 'affecting' in Article III:4 of the GATT … cover[s] not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products"[404], as well as "measures which create incentives or disincentives with respect to the sale, offering for sale, purchase, and use of an imported product".[405]

7.158. In this connection, we recall that in *Canada – Autos*, the panel concluded that where a challenged measure confers an advantage on the use of a domestic product but not on the use of a like imported product, it can clearly be characterized as affecting the internal sale or use of those products, because it necessarily has an impact on the conditions of competition:

> [A] measure which provides that an advantage can be obtained by using domestic products but not by using imported products has an impact on the conditions of competition between domestic and imported products and thus affects the "internal sale, … or use" of imported products.[406]

7.159. The same panel emphasized that a measure may affect the sale, purchase, transportation, distribution or use of products independently of its impact "under current circumstances"[407]:

> The idea that a measure which distinguishes between imported and domestic products can be considered to affect the internal sale or use of imported products only if such a measure is shown to have an impact under current circumstances on decisions of private firms with respect to the sourcing of products is difficult to reconcile with the concept of the "no less favourable treatment" obligation in Article III:4 as an obligation addressed to governments to ensure effective equality of competitive opportunities between domestic and imported products, and with the principle that a showing of trade effects is not necessary to establish a violation of this obligation.[408]

7.160. The panel in *Canada – Autos* thus rejected the respondent's argument that the measure at issue did not affect the sale, purchase, transportation, distribution or use of the relevant products because the domestic content requirements it established were very "low".[409] To the contrary, the panel found it sufficient to observe that the measure had "an effect on the competitive relationship between imported and domestic products by conferring an advantage upon the use of domestic products while denying that advantage if imported products are used".[410] On this basis, the panel held that the case before it "clearly involve[d] formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances"[411], and concluded that there was no "need to examine how important the [measure at issue was] under present circumstances as a factor influencing the decisions of" motor vehicle manufacturers whether to use domestic or imported parts in order to conclude that the measures affected the sale, purchase, transportation, distribution or use of the relevant products.[412]

7.161. In light of the above, we consider that, in assessing whether a challenged measure affects the sale, purchase, transportation, distribution or use of goods in a market, a panel should examine

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treatment obligation in Article III". In the present dispute, the United States has not submitted arguments with respect to Article III:8 of the GATT 1994 nor raised any defence under the general exceptions of Article XX of the GATT 1994. See Appellate Body Reports, *Brazil – Taxation*, para. 5.84.

[403] Appellate Body Report, *EC – Bananas III*, para. 220.

[404] Panel Reports, *Canada – Autos*, para. 10.80 and *China – Auto Parts*, para. 7.251. This line of reasoning dates back to the GATT era: see GATT Panel Report, *Italy – Agricultural Machinery*, para. 12.

[405] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1450 (referring to Panel Reports, *EC – Bananas III*, para. 7.175; *India – Autos*, paras. 7.196-7.197; and *Canada – Wheat Exports and Grain Imports*, para. 6.267).

[406] Panel Report, *Canada – Autos*, para. 10.82. See also ibid., para. 10.83.

[407] Panel Report, *Canada – Autos*, para. 10.84. See also ibid., para. 10.83.

[408] Panel Report, *Canada – Autos*, para. 10.84. See also ibid., para. 10.83.

[409] Panel Report, *Canada – Autos*, para. 10.83.

[410] Panel Report, *Canada – Autos*, para. 10.83.

[411] Panel Report, *Canada – Autos*, para. 10.84.

[412] Panel Report, *Canada – Autos*, para. 10.83.

whether such measure has an impact on the conditions of competition between domestic and imported like products, but need not examine whether or the extent to which the measure has, under current circumstances, influenced purchasing decisions on the market. Moreover, we consider that positive evidence that a measure may have had only minimal impact on the purchasing decisions of private firms will not be sufficient to rebut a *prima facie* showing that a measure affects the competitive relationship between imported and domestic products because, for example, it confers an advantage upon the use of domestic products while denying that advantage if imported products are used.

7.162. Bearing these observations in mind, we now turn to examine whether each of the measures at issue affects the sale, purchase, transportation, distribution or use of relevant products.

7.3.3.2.1 Measure 1: Washington State additional incentive

7.163. India argues that the Washington State additional incentive under the Washington Renewable Energy Cost Recovery Incentive Payment Program (RECIP) "provide[s] higher incentives (i.e. an advantage) based on domestically procured specified components".[413] On this basis, India concludes that the measure at issue "adversely modif[ies] the conditions of competition between domestic and imported 'like products' and therefore 'affect[s]'" those products.[414]

7.164. The United States responds that "India has provided *no* evidence that substantiates its assertion that 'the measures at issue' create a demand for equipment [manufactured in Washington State] and insulate them from competing 'like products' outside of Washington".[415] In the United States' view, India also has not demonstrated that the Washington State additional incentive modifies the conditions of competition "in Washington's market for renewable energy products 'to the determinant [*sic*] of imported products.'"[416] In particular, the United States argues that the figures relied upon by India that show a growth in the number of solar photovoltaic (PV) systems installed in Washington State between 2005 – when RECIP began – and 2015[417] do not support its assertion that the Washington State additional incentive has induced the wide-scale adoption of Washington-made renewable energy products in Washington State. The United States argues that the figure submitted by India does not indicate the percentage of installed systems – if any – containing components manufactured in Washington State.[418] Absent this information, the United States considers that India has failed to demonstrate that the Washington State additional incentive "ha[s] incentivized or 'affected' the 'use' of Washington-made solar PV systems or components in particular".[419] The United States adds that, out of the approximately USD 17 million in cost recovery incentive payments through 2015 funded by Washington State according to India, nothing indicates the proportion thereof associated with the use of Washington-made renewable energy equipment or components.[420] Finally, according to the United States, "[b]ecause *incentivization* is the vector by which India claims"[421] that the Washington State additional incentive affects the use of products, India "has necessarily failed to establish that the measure[] 'affect'[s] the 'use' of products with the meaning of" Article III:4.[422]

7.165. As explained above[423], the Washington State additional incentive is provided for customer-generated electricity produced using solar inverters, solar modules, stirling converters, or wind blades manufactured in Washington State. The measure does not prohibit the use of non-local, including imported solar inverters, solar modules, stirling converters, and wind blades. However, in such cases, no additional incentives based on the highest economic development factors on top of the base incentive rates are available.

7.166. In our view, India's demonstration that the Washington State additional incentive accords an advantage on the use of local products (i.e. solar inverters, solar modules, stirling converters, or

[413] India's first written submission, para. 50.
[414] India's first written submission, para. 50.
[415] United States' first written submission, para. 85 (emphasis original).
[416] United States' first written submission, para. 85.
[417] India's first written submission, para. 24, Figure 2.
[418] United States' first written submission, para. 87.
[419] United States' first written submission, para. 87.
[420] United States' first written submission, para. 87.
[421] United States' first written submission, para. 88 (emphasis original).
[422] United States' first written submission, para. 88.
[423] See para. 2.8 above.

wind blades manufactured in Washington State) that is not available for the use of relevant like non-local products, including imported products, is sufficient to make a *prima facie* case that the Washington State additional incentive affects the sale, purchase, transportation, distribution or use of the relevant products.

7.167. With respect to the United States' argument that the figures provided by India do not support its assertion, we agree with the United States that nothing in the relevant graph shows that the exponential growth of solar PV systems in Washington State between 2005 and 2015 is due, or somehow related, to the provision of the Washington State additional incentive. As pointed out by the United States, the graph in question does not contain information on the percentage of systems containing components manufactured in Washington State, or the type or percentage of components made in Washington State.

7.168. Further, the fact that, as of 23 September 2015, USD 17,023,303 from the Washington State budget had been spent on investment cost recovery incentive payments for electricity generated through certified renewable systems does not shed any light on the relationship, if any, between this amount and the Washington State additional incentive. There is no information on the record explaining what percentage of these incentive payments corresponds to customer-generated electricity produced using solar inverters, solar modules, stirling converters, or wind blades manufactured in of Washington State. Therefore, we are unpersuaded by India's assertions in this respect.

7.169. Nevertheless, we do not consider that these factual arguments by the United States are capable of rebutting India's *prima facie* showing that the measure affects the sale, purchase, transportation, distribution or use of the relevant products. This is because, as explained above, the relevant question at this point of our analysis is whether the measure has an impact on the conditions of competition between domestic and imported like products, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms "under current circumstances". In our view, the Washington State additional incentive "involves formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances".[424] Thus, in assessing whether the measure affects the sale, purchase, transportation, distribution or use of the relevant products, the question whether any person or enterprise has actually decided to take up that advantage is, in our view, beside the point.

7.170. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Washington State additional incentive "affect[s] the internal sale, offering for sale, purchase, transportation, distribution or use" of products within the meaning of Article III:4 of the GATT 1994.

7.3.3.2.2 Measure 2: California Manufacturer Adder

7.171. India argues that the California Manufacturer Adder under the California Self-Generation Incentive Program (SGIP) "provide[s] incentives (i.e., an advantage) based on whether the eligible equipment satisfy the requirements of the [program] i.e. whether they are manufactured in California or meet the in-state manufacturing level".[425] On this basis, India concludes that Measure 2 "adversely modif[ies] the conditions of competition between the domestic and imported 'like products' and therefore 'affect[s]'" those products.[426]

7.172. The United States responds that "India has provided *no* evidence that substantiates its assertion that the SGIP Adder operates to 'induce[]' buyers to 'purchase specified products of California-origin.'"[427] Moreover, according to the United States, India has also failed to demonstrate that the California Manufacturer Adder modifies the conditions of competition "in the market for renewable energy equipment in California 'to the determinant [*sic*] of imported products'."[428] The United States points out that India has not indicated the number of individuals who have been

[424] Panel Report, *Canada – Autos*, para. 10.84.
[425] India's first written submission, para. 171.
[426] India's first written submission, para. 171.
[427] United States' first written submission, para. 90 (referring to India's first written submission, para. 176) (emphasis original).
[428] United States' first written submission, para. 90.

granted incentives under this program.[429] In the United States' view, "[b]ecause *incentivization* is the vector by which India claims"[430] that the California Manufacturer Adder affects the use of products, India "has necessarily failed to establish that the SGIP Adder 'affect[s]' the 'use' of products with the meaning of" Article III:4.[431]

7.173. As explained above[432], the California Manufacturer Adder consists of an additional 20% incentive payment for the installation of eligible distributed generation resources "from a California Supplier" (under the 2016 SGIP Handbook) or generation and energy storage equipment "manufactured in California" (under the 2017 SGIP Handbook). We further noted that imported products cannot receive this additional incentive because they are not sourced from a California Supplier or manufactured in California. Although Measure 2 does not prohibit the installation of imported eligible distributed generation resources, in such cases, the additional 20% incentive payment provided under the California Manufacturer Adder is not available.

7.174. In our view, India's demonstration that the California Manufacturer Adder accords an advantage on the use of local products (i.e. eligible distributed generation resources under the 2016 SGIP Handbook, and generation and energy storage equipment under the 2017 SGIP Handbook) that is not available for the use of non-local products, including imported products is sufficient to make a *prima facie* case that the California Manufacturer Adder affects the sale, purchase, transportation, distribution or use of the relevant products.

7.175. We do not agree with the United States' argument that India should have demonstrated that the California Manufacturer Adder has had the effect of "inducing" buyers to "purchase" the eligible products of California-origin. As mentioned above[433], we are of the view that India is not required to show that the measure at issue in fact has or had an impact on the relevant buyers, as suggested by the United States. Neither is India required under Article III:4 of the GATT 1994 to indicate the number of those who have been granted incentives under this program. As explained above, the relevant question at this point of our analysis is whether the measure has an impact on the conditions of competition between domestic and imported like products, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms "under current circumstances". We consider that for India to make a *prima facie* case it suffices to show that the California Manufacturer Adder confers an advantage on the use of local products that it does not confer on the use of imported products.

7.176. For these reasons, we conclude that India has made a *prima facie* case, and the United States has not rebutted, that the California Manufacturer Adder "affect[s] the internal sale, offering for sale, purchase, transportation, distribution or use" of products within the meaning of Article III:4 of the GATT 1994.

7.3.3.2.3 Measure 4: Montana tax incentive

7.177. According to India, the Montana tax incentive "provide[s] tax incentives (i.e. an advantage) based on the in-state manufacture level of ethanol, i.e. the higher the content of Montana agricultural products in the ethanol so produced, the higher is the tax incentive".[434] On this basis, India concludes that the measure at issue "adversely modif[ies] the conditions of competition between the domestic and imported 'like products' and therefore 'affect[s]'" those products.[435]

7.178. The United States responds that "Montana Department of Transportation records indicate that *no* entity has availed [itself] of [the measure] since 1995".[436] According to the United States, this "contradicts India's assertion that [the measure] ha[s] incentivized the use of products of Montana-origin". Further, in the United States' view, because incentivization "is the vector by which

[429] United States' first written submission, para. 90.
[430] United States' first written submission, para. 92 (emphasis original).
[431] United States' first written submission, para. 92.
[432] See para. 2.14 above.
[433] See para. 7.169 above.
[434] India's first written submission, para. 365.
[435] India's first written submission, para. 365.
[436] United States' first written submission, paras. 15 and 99 (emphasis original).

India claims" that the measure at issue affects products, India has "necessarily failed to establish that [the measure] has 'affect[ed]' the 'use' of products within the meaning of" Article III:4.[437]

7.179. As explained above[438], the Montana tax incentive for ethanol production makes available tax incentives for ethanol production from Montana-origin ingredients. Although Measure 4 does not prohibit ethanol production from ingredients sourced outside Montana, such ethanol is not eligible to receive the tax incentive.[439]

7.180. In our view, India's demonstration that the Montana tax incentive confers an advantage on the use of domestic products (i.e. Montana-origin ingredients) that is not available for the use of imported products, is sufficient to make a *prima facie* case that the Montana tax incentive affects the sale, purchase, transportation, distribution or use of the relevant products.

7.181. We are cognizant that ethanol made from non-Montana ingredients may be eligible to receive the tax incentive if Montana ingredients are "not available".[440] We do not, however, consider that this exception undermines or contradicts India's submission that, by conferring a benefit on the use of local products – where such are available in the market – that is not available for the use of imported products, the measure at issue has an impact on the conditions of competition and therefore affects the sale, purchase, transportation, distribution or use of the products within the meaning of Article III:4. We note, moreover, that the United States has not suggested that this exception would in itself have any bearing on the question whether the measure affects the sale, purchase, transportation, distribution or use of the relevant products.

7.182. Turning to the United States' argument that Montana Department of Transportation records show that no entity has claimed an incentive under the measure at issue since 1995, we note that India has not contested this assertion. Moreover, the Montana Department of Transportation Records file submitted by the United States in support of its position does appear to show payments only between 1992 and 1995, although it is not entirely clear to us whether the information reflected in this exhibit is comprehensive.[441]

7.183. However, even if the United States' argument were factually correct, we do not consider that it would be capable of rebutting India's *prima facie* showing that the measure affects the sale, purchase, transportation, distribution or use of the relevant products. This is because, as explained above, the relevant question at this point of our analysis is whether the measure has an impact on the conditions of competition between domestic and imported like products, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms "under current circumstances". In our view, the Montana tax incentive "involves formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances".[442] Thus, in assessing whether the measure affects the sale, purchase, transportation, distribution or use of the relevant products, the question whether any person or enterprise has actually decided to take up that advantage is, in our view, beside the point.

7.184. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Montana tax incentive "affect[s] the internal sale, offering for sale, purchase, transportation, distribution or use" of products'' within the meaning of Article III:4 of the GATT 1994.

[437] United States' first written submission, para. 99.
[438] See para. 2.20 above.
[439] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).
[440] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).
[441] Montana Department of Transportation Records file (Exhibit US-10). Our uncertainty is caused by the heading of the document, which refers to "Payments to Alcotech, Ringling, MT". It is not clear whether the document relates only to these recipients, and if so whether there were or may be other recipients that received payments after 1995.
[442] Panel Report, *Canada – Autos*, para. 10.84.

7.3.3.2.4 Measure 5: Montana tax credit

7.185. India argues that the Montana tax credit for biodiesel blending storage provides an advantage "based on the use of Montana-origin feedstock for manufacturing biodiesel".[443] More specifically, India submits that the Montana tax credit reduces the investment costs of eligible taxpayers, and therefore "alters the conditions of competition in favour of Montana-origin feedstock as well as biodiesel produced from Montana-origin feedstock".[444] India concludes that the measure therefore "adversely modif[ies] the condition[s] of competition between the domestic and imported 'like products' and therefore 'affect' the internal sale, offering for sale, purchase and/or use of the imported 'like products'".[445]

7.186. The United States responds that "Montana Department of Transportation Records indicate that *no* taxpayer has sought to claim the Biodiesel Tax Credit since 2011".[446] According to the United States, this "contradicts India's assertion that [the measure] ha[s] incentivized the use of products of Montana-origin".[447] Further, in the United States' view, because incentivization "is the vector by which India claims" that the measure at issue affects products, India has "necessarily failed to establish that [the measure] has 'affect[ed]' the 'use' of products within the meaning of" Article III:4.[448]

7.187. As explained above[449], the Montana tax credit makes available a "credit against [certain] taxes … for the costs of investments in depreciable property used for storing or blending biodiesel with petroleum diesel for sale".[450] Such credits are, however, only available if the investment in respect of which the credit is claimed is "used primarily to blend petroleum diesel with biodiesel made entirely from Montana-produced feedstocks".[451] Tax-payers who blend petroleum diesel with biodiesel made entirely from Montana-produced feedstocks are entitled to the credit, whereas tax-payers who blend petroleum diesel with biodiesel made wholly or partly from feedstocks originating outside Montana are not eligible.

7.188. In our view, India's demonstration that the Montana tax credit confers an advantage on the sale, purchase, transportation, distribution or use of domestic products (i.e. Montana-origin feedstock and biodiesel made therefrom) that is not available for use of imported products is sufficient to make a *prima facie* case that the measure affects the sale, purchase, transportation, distribution or use of the relevant products.

7.189. We note that India has not contested the United States' arguments that Montana Department of Transportation Records indicate that no taxpayer has claimed the Montana tax credit since 2011. Moreover, the memorandum from the Montana Department of Revenue dated 16 April 2018, which the United States submitted in support of its position, does appear to show that no credits were paid between 2012 and 2016.[452] No data has been provided for 2017 and 2018.

7.190. However, even if the United States' argument was correct, we do not consider that it would be capable of rebutting India's *prima facie* showing that the measure affects the sale, purchase, transportation, distribution or use of the relevant products. This is because, as explained above, the relevant question at this point of our analysis is whether the measure has an impact on the conditions of competition between domestic and imported like products, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms "under current circumstances". In our view, the Montana tax credit, "involves formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances".[453] Thus, in assessing whether the measure affects the sale, purchase,

[443] India's first written submission, para. 463.
[444] India's first written submission, para. 463.
[445] India's first written submission, para. 463.
[446] United States' first written submission, paras. 18 and 101 (emphasis original).
[447] United States' first written submission, para. 101.
[448] United States' first written submission, para. 101.
[449] See para. 2.24 above.
[450] Montana Annotated Code, Section 15-32-703(1) (Exhibit US-11).
[451] Montana Annotated Code, Section 15-32-703(4)(a) (Exhibit US-11).
[452] We note that the document does not provide data for 2017 and 2018, and thus we do not know whether payments were made in those years.
[453] Panel Report, *Canada – Autos*, para. 10.84.

transportation, distribution or use of the relevant products, the question whether any person or enterprise has actually decided to take up that advantage is, in our view, beside the point.

7.191. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Montana tax credit "affect[s] the internal sale, offering for sale, purchase, transportation, distribution or use" of products'' within the meaning of Article III:4 of the GATT 1994.

7.3.3.2.5 Measure 6: Montana tax refund

7.192. India submits that the Montana tax refund "provide[s] tax refund[] incentives (i.e. an advantage) based on the condition that biodiesel must be produced from ingredients originating in Montana". According to India, Measure 6 thus "adversely modif[ies] the conditions of competition between the domestic and imported 'like products' and therefore 'affects' the internal sale, offering for sale, purchase and/or use of the imported 'like products'".[454]

7.193. The United States responds that "Montana Department of Transportation records indicate that *no* taxpayer has *ever* applied for (much less received) the Biodiesel Refund".[455] According to the United States, this "rebuts India's assertion that that the Biodiesel Refund has created a preference (i.e. 'incentivized') for biodiesel manufactured from Montana products".[456] In the United States' view, because incentivization "is the vector by which India claims" that Measure 6 affects products, India has "necessarily failed to establish that [the measure] has 'affect[ed]' the 'use' of products within the meaning of" Article III:4.[457]

7.194. As explained above[458], the Montana tax refund provides that "licensed distributors" are entitled to a refund of two cents per gallon on biodiesel "produced entirely from biodiesel ingredients produced in Montana".[459] Additionally, the Montana tax refund provides for owners and operators of retail motor fuel outlets to receive a tax refund equal to one cent "on biodiesel on which the special fuel tax has been paid and that is purchased from a licensed distributor if the biodiesel is produced entirely from biodiesel ingredients produced in Montana".[460]

7.195. In our view, India's demonstration that the Montana tax refund makes an advantage available for the use of local products (i.e. ingredients of biodiesel and biodiesel made with such ingredients), whereas the same advantage is not available when imported or other non-local products are used, is sufficient to make a *prima facie* case that the Montana tax refund affects the sale, purchase, transportation, distribution or use of the relevant products.

7.196. We note that India has not contested the United States' argument that Montana Department of Transportation Records indicate that no taxpayer has ever claimed the tax refund for biodiesel. Moreover, we note that the Montana Department of Transportation's Report on Dyed Fuel Enforcement, dated 2016, which the United States submitted in support of its position, does indeed state that "[t]he department has never had any person apply for" the tax refund for biodiesel.[461] This indicates that, at least until 2016 (the year in which the report was produced), no person had taken advantage of the incentives made available by Measure 6.

7.197. Importantly, however, even if the United States' argument were factually correct, we do not consider that it would be capable of rebutting India's *prima facie* case that the measure affects the sale, purchase, transportation, distribution or use of the relevant products. This is because, as explained above, the relevant question at this point of our analysis is whether the measure has an impact on the conditions of competition between domestic and imported like products, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms "under current circumstances". In our view, the Montana tax refund "involves formally different treatment

[454] India's first written submission, para. 562.
[455] United States' first written submission, paras. 20 and 103 (emphasis original).
[456] United States' first written submission, para. 103 (fn omitted).
[457] United States' first written submission, para. 103.
[458] See paras. 2.29 and 2.30 above.
[459] Montana Annotated Code, Section 15-70-433(1) (Exhibit IND-37).
[460] Montana Annotated Code, Section 15-70-433(2) (Exhibit IND-37).
[461] Montana Department of Transportation, Report on Dyed Fuel Enforcement Submitted to the Revenue and Transportation Interim Committee (2016), p. 4 (Exhibit US-13).

of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances".[462] Thus, in assessing whether the measure affects the sale, purchase, transportation, distribution or use of the relevant products, the question whether any person or enterprise has actually decided to take up that advantage is, in our view, beside the point.

7.198. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Montana tax refund "affect[s] the internal sale, offering for sale, purchase, transportation, distribution or use" of products'' within the meaning of Article III:4 of the GATT 1994.

7.3.3.2.6 Measure 7: Connecticut additional incentive

7.199. India submits that Measure 7, which is part of the broader Connecticut Residential Solar Investment Program (CRSIP), "provide[s] additional incentives (i.e. an advantage) if the major system components of a solar photovoltaic (PV) system are manufactured or assembled in [Connecticut]". According to India, it follows that Measure 7 "clearly adversely modif[ies] the conditions of competition … between domestic and imported like products and therefore 'affect[s]' the internal sale, offering for sale, purchase, and/or use of the imported like products".[463]

7.200. The United States responds that "India has provided no evidence to substantiate its suggestion that the [measure at issue] has played a 'decisive' role in inducing consumers to 'purchase' or 'use' renewable energy components manufactured in Connecticut".[464] According to the United States, the evidence submitted by India to establish that payments have been made under Measure 7 do "not support India's assertions"[465] for two reasons.

7.201. First, according to the United States, the figures cited by India do not make clear what proportion of the PV systems that received incentives were manufactured in or contained components manufactured in Connecticut.[466] In this connection, the United States argues that India's figures relate to funds disbursed by the Green Bank, whereas in fact "the Green Bank does *not* have legal authority to [grant the challenged additional incentives] under [the] applicable Connecticut Statute".[467] Thus, in the United States' view, none of the grants recorded in the evidence submitted by India could have been "linked to the purchase or use of Connecticut-manufactured solar PV systems or components".[468]

7.202. Additionally, the United States argues that although Measure 7 gives the Connecticut Public Utilities Regulatory Authority (PURA) the authority to grant an additional incentive of up to 5% for solar PV systems or components manufactured in Connecticut, it does not *require* PURA to do so.[469] The United States notes that the relevant provision of the measure at issue states that PURA "shall provide an additional incentive of *up to five per cent* of the then-applicable incentive"[470], and submits that the phrase "up to" indicates that PURA "has the discretion to grant *zero* additional incentive".[471] In the United States' view, "if a challenged measure provides discretion to administering authorities to act in a WTO-consistent manner, then the legislation cannot, 'as such', violate the Member's WTO obligations".[472] According to the United States, however, India has not shown that the measure mandates the disbursement of additional incentives.[473] In particular, the United States submits that India has not adduced any evidence demonstrating that "PURA has issued rules, regulations, or guidelines … much less *ever* made the incentive available to Connecticut homeowners pursuant to its discretionary authority".[474] Accordingly, in the United States' view, "India has failed to

[462] Panel Report, *Canada – Autos*, para. 10.84.
[463] India's first written submission, para. 675.
[464] United States' first written submission, para. 105.
[465] United States' first written submission, para. 105.
[466] United States' first written submission, para. 106.
[467] United States' first written submission, para. 107.
[468] United States' first written submission, para. 108.
[469] United States' first written submission, para. 110.
[470] United States' first written submission, para. 110 (emphasis original).
[471] United States' first written submission, para. 110.
[472] United States' response to Panel question No. 112, para. 3.
[473] United States' response to Panel question No. 112, para. 3.
[474] United States' first written submission, para. 111 (emphasis original).

demonstrate that the [measure at issue] is (or has *ever* been) legally capable of 'affecting' the 'purchase' or 'use' of products within the meaning of Article III:4" of the GATT 1994.[475]

7.203. As explained above[476], the CRSIP makes available two kinds of financial incentives: performance-based incentives (PBI), which are available to homeowners who acquire a solar PV system under a third-party financing structure (i.e. by way of a lease or a power purchase agreement), and expected performance-based buydowns (EPBB), which are available to homeowners who purchase a solar PV system from an Eligible Contractor.[477] As a general matter, these incentives are paid at rates determined and published by the Connecticut Green Bank.[478] Under the CRSIP, PURA may make available additional incentives of up to 5% of the ordinarily available incentive[479] for the use of "major system components manufactured or assembled in Connecticut", and another additional incentive of up to 5% of the ordinarily available incentive may be made available "for the use of major system components manufactured or assembled in a distressed municipality … or a targeted investment community".[480] Thus, Measure 7 provides additional incentives where PV systems contain "major system components" manufactured or assembled locally.

7.204. In our view, India's demonstration that the Connecticut additional incentive provides an advantage for the use of local products but not for the use of imported or other non-local products is sufficient to make a *prima facie* case that the measure affects the sale, purchase, transportation, distribution or use of the relevant products.

7.205. As noted, the United States has attempted to rebut India's case with two arguments. First, the United States argues that the measure allows but does not *mandate* the provision of any additional incentives. This is so because, according to the United States, the relevant provision of the CRSIP provides that PURA shall provide additional incentives of "up to" 5%, and the use of the term "up to" implies that PURA may decide to pay an additional incentive of 0%. Second, the United States argues that the data submitted by India does not show that any additional incentive payments have in fact been made.

7.206. We agree with the United States that, if the measure at issue simply granted PURA discretionary authority to make additional incentives available for the use of local content, this may raise a question about whether the text of the measure would, without more, be sufficient to establish that the measure affects the sale, purchase, transportation, distribution or use of products within the meaning of Article III:4. In our view, however, we are not confronted with such a situation in the present case.

7.207. To recall, Section 16-245ff(i) of the General Statutes of Connecticut provides that PURA "shall provide an additional incentive of *up to* five per cent of the then-applicable incentive …".[481] As noted, the United States submits that the use of the phrase "up to" indicates that PURA could set the additional incentive rate at 0%. We find this argument difficult to accept. The term "up to" means "as high or as far as".[482] It does not relate to the base or starting point from which a thing (such as the rate of a payment) begins to ascend "up to" a certain higher point. Thus, as we understand it, the use of the term "up to" in Section 16-245ff(i) simply means that PURA may set additional incentives as high as 5%, but no higher. It does not shed light on whether PURA could set the incentive rate at 0%, or whether PURA is required or only permitted to disburse the additional incentive.

7.208. Moreover, we find the United States' position difficult to reconcile with the statute's use of the term "shall". As past panels have noted, the term "shall" "denotes a requirement that is

[475] United States' first written submission, para. 111 (emphasis original).
[476] See paras. 2.32 - 2.35 above.
[477] General Statutes of Connecticut, Section 16-245ff(c) (Exhibit IND-124).
[478] General Statutes of Connecticut, Section 16-245ff(f) (Exhibit IND-124).
[479] General Statutes of Connecticut, Section 16-245ff(i) (Exhibit IND-124).
[480] General Statutes of Connecticut, Section 16-245ff(i) (Exhibit IND-124).
[481] General Statutes of Connecticut, Section 16-245ff(i) (Exhibit IND-124) (emphasis added).
[482] Oxford Dictionaries Online, definition of "up to" http://www.oed.com/view/Entry/219798?rskey=volPsV&result=1&isAdvanced=false#eid16164799 (accessed 10 April 2019).

obligatory in nature and that goes beyond mere encouragement".[483] This is consistent with the ordinary meaning of the term as reflected in the *Oxford English Dictionary*, which defines the word "shall" as relating, *inter alia*, to a "command".[484] We consider that Section 16-245ff(i) *commands*, *requires*, or *obligates* PURA to make additional incentives available. In this sense, it does not simply allow or enable PURA to disburse additional incentives, but requires it to make such additional incentives available. Moreover, in our view, such a command would not be fulfilled if PURA were to set the additional incentive at 0%. To set the rate at 0% would, in effect, be not to grant an additional incentive at all, and thus not to conform to the obligation imposed by the plain language of Section 16-245ff(i).

7.209. Accordingly, we do not consider that the ordinary meaning of the text supports the United States' view that, under the CRSIP, PURA may set an additional incentive of 0%, and that India has therefore failed to establish that the measure is legally capable of affecting the purchase or use of products within the meaning of Article III:4. To the contrary, as we read it, the text of Section 16-245ff(i) *requires* PURA to set a level of additional incentives no higher than 5% of the applicable base rate, but more than 0%. This is so because a rate of 0% would mean that, in effect, *no* incentive is made available. Setting a rate of 0% would therefore be contrary to the plain words of the relevant provision. Because the provision requires a level of additional incentives to be set, we do not consider that the so-called mandatory/discretionary principle raised by the United States[485] is implicated in our analysis of Measure 7.

7.210. This brings us to the United States' second argument, namely, that the data submitted by India does not show that additional incentive payments have been made. We note, however, that India did not adduce these data in the specific context of its claim that Measure 7 affects the sale, purchase, transportation, distribution or use of the relevant products within the meaning of Article III:4, but rather in its more general description of this measure. Accordingly, we do not consider that India intended to rely on this evidence as an essential element of its argument that Measure 7 affects the sale, purchase, transportation, distribution or use of the relevant products. Nor do we think that India needed to do so. As we have explained, the relevant question at this point of our analysis is whether the measure has an impact on the conditions of competition, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms "under current circumstances".

7.211. Accordingly, even if the United States' argument were correct and it were accepted that the evidence submitted by India does not show that additional incentives have been paid, this would, in our view, be insufficient to rebut India's *prima facie* case based on the text of Measure 7. This is because, as explained above, the relevant question at this point of our analysis is whether the measure has an impact on the conditions of competition between domestic and imported like products, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms "under current circumstances". In our view, the Connecticut additional incentive "involves formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances".[486] Thus, in assessing whether Measure 7 affects the sale, purchase, transportation, distribution or use of the relevant products, the question whether any person or enterprise has actually decided to take up that advantage is, in our view, beside the point.

7.212. This logic also leads us to conclude that we need not determine, for the purposes of resolving this claim, whether the Green Bank is authorized to make additional incentive payments, as India argues. What matters for the purposes of the present claim is the existence of a measure that accords, on its face, formally different treatment to imported and domestic products[487], and thus impacts the conditions of competition, and not whether that measure has or is actually having market effects, including by influencing the purchasing decisions of private firms. In our view, therefore, details concerning the internal administration of the additional incentive, such as the

[483] Panel Report, *EC – Sardines*, para. 7.110.
[484] Oxford Dictionaries Online, definition of "shall" http://www.oed.com/view/Entry/177349?rskey=khh0Pw&result=1&isAdvanced=false#eid (accessed 10 April 2019).
[485] United States' response to Panel question No. 112, para. 3.
[486] Panel Report, *Canada – Autos*, para. 10.84.
[487] Panel Report, *Canada – Autos*, para. 10.84.

precise identity of the entity authorized to pay it, are not determinative of whether the measure affects the sale, purchase, transportation, distribution or use of the relevant products.

7.213. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Connecticut additional incentive "affect[s] the internal sale, offering for sale, purchase, transportation, distribution or use" of products within the meaning of Article III:4 of the GATT 1994.

7.3.3.2.7 Measure 8: Michigan Equipment Multiplier / Michigan Labour Multiplier

7.214. India submits that the Renewable Energy Standards Program in the State of Michigan (RESPM) "provide[s] higher incentives (i.e. an advantage) based on the in-state manufacture level of the renewable energy system". According to India, this necessarily means that Measure 8 "adversely modif[ies] the conditions of competition between domestic and imported 'like products' and therefore 'affect[s]' the internal sale, offering for sale, purchase[,] and/or use of the imported 'like products'".[488]

7.215. The United States submits that the evidence submitted by India shows that renewable energy credits (RECs) issued pursuant to the Michigan Equipment Multiplier "have accounted for only 0.0000878% of all RECs generated since" the RESPM entered into force in 2009. According to the United States[489], this "rebuts any suggestion that [the] Michigan Equipment Multiplier has 'induced' (i.e. incentivized) buyers to 'purchase' or 'use' renewable energy systems made in Michigan as opposed to imported like products".[490] The United States argues that because incentivization "is the vector by which India claims" that the measure at issue affects products, India has "necessarily failed to establish that [the measure] has 'affect[ed]' the 'use' of products within the meaning of" Article III:4.[491]

7.216. As explained above[492], the RESPM requires electric providers to maintain renewable energy credit portfolios. Electric providers obtain RECs by generating or purchasing renewable energy, at a rate of one credit per megawatt hour of electricity generated from each of their renewable energy systems.[493] However, additional RECs are available per megawatt hour produced from renewable energy systems constructed using (i) equipment made in Michigan (Michigan Equipment Multiplier)[494]; or (ii) a workforce composed of residents of Michigan (Michigan Labour Multiplier).[495] Such additional RECs are not available for energy produced using a renewable energy system made wholly or partly from equipment manufactured outside of Michigan, or constructed by non-Michigan workforce.

7.217. In our view, India's demonstration that the Michigan Equipment and Labour Multipliers make an advantage available for the use of local products (i.e. renewable energy systems manufactured using Michigan-origin components or by a workforce made up of Michigan residents), whereas the same advantage is not available when imported or other non-local products are used, is sufficient to make a *prima facie* case that the Michigan Equipment and Labour Multipliers affect the sale, purchase, transportation, distribution or use of the relevant products.

7.218. India has not contested the United States' assertion that the evidence on the record shows that only a miniscule number of RECs generated under the RESPM (some 0.0000878%) have been issued pursuant to the Michigan Equipment Multiplier. In our view, the evidence relied upon by both parties, the Michigan Public Service Commission's Annual Report of Implementation of PA 295 Renewable Energy Standard and the Cost-Effectiveness of Energy Standards, is somewhat unclear, because although it contains the graphs relied upon by the United States in support of its position, it also contains a series of pie charts that appear to show that between 2009 and 2015 an average of 10% of annual RECs were generated as "incentive" RECs.[496] Moreover, the aforementioned Annual

[488] India's first written submission, para. 777.
[489] United States' first written submission, para. 117.
[490] United States' first written submission, para. 118.
[491] United States' first written submission, para. 118.
[492] See para. 2.40 above.
[493] Michigan Public Act No. 342, Section 39(1) (Exhibit IND-44).
[494] Michigan Public Act No. 342, Section 39(2)(d) (Exhibit IND-44).
[495] Michigan Public Act No. 342, Section 39(2)(e) (Exhibit IND-44).
[496] Michigan Public Service Commission, Annual Report of Implementation of PA 295 Renewable Energy Standard and the Cost-Effectiveness of Energy Standards (15 February 2017), Appendix D (Exhibit US-20).

Report states that "[i]t appears that Michigan's incentive REC provision is meeting its intended purpose to encourage developers to maximize utilization of Michigan equipment and labour".[497] We are not entirely clear how to reconcile these pie charts and this statement with the United States' argument that the report indicates that only a tiny fraction of a per cent of all RECs have been generated pursuant to the challenged incentives.

7.219. However, even if the United States' argument were correct, we do not consider that it would be capable of rebutting India's *prima facie* showing that the Multipliers affect the sale, purchase, transportation, distribution or use of the relevant products. This is because, as explained above, the relevant question at this point of our analysis is whether the measure has an impact on the conditions of competition between domestic and imported like products, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms "under current circumstances". In our view, the Michigan Equipment and Labour Multipliers "clearly involve[] formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances".[498] Thus, in assessing whether the Multipliers affect the sale, purchase, transportation, distribution or use of the relevant products, the question whether any person or enterprise has actually decided to take up that advantage is, in our view, beside the point.

7.220. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Michigan Equipment Multiplier and the Michigan Labour Multiplier "affect the internal sale, offering for sale, purchase, transportation, distribution or use" of products within the meaning of Article III:4 of the GATT 1994.

7.3.3.2.8 Measure 9: Delaware Equipment Bonus / Delaware Workforce Bonus

7.221. India submits that both the Delaware Equipment and Workforce Bonuses "provide higher incentives (i.e. an advantage) based on the in-state manufacture level of the specified renewable energy equipment".[499] India contends that, as a result, the conditions of competition between domestic and imported like products are modified to the detriment of the latter, and therefore both the Delaware Equipment and Workforce Bonuses affect the sale, purchase, transportation, distribution or use of the relevant products.[500]

7.222. The United States responds that "India has failed to demonstrate that the Delaware Equipment Bonus incentivizes the 'purchase' of renewable energy products manufactured in Delaware."[501] According to the United States, "India has failed to demonstrate that RECs [renewable energy credits] associated with the 'Delaware Equipment Bonus' (i.e., 'Bonus RECs') *in particular* are tradable instruments or have independent monetary value."[502] The United States supports its view with reference to the language of the provision setting forth the Delaware Equipment Bonus[503], which establishes that retail electricity suppliers shall receive an additional 10% credit "*toward meeting the renewable energy portfolio standards…*".[504] For the United States, this shows that "retail electricity suppliers cannot trade Bonus RECs for monetary value, but use them only for purposes of satisfying their obligations under Delaware's [renewable energy portfolio standards]".[505]

7.223. Furthermore, the United States submits that India has failed to demonstrate that "the prospect of receiving Bonus RECs incentivizes retail electricity suppliers to purchase renewable energy generation equipment made in Delaware."[506] In that respect, the United States is of the view that the Delaware Equipment Bonus cannot incentivize the purchase or use of equipment manufactured in Delaware because it is granted to retail electricity suppliers that do not generate power but only distribute it. The United States indicates that the Delaware Equipment Bonus is not

[497] Michigan Public Service Commission, Annual Report of Implementation of PA 295 Renewable Energy Standard and the Cost-Effectiveness of Energy Standards (15 February 2017), pp. 22-23 (Exhibit US-20).
[498] Panel Report, *Canada – Autos*, para. 10.84.
[499] India's first written submission, para. 871.
[500] India's first written submission, para. 871.
[501] United States' first written submission, para. 119.
[502] United States' first written submission, para. 120 (emphasis original).
[503] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 351(d) (Exhibit IND-54).
[504] United States' first written submission, para. 120 (emphasis original).
[505] United States' first written submission, para. 120.
[506] United States' first written submission, para. 121.

addressed to "generation units", which are the ones generating power and making purchasing decisions as to renewable energy generation equipment.[507]

7.224. Finally, the United States notes that "'[s]olar panels are no longer manufactured in Delaware' and have not been produced in Delaware since 2013".[508] As argued with respect to other measures at issue, the United States considers that "[b]ecause incentivization is the vector by which India claims that Delaware Equipment Bonus 'affects' the 'purchase' or 'use' of products within the meaning of Article III:4, India has necessarily failed to establish that the Bonus 'affects' the 'use' of products".[509]

7.225. As explained above[510], the Delaware Renewable Energy Portfolio Standards Act (REPSA) provides retail electricity suppliers with an additional 10% credit toward meeting the renewable energy portfolio standards for solar or wind energy installations, provided that a minimum of 50% of the cost of renewable energy equipment, inclusive of mounting components, are manufactured in Delaware (the Delaware Equipment Bonus), or that the facility is constructed or installed with a minimum of 75% in-state workforce (the Delaware Workforce Bonus). These bonuses can be applied cumulatively. The measure does not require the use of renewable energy equipment at least partially (50%) manufactured in Delaware or facilities constructed by a Delaware-based workforce, but in the absence of such equipment or facilities, no additional credits will be generated.

7.226. In our view, India's demonstration that the Delaware Equipment and Workforce Bonuses make an advantage available for the use of local products (i.e. renewable energy equipment manufactured using Delaware-origin inputs or by a workforce made up of Delaware residents), whereas the same advantage is not available when imported products are used, is sufficient to make a *prima facie* case that the measure affects the sale, purchase, transportation, distribution or use of the relevant products.

7.227. Turning to the United States' argument that India has failed to demonstrate that the RECs are tradable instruments or have independent monetary value, we start by noting that, as indicated by the United States, retail electricity suppliers may use RECs and solar renewable energy credits (SRECs) to secure compliance with the renewable energy portfolio standards established pursuant to the relevant subchapter of the Delaware Code.[511] The Delaware Code also provides in its Section 360(a) for the possibility for retail electricity suppliers to "sell or transfer any [REC] or [SREC] not needed to meet said standards".[512] Therefore, we do not agree with the United States' argument that retail electricity suppliers can use their RECs or SRECs "only for purposes of satisfying their obligations under Delaware's [renewable energy portfolio standards]".[513] In light of the text of Section 360(a) of the Delaware Code, it is clear to us that retail electricity suppliers are allowed to sell or transfer any RECs or SRECs they may not need to achieve their renewable energy portfolio standards. The reference in Sections 356(d) and (e) of the Delaware Code to "additional 10% credit *toward meeting the renewable energy portfolio standards*" does not preclude the possibility, in our view, of retail electricity suppliers selling or transferring the RECs or SRECs not needed in order to meet the standard. We consider that any potential derogation of such possibility would have been explicitly provided by the legislator.

7.228. Moreover, there is considerable evidence on the record that supports our view that RECs and SRECs are tradable instruments with monetary value. First, the Delaware Code defines both RECs and SRECs as "tradable instrument[s]".[514] Second, India has provided a number of exhibits referring to the establishment of a market to trade such instruments, as well as detailed regulations governing the procurement process. By way of example, we find numerous references in the

[507] United States' first written submission, paras. 122-123.
[508] United States' first written submission, para. 124.
[509] United States' first written submission, para. 125.
[510] See para. 2.52 above.
[511] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 360(a) (Exhibit IND-54).
[512] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 360(a) (Exhibit IND-54).
[513] United States' first written submission, para. 120.
[514] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Sections 352(18) and 352(25) (Exhibit IND-54).

REPSA[515] to the existence of a market where RECs can be transferred or sold among retail electricity suppliers.[516] We further find on the record exhibits explaining how to sell RECs[517], as well as recommendations of the renewable energy taskforce on the State of Delaware Pilot Program for the Procurement of SRECs where prices per SREC are listed.[518] In light of the evidence provided, we conclude that RECs and SRECs have monetary value and can be traded.

7.229. We now move on to the United States' argument that India has failed to prove that the Delaware Bonuses incentivize the purchase of renewable energy generation equipment of Delaware origin because they are addressed to entities (i.e. retail electricity suppliers) that do not generate electricity but only distribute it. We first note that, as the United States argues, retail electricity suppliers do not generate electricity. The Delaware Code defines "retail electricity supplier" as "a person or entity that sells electrical energy to end-use customers in Delaware, including but not limited to non-regulated power producers, electric utility distribution companies supplying standard offer, default service, or any successor service to end-use customers."[519] We further note that, despite the fact that generation units can be entitled to RECs and SRECs under certain circumstances[520], the text of the Delaware Bonuses explicitly identifies retail electricity suppliers as the only potential recipients of the 10% additional credits.[521]

7.230. Nevertheless, we note that Measure 9 makes additional credits available to electricity distributors who distribute electricity generated using local equipment. In other words, electricity distributors receive extra credits when they distribute such energy, but do not receive these credits if and when they distribute energy generated using non-local, including imported equipment. In our view, the measure thus formally treats local and imported equipment differently, and therefore has an impact on the conditions of competition in the market for the equipment itself. The fact that the electricity distributors who are entitled to receive the benefit are not themselves generating electricity is beside the point.

7.231. Finally, we are of the view that the United States' argument with respect to the absence of solar panel manufacturing activity in Delaware since 2013 cannot rebut India's *prima facie* case that the Delaware Bonuses affect the purchase and use of the relevant products. First, the Delaware Equipment Bonus and the Delaware Workforce Bonus encompass both solar and wind energy installations.[522] Thus, these additional credits do not just relate to "solar panels", but also to wind energy installations as well as solar energy installations other than "solar panels". Additionally, we recall that the relevant question at this point of our analysis is whether the measure has an impact on the conditions of competition between domestic and imported like products, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms "under current circumstances". In our view, the Delaware Equipment and Workforce Bonuses "clearly involve[] formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances".[523] Therefore, in assessing whether the Delaware Equipment Bonus and the Delaware Workforce Bonus affect the internal sale, offering for sale, purchase, transportation, distribution or use" of the relevant equipment in the Delaware market, the fact that solar panels have not been produced in Delaware since 2013 is beside the point.

[515] Subchapter III-A in Chapter 1 of Title 26 of the Delaware Code governing the renewable energy portfolio Standards is known as the "Renewable Energy Portfolio Standards Act". See Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 351(a) (Exhibit IND-54).

[516] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 359(a) (Exhibit IND-54). See also Delaware Code, Title 26, Chapter 1, Subchapter III-A, Sections 359(c)(2)(b) and 359(d)(Exhibit IND-54).

[517] PJM GATS, How Do I Sell RECs? (Exhibit IND-95).

[518] Recommendations of the Renewable Energy Taskforce (Exhibit IND-58).

[519] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 352(22) (Exhibit IND-54). This Section further clarifies that "[a] retail electricity supplier does not include a municipal electric company".

[520] RESPA Rule 3.1.8 provides that "[u]pon designation as an Eligible Energy Resource, the Generation Unit's owner shall be entitled to one (1) REC for each mega-watt hour of energy derived from Eligible Energy Resources other than Solar Photovoltaic Energy Resources. Upon designation as an Eligible Energy Resource, the owner of a Generation Unit employing Solar Photovoltaic Energy Resources shall be entitled to one (1) SREC for each mega-watt hour of energy derived from Solar Photovoltaic Energy Resource". See Rules and Procedures to Implement the Renewable Energy Portfolio Standard (Exhibit IND-55).

[521] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 356(d) and (e) (Exhibit IND-54).

[522] Delaware Code, Title 26, Chapter 1, Subchapter III-A, Section 356(d) and (e) (Exhibit IND-54).

[523] Panel Report, *Canada – Autos*, para. 10.84.

7.232. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Delaware Equipment Bonus and the Delaware Workforce Bonus "affect[] the internal sale, offering for sale, purchase, transportation, distribution or use" of products'' within the meaning of Article III:4 of the GATT 1994.

7.3.3.2.9 Measure 10: Minnesota production incentives and rebates

7.233. India argues that the Minnesota solar energy incentive program (SEPI) and the Minnesota solar photovoltaic (PV) rebate are granted "if the specified products (i.e. solar PV modules …) are manufactured in Minnesota".[524] India considers that these advantages "clearly adversely modify the conditions of competition between domestic and imported like products and therefore 'affect' the internal sale, offering for sale, purchase and/ or use of the imported like products".[525]

7.234. The United States responds that India has failed to demonstrate that these programs under Measure 10 incentivize the use or purchase of solar products of Minnesota origin.[526] In particular, the United States refers to a graph from a 2016 Minnesota Department of Revenue (DOR) press release in which the figures show that "solar installations that received incentives under the Solar PV Incentive program accounted for less than three per cent of all solar installations in Minnesota during 2016".[527] As for the Minnesota solar PV rebate, the United States argues that, "[s]ince incentivization is the vector by which India claims that this measure 'affects' the 'purchase' or 'use' of products… India has necessarily failed to establish that [it] 'affects' the 'use' of products" within the meaning of Article III:4.[528]

7.235. As explained above[529], the SEPI and the Minnesota solar PV rebate grant incentives and rebates for the use of solar PV modules made in Minnesota. Although use of non-local, including imported, solar PV modules is not prohibited or otherwise limited, we note that, where such modules are used, the financial incentives and rebates set forth in Sections 216C.411 - 415 and 116C.7791 of the 2016 Minnesota Statutes are not provided, given that such modules do not fulfil the requirement of having been manufactured in Minnesota.

7.236. In our view, India's demonstration that these two programs under Measure 10 confer an advantage on the use of relevant domestic products (i.e. solar PV modules) that is not available for the use of the relevant like imported products is sufficient to make a *prima facie* case that the measure affects the sale, purchase, transportation, distribution or use of the relevant products.

7.237. We now turn to the United States' argument relating to the "negligible amount" of solar installations that received incentives under the SEPI during 2016.[530] As noted above, the United States submits that less than 3% of all solar installations in Minnesota during 2016 received incentives under the SEPI. We note that India has not contested this argument, and indeed the chart in the DOR press release indicates the number of applicants and projects funded for each investor-owned electric utilities (Xcel Energy, Minnesota Power, and Otter Tail Power) under the SEPI.[531]

7.238. We do not consider that this argument by the United States is capable of rebutting India's *prima facie* showing that the measure affects the relevant products. This is because, as explained above, the relevant question at this point of our analysis is whether the measure has an impact on the conditions of competition between domestic and imported like products, not whether or the extent to which it has or is actually influencing the purchasing decisions of private firms "under current circumstances". In our view, the SEPI and the Minnesota solar PV rebate "involve[] formally different treatment of imported and domestic products albeit that the actual trade effects of this different treatment may be minimal under current circumstances".[532] Thus, in assessing whether these two programs affect the sale, purchase, transportation, distribution or use of the relevant

[524] India's first written submission, para. 1010.
[525] India's first written submission, para. 1010.
[526] United States' first written submission, para. 127.
[527] United States' first written submission, para. 128 (referring to India's first written submission, para. 983).
[528] United States' first written submission, para. 129.
[529] See paras. 2.57 and 2.65 above.
[530] United States' first written submission, para. 129.
[531] United States' first written submission, para. 128 (referring to India's first written submission, para. 983).
[532] Panel Report, *Canada – Autos*, para. 10.84.

products, the question whether many or few projects have benefitted from the advantage, or the extent to which they have done so is, in our view, beside the point.

7.239. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the SEPI and the Minnesota solar PV rebate under Measure 10 "affect[] the internal sale, offering for sale, purchase, transportation, distribution or use" of products within the meaning of Article III:4 of the GATT 1994.

7.3.3.3 Conclusion on "laws, regulations, and requirements affecting the[] internal sale, offering for sale, purchase, transportation, distribution or use" of relevant products

7.240. In conclusion, we find that India has shown *prima facie*, and the United States has not rebutted, that each of the measures at issue is a "law", "regulation" or "requirement" "affecting the[] internal sale, offering for sale, purchase, transportation, distribution or use" of the relevant products within the meaning of Article III:4 of the GATT 1994.

7.3.4 Less favourable treatment

7.241. India argues that the measures at issue accord treatment less favourable to imported products than to like domestic products by incentivizing the use of domestic inputs and thereby denying effective equality of opportunity to the imported products to compete in the domestic market.[533] India further argues that the measures at issue do not provide equality of opportunity to the imported products to compete in the domestic market, and that they also modify the conditions of competition in the relevant domestic market to the detriment of imported products.[534]

7.242. The United States argues that "if a measure does not 'affect' the use … of a product, it is difficult to see how the measure could 'modify the conditions of competition' with respect to that product on the market" in such a way as to give rise to less favourable treatment.[535] According to the United States, since in this case India has failed to show that any of the measures affect the sale, purchase, transportation, distribution or use of a product, it has necessarily failed to show that they modify the conditions of competition.[536]

7.243. According to the Appellate Body, the term "treatment no less favourable" "requires effective equality of opportunities for imported products to compete with like domestic products".[537] Thus, the question "[w]hether or not imported products are treated 'less favourably' than like domestic products should be assessed … by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products"[538] or, in other words, whether any "regulatory differences distort the conditions of competition to the detriment of imported products".[539]

7.244. We agree with the United States that, in principle, it is difficult to see how a measure could accord less favourable treatment to imported than to domestic products without it affecting the sale, purchase, transport, distribution or use of such products. We recall, however, that less favourable treatment and the affecting standard are two distinct elements of the legal test under Article III:4 of the GATT 1994, and raise related but different considerations. The question whether a measure affects the sale, purchase, transportation, distribution or use of products concerns whether the challenged measure impacts the conditions of competition[540], whereas less favourable treatment

[533] India's first written submission, paras. 51, 172, 274, 366, 464, 563, 676, 778, 873, 1011 and 1119.
[534] India's first written submission, paras. 54, 175, 277, 369, 467, 566, 679, 781, 876, 1014 and 1122.
[535] United States' first written submission, para. 80.
[536] United States' first written submission, para. 84.
[537] Appellate Body Reports, *EC – Seal Products*, para. 5.101 (fns omitted).
[538] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137 (emphasis original). See also Appellate Body Reports, *EC – Seal Products*, para. 5.101.
[539] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128.
[540] See para. 7.161 above.

focuses on whether the challenged measure modifies the conditions of competition to the detriment of imported products.[541]

7.245. Importantly, in the context of less favourable treatment, the Appellate Body has repeatedly emphasized that an assessment under Article III:4 of the GATT 1994 "may well involve – but does not require – an assessment of the contested measure in the light of evidence regarding the actual effects of that measure in the market".[542] A finding of less favourable treatment therefore "need not be based on the *actual effects* of the contested measure in the marketplace".[543] Moreover, "it does not require demonstration of trade effects, nor proof that the sourcing decisions of private firms have actually been impacted by" the measure at issue.[544] Indeed, the Appellate Body has underscored that "it is irrelevant that the trade effects of [a challenged measure], as reflected in the volumes of imports, are insignificant or even non-existent".[545] This is so because "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."[546]

7.246. Thus, a panel should attempt to discern "[t]he implications of the contested measure for the equality of competitive conditions … *first and foremost*"[547] by engaging in "careful scrutiny of the measure, including consideration of the design, structure, and expected operation of the measure at issue".[548] This "careful examination" must be "grounded in close scrutiny of the fundamental thrust and effect of the measure itself".[549] To succeed, a claim of less favourable treatment "cannot rest on simple assertion", but "will normally require further identification or elaboration of [the challenged measure's] implications for the conditions of competition".[550]

7.247. We note that, throughout these proceedings, the United States has argued that, although India is not required "to proffer empirical evidence that the measures at issue *have* incentivized the purchase or use domestic products", it does "bear the burden of demonstrating that the challenged measures are bound or likely to have such incentivizing effects".[551] In our view, however, a complainant need not show that a challenged measure is "bound or likely" to modify the conditions of competition to the detriment of imported products in order to establish the existence of less favourable treatment. To the contrary, the Appellate Body has held that "an analysis of less favourable treatment should not be anchored in an assessment of the degree of likelihood that an adverse impact on competitive conditions will materialize"[552], and both GATT[553] and WTO panels have explained that "a measure can be found to be inconsistent with Article III:4 because of its *potential* discriminatory impact on imported products".[554] As we understand it, therefore, a

[541] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 137).

[542] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134. In the same vein, the Appellate Body explained that "[t]he analysis of whether imported products are accorded less favourable treatment … need not be based on empirical evidence as to the actual effects of the measure at issue in the internal market of the Member concerned", although "[o]f course, nothing precludes a panel from taking such evidence of actual effects into account." Ibid., para. 129.

[543] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (emphasis original, fn omitted, referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:I, 97, at 110).

[544] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159 (fn omitted, referring to Panel Report, *Canada-Autos*, *supra*, paras. 10.84 and 10.78; and Appellate Body Report, *Japan – Alcoholic Beverages II,* pp. 16-17).

[545] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16. See also Appellate Body Report, *Korea – Alcoholic Beverages*, para. 119.

[546] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16.

[547] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130 (emphasis added).

[548] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134. See also ibid., para. 130.

[549] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 129 (referring to Appellate Body Reports, *US – FSC (Article 21.5 – EC),* para. 215; and *Korea – Various Measures on Beef*, footnote 44 to para. 142).

[550] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130.

[551] United States' second written submission, para. 13 (emphasis original).

[552] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134.

[553] GATT Panel Report, *US – Section 337*, para. 5.13 (observing that numerous GATT panels made findings under Article III:4 of the GATT 1947 "base[d] … on the distinctions made by the laws, regulations or requirements themselves and on their potential impact, rather than on the actual consequences for specific imported products").

[554] Panel Report, *Canada – Autos*, para. 10.78 (emphasis added, fn omitted, referring to Panel Report on *US – Section 337,* paras. 5.11 and 5.13).

complainant is not required to *quantify* the likelihood that a challenged measure will in fact have a detrimental impact on imported products in order to make a *prima facie* case of less favourable treatment. Rather, the focus of the analysis is on the implications of the measure for the market, as they are discernible from the "design, structure, and expected operation of the measure".[555]

7.248. With these considerations in mind, we turn to examine each of the challenged measures to determine whether they accord to imported products treatment less favourable than that accorded to like products of national origin.

7.3.4.1 Measure 1: Washington State additional incentive

7.249. India submits that the Washington State additional incentive accords less favourable treatment to imported products *vis-à-vis* domestic like products "by incentivizing the use of the specified components manufactured in Washington and thereby denying the effective equality of opportunity to the imported products to compete in the domestic market of Washington".[556] India argues that the economic development factor applied on the incentive base rate to calculate the incentive payment is higher "when compared to same components manufactured outside Washington", thereby resulting in a higher incentive payment.[557] According to India, Measure 1 will lead buyers to prefer specified products manufactured in Washington over like imported products.[558]

7.250. The United States responds that "India [has not] provided evidence that demonstrates that the measure at issue has modified the 'conditions of competition' in Washington's market for renewable energy products 'to the determinant [*sic*] of imported products'".[559] In the United States' view, since India has failed to establish that the measures affect the sale, purchase, transportation, distribution or use of the relevant products, it has "failed to demonstrate that the measures at issue 'modify the conditions of competition' between imported and domestic products in Washington."[560]

7.251. As noted above[561], the Washington State additional incentive is provided for customer-generated electricity produced using solar inverters, solar modules, stirling converters, or wind blades manufactured in Washington State.

7.252. As India argues, and as we have found, Measure 1 provides for an additional incentive by applying a higher economic development factor on the incentive base rate when, and to the extent that, eligible equipment includes solar inverters, solar modules, stirling converters, and wind blades manufactured in Washington State.[562] Looking at the text, design, and structure of the measure, we note that the economic development factors for equipment manufactured in Washington State range from 2.4 to 1, whereas the factor for any equipment used to produce energy by wind, regardless of its origin, is 0.8, and no factor is applied on the incentive base rate in case of non-local (including imported) solar modules or stirling converters.[563] The "fundamental thrust and effect"[564] of the challenged measure is thus to tie the amount of the final incentive payment to the use of certain Washington State-origin equipment. The higher the level of local content used, the higher the incentive provided.

7.253. On this basis, we consider that India has shown *prima facie* that the Washington State additional incentive modifies the conditions of competition in favour of Washington-made solar inverters, solar modules, stirling converters, and wind blades by creating a financial incentive favouring made-in-Washington-State like products.[565] We recall in this connection that past cases

[555] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 130 and 134.
[556] India's first written submission, para. 51. See also India's first written submission, para. 57.
[557] India's first written submission, para. 55.
[558] India's first written submission, para. 57.
[559] United States' first written submission, para. 85.
[560] United States' first written submission, para. 88.
[561] See para. 2.8 above.
[562] See para. 2.8 above.
[563] See para. 2.11 above. Further, we recall that economic development factors can be applied cumulatively under certain circumstances. See para. 2.12 above.
[564] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[565] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than Washington) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. As the panel in *Canada – Wheat Exports and Grain Imports* stated, "where an

have consistently held that the provision of incentives or advantages for the use of domestic over imported products accords less favourable treatment to such imported products.[566]

7.254. As noted, the United States' primary response to India's claim is that, because India has failed to show that Measure 1 affects the sale, purchase, transportation or use of the relevant products, it follows that it has also failed to show that the measure accords treatment less favourable to imported than to domestic products.[567]

7.255. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 1 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[568] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is distinct from the question whether it affects the sale, purchase, transport, distribution or use of such products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 1 accords less favourable treatment to imported than to domestic products.

7.256. We recall the United States' argument, in the context of whether the measure affects the sale, purchase, transportation, distribution or use of products, that the figures provided by India do not support its assertion that the exponential growth of solar PV systems in Washington State between 2005 and 2015 is due, or somehow related, to the provision of the Washington State additional incentive. We have discussed this evidence above.[569] In the context of the claim before us, and insofar as this argument might be relied upon to argue that the measure does not accord less favourable treatment, it suffices to recall that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[570] In the present dispute, the implications of Washington State additional incentive for competitive conditions are explicit from the text, design, and structure of the relevant provisions. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of the measure at issue.[571] Accordingly, we do not consider that evidence showing that the measure may have had minimal or no market effects in recent years, even if accepted, would be sufficient to rebut India's *prima facie* case that the Washington State additional incentive treats non-local products, including imported products, less favourably than like local products.

7.257. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Washington State additional incentive modifies the conditions of competition to the detriment of imported solar inverters, solar modules, stirling converters, and wind blades, and therefore accords less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.2 Measure 2: California Manufacturer Adder

7.258. India submits that the California Manufacturer Adder accords less favourable treatment to imported products than to like domestic products. According to India, by "incentivizing the use of the eligible equipment that meet the in-state manufacturing level" required, the measure at issue "den[ies] the effective equality of opportunity to the imported products to compete in the domestic

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origin-based difference in regulatory treatment is made between products originating in one area, region or administrative unit of a country and all other like products – that is, like products originating in other areas of the same country or originating in foreign countries – Article III:4 requires that the foreign product be granted treatment no less favourable than that accorded to the most-favoured domestic product". Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).

[566] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.

[567] United States' first written submission, para. 88.

[568] See para. 7.170 above.

[569] See paras. 7.167 - 7.168 above.

[570] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.

[571] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.

market of California".[572] India argues that the additional incentive for the use of eligible equipment manufactured in California, provided that either the California Supplier requirement (under the 2016 California Self-Generation Incentive Program (SGIP) Handbook) or the California Manufacturer requirement (under the 2017 SGIP Handbook) are met, modifies the conditions of competition to the detriment of the imported 'like products' because "a potential buyer will prefer to purchase the 'eligible equipment' satisfying the California Manufacturer or California Supplier criteria … over those which are imported."[573]

7.259. The United States responds that, insofar as India has failed to show that the measure at issue affects the sale, purchase, transportation, distribution or use of the relevant products, India has "consequently" failed to show that the measure modifies the conditions of competition to the detriment of imported products and thus accords less favourable treatment to such products.[574] The United States adds that India has not provided "evidence demonstrating that the availability of the SGIP Adder otherwise operates to modify the 'conditions of competition' in the market for renewable energy equipment in California 'to the determinant [*sic*] of imported products.'"[575]

7.260. As explained above[576], the California Manufacturer Adder consists of an additional 20% incentive payment for the installation of eligible distributed generation or Advanced Energy Storage (AES) technologies "from a California Supplier" (under the 2016 SGIP Handbook) or certain generation and energy storage equipment "manufactured in California" (under the 2017 SGIP Handbook).

7.261. As India argues, and as we have found, the measure at issue provides for an additional incentive for the installation of certain equipment to the extent that this equipment is "from a California Supplier" or "manufactured in California".[577] Looking at the text, design, and structure of the California Manufacturer Adder, we note that the definitions of both "California Supplier" under the 2016 SGIP Handbook and "California Manufacturer" under the 2017 SGIP Handbook leave no doubt that non-local products, including imported products, will under no circumstances qualify for the California Manufacturer Adder, since these definitions contain requirements regarding the location of the manufacturing facility and the residence of its workers, among others.[578] In fact, the 2017 SGIP Handbook explicitly requires that "at least 50% of the capital equipment value of the eligible distributed generation resources must be manufactured by an approved 'California Manufacturer'".[579] Thus, the "fundamental thrust and effect"[580] of the challenged measure is to tie the granting of the additional incentive to the use of equipment manufactured in California.

7.262. On this basis, we consider that India has shown *prima facie* that the California Manufacturer Adder modifies the conditions of competition in favour of California-origin[581] eligible equipment[582] by creating a financial incentive favouring products of California origin.[583] In this connection, we recall that past cases have consistently held that the provision of incentives or advantages for the

[572] India's first written submission, para. 172.
[573] India's first written submission, para. 176.
[574] United States' first written submission, para. 92.
[575] United States' first written submission, para. 90.
[576] See para. 2.14 above.
[577] See paras. 7.101 - 7.102 above.
[578] See paras. 2.16 - 2.17 above.
[579] 2017 SGIP Handbook, p. 25 (Exhibit IND-15).
[580] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[581] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than California) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. See Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).
[582] Distributed generation or AES technologies from a California Supplier (under the 2016 SGIP Handbook (Exhibit IND-16)) or certain generation and energy storage equipment (under the 2017 SGIP Handbook (Exhibit IND-15)).
[583] Distributed generation or AES technologies from a California Supplier (under the 2016 SGIP Handbook (Exhibit IND-16)) or certain generation and energy storage equipment (under the 2017 SGIP Handbook (Exhibit IND-15)). See para. 2.18 above.

use of domestic over imported products accords less favourable treatment to such imported products.[584]

7.263. As noted, the United States' primary response to India's claim is that, because India has failed to show that Measure 2 affects the sale, purchase, transportation or use of the relevant products, it follows that it has also failed to show that the measure accords treatment less favourable to imported than to domestic products.[585]

7.264. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 2 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[586] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 2 accords less favourable treatment to imported than to domestic products.

7.265. We also recall that, as discussed above, we do not agree with the United States' argument, made in the context of the affecting standard, that India should have demonstrated that the California Manufacturer Adder has actually had the effect of "inducing" buyers to "purchase" the relevant products of California-origin. In the context of the claim before us, and insofar as this argument might be relied upon to argue that the measure does not accord less favourable treatment, it suffices to note that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[587] In our view, the implications of Measure 2 for competitive conditions are explicit from the text, design, and structure of the relevant provisions. In this respect, we recall the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of the measure at issue.[588] Accordingly, we do not consider that evidence showing that the measure may have had minimal or no market effects in recent years, even if accepted, would be sufficient to rebut India's *prima facie* case that the California Manufacturer Adder treats non-local products, including imported products, less favourably than like local products.

7.266. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the California Manufacturer Adder modifies the conditions of competition to the detriment of imported distributed generation or AES technologies (under the 2016 SGIP Handbook) and certain generation and energy storage equipment (under the 2017 SGIP Handbook), and therefore accords less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.3 Measure 4: Montana tax incentive

7.267. India submits that the Montana tax incentive accords less favourable treatment to imported products than to like domestic products "by offering the tax incentives based on the in-state manufacture level of ethanol and, thereby, den[ies] the effective equality of opportunity to the imported products to compete in the domestic market of Montana".[589] According to India, by giving ethanol distributors a "direct financial advantage in [the] form of the tax incentive for using the domestic product", Measure 4 "alter[s] the conditions of competition in the market in favour of the domestic products and final product derived from such use of domestic products".[590]

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[584] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.

[585] United States' first written submission, para. 92.

[586] See para. 7.176 above.

[587] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.

[588] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.

[589] India's first written submission, para. 366.

[590] India's first written submission, para. 369.

7.268. The United States responds that, insofar as India has failed to show that Measure 4 affects the sale, purchase, transportation, distribution or use of the relevant products, it has "consequently" failed to show that this measure modifies the conditions of competition to the detriment of imported products and thus accords less favourable treatment to such products.[591]

7.269. As explained above[592], under Measure 4, a tax incentive is payable to ethanol distributors on "ethanol … produced in Montana from Montana agricultural products, including Montana wood or wood products".[593] The Montana tax incentive does not make provision for a tax incentive on ethanol produced outside of Montana.

7.270. As India argues, and as we have found, Measure 4 offers a financial incentive to ethanol distributors when, and to the extent that, they distil ethanol from Montana-origin ingredients.[594] Looking at the text, design, and structure of the Montana tax incentive, we observe that, ethanol distributors are entitled to 20 cents per gallon of ethanol 100% produced from Montana-origin ingredients, "with the amount of the tax incentive for each gallon reduced proportionately, based on the amount of agricultural or wood products not produced in Montana that is used in the production of the ethanol".[595] Thus, the amount of the financial incentive is inextricably tied to the use of Montana-origin ingredients. The "fundamental thrust and effect"[596] of Measure 4 is that higher incentives are provided the more local ingredients are used; conversely, the more non-local ingredients used by an ethanol distributor, the lower the financial incentive to which the distributor is entitled.

7.271. We do not, however, consider that India has shown that the Montana tax incentive also modifies the conditions of competition in favour of domestic *ethanol*, i.e. the "final product". We do not discount the possibility that an incentive on ingredients may flow through to the final product(s) in which such ingredients are used, particularly where such ingredients are required to be used in the production of a particular final product in order to benefit from the incentive. Such flow-through must, however, at least be argued by the complaining party as part of its burden to adduce arguments and to substantiate its assertions.[597] India has not done so in the present case; rather, it has simply asserted[598] that because the measure at issue provides a tax-incentive for the use of domestic ingredients, both the ingredients and *the final product* are placed in a better competitive position.[599] In our view, such an assertion, without more detailed explanation of how the Montana tax incentive modifies the conditions of competition with respect to the final product, is not sufficient to establish the existence of less favourable treatment in regard to the final product.

7.272. On this basis, we consider that India has made a *prima facie* case that the Montana tax incentive modifies the conditions of competition in favour of Montana-origin ingredients by creating a financial incentive favouring their usage.[600] We recall in this connection that past cases have consistently found that the provision of incentives or advantages for the use of domestic over imported products accord less favourable treatment to such imported products.[601] We do not,

[591] United States' first written submission, para. 99.
[592] See para. 2.20 above.
[593] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).
[594] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).
[595] Montana Annotated Code, Section 15-70-522 (Exhibit IND-34).
[596] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[597] See Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, fn 253 and *EC – Tariff Preferences*, para. 105. We also recall the Appellate Body's statement in *US – Wool Shirts and Blouses* that it would be "difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof." Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[598] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130.
[599] India's first written submission, para. 369.
[600] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than Montana) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. See Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).
[601] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.

however, find that India has made a *prima facie* case that the measure also modifies the conditions of competition in favour of *ethanol* (i.e. the final product) made from such local ingredients.

7.273. As noted, the United States' primary response to India's claim is that, because India has failed to show that Measure 4 affects the sale, purchase, transportation or use of the relevant products, it follows that it has also failed to show that the measure accords treatment less favourable to imported than to domestic products.[602]

7.274. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 4 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[603] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 4 accords less favourable treatment to imported than to domestic products.

7.275. Finally, we recall the United States' argument, in the context of whether Measure 4 affects the sale, purchase, transportation, distribution or use of products, that the evidence on the record shows that no incentive has been paid under the measure since 1995.[604] We have discussed this evidence above. In the context of the claim before us, and insofar as this argument might be relied upon to argue that the measure does not accord less favourable treatment, it suffices to recall that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[605] Here, the measure's implications for competitive conditions are explicit from the text, design, and structure of the relevant provisions. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of the measure at issue.[606] Accordingly, we do not consider that evidence showing that Measure 4 may have had minimal or no market effects in recent years, even if accepted, would be sufficient to rebut India's *prima facie* case that the Montana tax incentive treats non-local products, including imported products, less favourably than like local products.

7.276. For the foregoing reasons, we find that India has shown *prima facie*, and the United States has not rebutted, that the Montana tax incentive modifies the conditions of competition to the detriment of imported ethanol ingredients. However, we do not consider that India has shown *prima facie* that the Montana tax incentive modifies the conditions of competition to the detriment of *ethanol* made from imported ingredients. Ultimately, though, having found that India has shown *prima facie* that the Montana tax incentive modifies the conditions of competition to the detriment of one of the two like imported products identified by India, we conclude that India has shown, and the United States has not rebutted, that the Montana tax incentive accords less favourable treatment to imported products, within the meaning of Article III:4 of the GATT 1994.

7.3.4.4 Measure 5: Montana tax credit

7.277. India submits that, under the Montana tax credit, "the tax credit is available only where … biodiesel has been manufactured from Montana produced feedstock".[607] According to India, this "tax credit would play a decisive role in the choice that the consumer makes between domestic and imported products".[608] In India's view, "insofar as the tax credit is contingent on the use of Montana produced feedstock it alters the conditions of competition of such feedstock".[609] Specifically, India submits that "[t]he provision of the incentive would necessarily alter the competitive environment

[602] United States' first written submission, para. 99.
[603] See para. 7.184 above.
[604] United States' first written submission, para. 16.
[605] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[606] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[607] India's first written submission, para. 468.
[608] India's first written submission, para. 468.
[609] India's first written submission, para. 469.

as any biodiesel producer would, in order to get the benefit of the refund, use feedstock produced in Montana to produce biodiesel".[610] Moreover, according to India, "[e]ven if the biodiesel producer is not eligible for such incentive, on account of the tax credit, any person who is eligible for the tax credit would prefer to buy biodiesel produced entirely from Montana produced feedstock".[611] India concludes that "[t]his impl[es] that a greater demand is created, by way of the incentive offered, for both (a) Montana produced feedstock and (b) biodiesel produced from Montana produced feedstock".[612]

7.278. The United States responds that, insofar as India has failed to show that Measure 5 affects the sale, purchase, transportation, distribution or use of products, it follows "by the same token" India has also failed to show that the measure modifies the conditions of competition to the detriment of imported products and thus accords less favourable treatment to such products.[613]

7.279. As explained above[614], the Montana tax credit for biodiesel blending and storage provides for "special fuel distributors" and "owners or operators of a motor fuel outlet" to receive a "credit against [certain] taxes … for the costs of investments in depreciable property used for storing or blending biodiesel with petroleum diesel for sale".[615] This incentive is only available if the investment for which the credit is claimed is "used primarily to blend petroleum diesel with biodiesel made entirely from Montana-produced feedstocks".[616]

7.280. As India has argued, and as we have found, the Montana tax credit for biodiesel blending and storage conditions the availability of a tax incentive on the use of local products. Looking at the text, design, and structure of the Montana tax credit, we note that tax-payers who blend petroleum diesel with biodiesel made entirely from Montana-produced feedstocks are entitled to the credit, whereas tax-payers who blend petroleum diesel with biodiesel made wholly or partly from feedstocks originating outside Montana are not so eligible. We agree with India that by offering a financial benefit for the use of local feedstock, the "fundamental thrust and effect"[617] of Measure 5 is to induce or incentivize blenders to use Montana-origin feedstock rather than feedstock from outside of Montana, including from other Members.

7.281. We also agree with India that Measure 5 modifies the conditions of competition in respect of biodiesel blended from Montana-origin feedstock. Looking again at the text, design, and structure of the measure, we note that it offers a tax incentive on property used not only to blend biodiesel, but also to store biodiesel blended from Montana-origin feedstock. This means that persons or enterprises who store biodiesel produced from Montana-origin feedstock receive the incentive, whereas those who store biodiesel made from feedstock produced outside Montana do not. In our view, this suggests that the "fundamental thrust and effect"[618] of Measure 5 is to create a commercial incentive to purchase and store biodiesel made from Montana-origin ingredients.

7.282. On this basis, we consider that India has shown *prima facie* that the Montana tax credit modifies the conditions of competition in favour of Montana-origin ingredients and biodiesel blended therefrom by creating a financial incentive favouring their usage.[619] We note in this connection that past cases have consistently found that the provision of incentives or advantages for the use of domestic over imported products accord less favourable treatment to such imported products.[620]

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[610] India's first written submission, para. 469.
[611] India's first written submission, para. 469.
[612] India's first written submission, para. 469.
[613] United States' first written submission, para. 101.
[614] See para. 2.24 above.
[615] Montana Annotated Code, Section 15-32-703(1) (Exhibit US-11).
[616] Montana Annotated Code, Section 15-32-703(4)(a) (Exhibit US-11).
[617] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[618] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[619] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than Montana) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. See Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).
[620] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.

7.283. As noted, the United States' primary response to India's claim is that, because India has failed to show that Measure 5 affects the sale, purchase, transportation or use of the relevant products, it follows that it has also failed to show that the measure accords treatment less favourable to imported than to domestic products.[621]

7.284. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 5 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[622] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 5 accords less favourable treatment to imported than to domestic products.

7.285. Finally, we recall the United States' argument, in the context of whether Measure 5 affects the sale, purchase, transportation, distribution or use of products, that the evidence on the record shows that no incentive has been paid under Measure 5 since 1995.[623] We have discussed this evidence above. In the context of the claim before us, and insofar as this argument might be relied upon to argue that the measure does not accord less favourable treatment, it suffices to recall that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[624] Here, the measure's implications for competitive conditions are explicit from text, design, and structure of the relevant legislation. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of the measure at issue.[625] Accordingly, we do not consider that evidence showing that Measure 5 has may have had minimal or no market effects in recent years, even if accepted, would be sufficient to rebut India's *prima facie* case that the Montana tax credit treats non-local products, including imported products, less favourably than like local products.

7.286. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Montana tax credit modifies the conditions of competition to the detriment of imported feedstock and biodiesel produced therefrom, and therefore accords less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.5 Measure 6: Montana tax refund

7.287. India argues that because the Montana tax refund "is contingent upon the use of Montana produced ingredients it alters the conditions of competition for the said ingredients".[626] According to India, "[t]he provision of the incentive would necessarily alter the conditions of competition environment as any biodiesel producer would, in order to get [the] benefit of the refund, use ingredients produced in Montana to produce biodiesel". India argues that this creates "a greater demand … by way of the incentive offered in the upstream market, for Montana produced ingredients".[627] India further submits that Measure 6 "also alters the conditions of competition in the market in favour of biodiesel produced from ingredients produced in Montana domestic product [*sic*]". This is so, in India's view, because "[t]he availability of a tax refund for biodiesel manufactured from Montana products would imply that distributors/importers/retailers would prefer to use biodiesel produced using Montana produced ingredients". India concludes that Measure 6 therefore accords less favourable treatment to imported than to domestic products within the meaning of Article III:4 of the GATT 1994.[628]

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[621] United States' first written submission, para. 101.
[622] See para. 7.191 above.
[623] United States' first written submission, para. 16.
[624] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[625] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[626] India's first written submission, para. 568.
[627] India's first written submission, para. 568.
[628] India's first written submission, para. 569.

7.288. The United States responds that, insofar as India has failed to show that Measure 6 affects the sale, purchase, transportation, distribution or use of the relevant products, it has "consequently" failed to show that Measure 6 modifies the conditions of competition to the detriment of imported products and thus accords less favourable treatment to such products.[629]

7.289. As explained above[630], under the Montana tax refund, licensed distributors receive a refund equal to two cents per gallon on the sale of biodiesel produced entirely from biodiesel ingredients produced in Montana. Measure 6 also provides for owners and operators of retail motor fuel outlets to receive a tax refund equal to one cent per gallon on biodiesel purchased from a licensed distributor if the biodiesel is produced entirely from biodiesel ingredients produced in Montana.

7.290. We find convincing India's submission that the Montana tax refund accords less favourable treatment to non-local, including imported, products. Looking at the text, design, and structure of Measure 6, we note that it ties the provision of a tax refund to the use of local products. The refund is payable only for transactions involving the sale or purchase of biodiesel produced entirely from Montana-origin ingredients. By offering a financial benefit to licensed distributors who sell biodiesel made entirely from Montana-origin ingredients, the "fundamental thrust and effect"[631] of Measure 6 is to stimulate increased demand for the Montana-origin ingredients that must be used for the biodiesel to be eligible for the refund. Conversely, Measure 6 reduces demand for non-Montana-origin ingredients, use of which renders biodiesel ineligible for the tax refund.

7.291. Additionally, the Montana tax refund incentivizes motor fuel retailers to purchase biodiesel made from local ingredients by offering them a refund of one cent per gallon on biodiesel made from Montana-origin ingredients, which refund is not available on purchases of biodiesel made wholly or partly from non-Montana-origin ingredients. The Montana tax refund thereby strengthens the competitive position of such biodiesel over other biodiesels made wholly or partly from non-Montana-origin ingredients.

7.292. We therefore consider that India has made a *prima facie* case that the Montana tax refund accords treatment less favourable to imported products than to local products.[632] We note that this finding is consistent with the numerous past cases that have found that the provision of incentives or advantages for the use of domestic over imported products accord less favourable treatment to such imported products.[633]

7.293. As noted, the United States' primary response to India's claim is that, because India has failed to show that Measure 6 affects the sale, purchase, transportation or use of the relevant products, it follows that it has also failed to show that the measure accords treatment less favourable to imported than to domestic products.[634]

7.294. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 6 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[635] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 6 accords less favourable treatment to imported than to domestic products.

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[629] United States' first written submission, para. 103.

[630] See paras. 2.28 - 2.30 above.

[631] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

[632] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than Montana) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. See Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).

[633] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.

[634] United States' first written submission, para. 103.

[635] See para. 7.198 above.

7.295. Finally, we recall the United States' argument, in the context of whether Measure 6 affects the sale, purchase, transportation, distribution or use of products, that the evidence on the record shows that no incentive has been paid under the measure at issue since 2011.[636] We have discussed this evidence above. In the context of the claim before us, and insofar as this argument might be relied upon to argue that the measure does not accord less favourable treatment, it suffices to recall that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[637] Here, the measure's implications for competitive conditions are explicit from the text, design, and structure of the relevant legislation. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of the measure at issue.[638] Accordingly, we do not consider that evidence showing that Measure 6 may have had minimal or no market effects in recent years, even if accepted, would be sufficient to rebut India's *prima facie* case that the Montana tax refund treats non-local products, including imported products, less favourably than like local products.

7.296. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Montana tax refund modifies the conditions of competition to the detriment of imported ingredients and biodiesel produced therefrom, and therefore accords less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.6 Measure 7: Connecticut additional incentive

7.297. Regarding the Connecticut additional incentive, India submits that, because of the high costs associated with the installation of solar photovoltaic (PV) modules and solar thermal systems, "any form of incentive would play a decisive role in the choice that the consumer makes between domestic and imported products". Thus, according to India, "[t]he provision of additional incentives necessarily alters the competitive environment as any consumer would want to reduce its costs by installing the products that are eligible for the additional incentives".[639] India concludes that because Measure 7 "provid[es] additional incentives for the use of Connecticut-origin product[s], it alters the conditions of competition in the market in favour of the domestic product", and "[t]his alteration … is to the detriment of … imported 'like products'".[640]

7.298. The United States responds that, insofar as India has failed to show that Measure 7 affects the sale, purchase, transportation, distribution or use of the relevant products, it follows "by definition" that it has also failed to show that Measure 7 modifies the conditions of competition to the detriment of imported products and thus accords less favourable treatment to such products.[641] The United States adds that India, in the context of the alleged additional incentive, has argued that "*any* incentive would play a decisive role in" consumer choice, whereas what India needed to show was that the "*particular* CRSIP [Connecticut Residential Solar Investment Program] measures" have done so. According to the United States, India's failure to refer to the specific challenged measure in its arguments means that India has not provided "a particularized analysis of [Measure 7's] expected operation before summarily inferring that [it] play[s] a decisive role in incentivizing purchase or use of products made in the state of Connecticut".[642]

7.299. In response to the United States' argument concerning India's reference to "*any* incentive", India, in response to a question from the Panel, submitted that:

> The reference to the phrase "any form of incentive" needs to be read in the context which has it has been used. The context, of course, is the additional incentives offered under the challenged measures. In fact, in the very next sentence, India refers to the

[636] United States' first written submission, para. 16.
[637] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[638] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[639] India's first written submission, para. 679.
[640] India's first written submission, para. 680.
[641] United States' first written submission, para. 112.
[642] United States' second written submission, para. 9 (emphasis original, fns omitted).

> additional incentives under the challenged measures at issue. The claim that India has not offered particularised analysis of the CRSIP measures, therefore, is baseless.[643]

7.300. As explained above[644], the Connecticut additional incentive is a part of the CRSIP, which provides financial incentives to homeowners who install solar PV or solar thermal systems on their properties.[645] Specifically, the Connecticut additional incentive provides that an additional incentive of up to 5% of the ordinarily available incentive may be made available for the use of "major system components manufactured or assembled in Connecticut"[646], and another additional incentive of up to 5% of the ordinarily available incentive may be made available "for the use of major system components manufactured or assembled in a distressed municipality … or a targeted investment community".[647] Nothing in the relevant legislation either requires the installation of systems whose "major system components" are locally manufactured or prevents the installation of systems whose "major system components" are not locally manufactured. Homeowners who install such systems are eligible to receive the base incentives provided for in the CRSIP. However, such homeowners are not eligible to receive the additional incentive, which may be up to 5% of the CRSIP base incentive payable to all homeowners who install solar PV or solar thermal systems.[648]

7.301. We are convinced by India's submission that the Connecticut additional incentive accords less favourable treatment to non-local products, including imported products. Looking at its text, design, and structure, we observe that Measure 7 establishes a system under which homeowners who choose to install solar PV or solar thermal systems made from locally produced components receive a larger refund than those who decide to install systems made from non-local major system components. We agree with India that, by providing a larger refund for the installation of systems made with locally produced components, the "fundamental thrust and effect"[649] of Measure 7 is to stimulate demand for systems made from locally produced components, as opposed to systems made with components produced elsewhere. This in turn strengthens the competitive position of such components over components produced outside of Connecticut.

7.302. In our view, therefore, India has established *prima facie* that the Connecticut additional incentive modifies the conditions of competition to the detriment of such imported components.[650] We note in this connection that this finding is consistent with the many past cases that have held that the provision of incentives or advantages for the use of domestic over imported products accord less favourable treatment to such imported products.[651]

7.303. We do not agree with the United States' argument that India has failed to provide a sufficiently particularized analysis of Measure 7. Contrary to the United States' suggestion, India's first written submission is not concerned with incentives in the abstract. Rather, paragraphs 679 and 680 of India's first written submission clearly explain why, in India's view, the Connecticut additional incentive modifies the conditions of competition to the detriment of non-local products, including imported products. Paragraph 679 begins by noting the high cost of installing solar PV and solar thermal systems. It then states that, in light of such costs, *any* incentive that lowered such cost would play a key role in a consumer's decision whether and which system to install. Finally, it focuses on Measure 7, arguing that, because the provision of a financial incentive that lowers the costs of certain solar PV or solar thermal systems would create an incentive in favour of those systems, it follows that the Connecticut additional incentive, which provides a bigger refund to homeowners who install systems made from local components than to those who install systems made from

[643] India's response to Panel question No. 118, para. 42.

[644] See para. 2.32 - 2.35 above.

[645] General Statutes of Connecticut, Section 16-245ff(c) (Exhibit IND-124).

[646] As noted, the term "major system components" is not defined in the relevant legal instruments.

[647] Connecticut General Statutes, Section 16-245ff(i) (Exhibit IND-124).

[648] We recall that we have found that the Connecticut additional incentive is mandatory, in the sense that the Connecticut Public Utilities Regulatory Authority (PURA) is *required* to set an additional incentive of more than 0% and no higher than 5% if certain requirements are met. See para. 7.209 above.

[649] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

[650] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than Connecticut) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. See Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).

[651] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.

non-local components, creates *a greater* incentive in favour of such systems, thereby modifying the conditions of competition in their favour.[652] In other words, India explains that, in the costly field of solar PV and solar thermal systems, cheaper systems will be more competitive; by providing additional refunds for the purchase of systems made with local components, the Connecticut additional incentive modifies the conditions of competition in favour of such systems.

7.304. In our view, the case as set out by India in paragraphs 679 and 680 of its first written submission is therefore sufficiently detailed and particularized to raise a *prima facie* case that the Connecticut additional incentive accords less favourable treatment to imported products.

7.305. This brings us to the United States' other argument, which is that, because India has not shown that the measure affects the sale, purchase, transportation, distribution or use of products, it consequentially cannot accord products less favourable treatment.

7.306. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 7 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[653] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 7 accords less favourable treatment to imported than to domestic products.

7.307. Finally, we recall the United States' argument, in the context of whether Measure 7 affects the sale, purchase, transportation, distribution or use of products, that data submitted by India do not establish that any additional incentive payments have been made. Insofar as this argument might be relied upon to argue that the measure does not accord less favourable treatment, we note that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[654] Here, the implications of Measure 7 for competitive conditions are explicit from the text, design, and structure of the relevant legislation. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of Measure 7.[655] Accordingly, we do not consider that evidence showing that Measure 7 may have had minimal or no market effects in recent years, even if accepted, would be sufficient to rebut India's *prima facie* case that the Connecticut additional incentive treats non-local products, including imported products, less favourably than like local products.

7.308. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Connecticut additional incentive modifies the conditions of competition to the detriment of imported major system components of solar PV and solar thermal systems, and the systems made with such components, and therefore accords less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.7 Measure 8: Michigan Equipment Multiplier / Michigan Labour Multiplier

7.309. India submits that, under the Michigan Equipment and Michigan Labour Multipliers, "only those renewable energy systems that meet the statutorily prescribed level of in-state manufacturing are eligible for the additional incentives".[656] In India's view, this means that "the relevant imported products do not get the *equality of opportunity* to compete on the domestic market of Michigan".[657] According to India, "[s]ince [] the buyers are induced to purchase renewable energy system[s] of Michigan origin, the 'like' imported products, which are negated the *equality of competition*, become

[652] India's first written submission, paras. 679 and 680.
[653] See para. 7.198 above.
[654] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[655] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[656] India's first written submission, para. 782.
[657] India's first written submission, para. 782 (emphasis original).

undesirable in the eyes of a potential buyer".[658] India concludes that such imported products are therefore accorded less favourable treatment.

7.310. The United States responds that, insofar as India has failed to show that Measure 8 affects the sale, purchase, transportation, distribution or use of the relevant products, it has "consequently" also failed to show that the measure modifies the conditions of competition to the detriment of imported products and thus accords less favourable treatment to such products.[659] Moreover, the United States submits that India has failed to "provide any analysis as to why [Measure 8] would result in buyers being 'induced to purchase' equipment made in Michigan or cause imported products to become 'undesirable'". In the United States' view, "India simply assumes in passing … that [Measure 8] will incentivize the purchase of locally manufactured equipment on the Michigan market".[660]

7.311. In response to the United States' argument that it has failed to explain how Measure 8 would modify the conditions of competition to the detriment of imported products, India submitted that, in its first written submission, it "explained the discriminatory element of the challenged measure[,] i.e. incentives that are offered once the in-state level of manufacturing criterion is met". In India's view, "[t]his … denies the equality of opportunity to the like imported products and that is sufficient for proving less favourable treatment".[661]

7.312. As explained above[662], the Michigan Equipment and Michigan Labour Multipliers are part of a broader set of rules and regulations called "Renewable Energy Standards Program in the State of Michigan" (RESPM). *Inter alia*, the RESPM requires electricity providers to maintain a portfolio of renewable energy credits (RECs) that can be collected either by generating or purchasing renewable energy.[663] The Multipliers at issue provide that electricity providers are eligible to receive an extra 1/10 REC (over and above the RECs ordinarily allotted for generation or purchase of renewable electricity) for every megawatt hour of electricity generated (i) from a renewable energy system constructed using equipment made in Michigan[664], or (ii) from a renewable energy system constructed using a workforce composed of residents of Michigan.[665]

7.313. In our view, India has convincingly shown that both the Michigan Equipment and Michigan Labour Multipliers accord less favourable treatment to imported products. Looking at the text, design, and structure of the Multipliers, we note that both programs give electricity providers who generate electricity using systems made from local equipment or by local workforce, or who purchase electricity so generated, an extra 1/10 REC per kilowatt hour of electricity. This means that providers who generate or purchase such electricity will more easily be able to satisfy the regulatory requirements concerning the collection of RECs. In the context of a regulatory system requiring electricity providers to obtain a certain number of credits per year, the possibility of obtaining extra credits without having to produce or purchase additional energy is a clear incentive favouring the use of renewable energy systems containing local inputs or constructed using local workforce. Accordingly, the "fundamental thrust and effect"[666] of the Multipliers is to promote the purchase of renewable energy systems made with local components or constructed using local labour.

7.314. We thus consider that India has shown *prima facie* that the Multipliers under Measure 8 incentivize the purchase of renewable energy systems made with local components or constructed

[658] India's first written submission, para. 782.
[659] United States' first written submission, para. 118.
[660] United States' second written submission, para. 10.
[661] India's response to Panel question No. 118, para. 42.
[662] See para. 2.40 above.
[663] Michigan Public Act No. 295, Section 39(1) (Exhibit IND-43).
[664] Michigan Public Act No. 295, Section 39(2)(d) (Exhibit IND-43). This additional credit is only available for the first three years after the renewable energy system first produces electricity on a commercial basis.
[665] Michigan Public Act No. 295, Section 39(2)(e) (Exhibit IND-43). This additional credit is only available for the first three years after the renewable energy system first produces electricity on a commercial basis.
[666] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

using local labour, and therefore modify the conditions of competition in their favour, and to the detriment of like imported products.[667]

7.315. In this connection, we do not agree with the United States that India's arguments concerning the Michigan Equipment and Michigan Labour Multipliers lack analysis or are based on presumptions. Paragraphs 735-749 of India's first written submission contain a detailed explanation of the Multipliers, explaining both their regulatory context and expected and historical operation. India supports its description of the Multipliers by explaining how they have influenced the sourcing decisions of one particular Michigan electricity provider.[668] India then proceeds to elaborate its legal arguments, including those cited earlier in this section.[669] Those legal arguments draw on, and are supported by, the factual argumentation contained in paragraphs 735-749. Reading these two sections of India's submission together, we consider that India has sufficiently explained both the factual and legal bases of its claim against these Multipliers. Specifically, we consider that India has explained why the Multipliers "would result in purchasers being 'induced to purchase' renewable energy systems containing local components or constructed using local workforce"[670] – as noted in the previous paragraph, this is because the availability of extra RECs is a clear incentive in the context of a regulatory system requiring that electricity providers obtain a certain number of RECs per year. In our view, this analysis emerges clearly from India's submission when all the relevant parts of that document are read as a whole, and not in an unduly isolated or fragmented manner, as, for example, by reading one subsection without reference to other related subsections.

7.316. We now turn to the United States' other argument, namely that, because India has not shown that Measure 8 affects the sale, purchase, transportation, distribution or use of the relevant products, it consequentially cannot accord imported products less favourable treatment.[671]

7.317. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 8 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[672] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 8 accords less favourable treatment to imported than to domestic products.

7.318. Finally, we recall the United States' argument, in the context of whether Measure 8 affects the sale, purchase, transportation, distribution or use of products, that evidence on the record shows that only a miniscule number of credits generated under the RESPM have been issued pursuant to the Michigan Equipment Multiplier. We discussed the evidence above.[673] In the context of the claim before us, and insofar as this argument might be relied upon to argue that the measure does not accord less favourable treatment, it suffices to recall that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[674] Here, the implications of Measure 8 for competitive conditions are explicit from the text, design, and structure of the relevant legislation. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of the measure at issue.[675] Accordingly, we do not consider that evidence showing that Measure 8 may have had minimal or no market effects in recent years is sufficient to rebut India's *prima facie* case that Michigan Equipment and the Michigan Labour

[667] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than Michigan) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. See Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).

[668] India's first written submission, paras. 745-746.

[669] See para. 7.309 above.

[670] United States' second written submission, para. 10.

[671] India's first written submission, para. 118.

[672] See para. 7.220 above.

[673] See para. 7.218 above.

[674] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.

[675] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.

Multipliers treat non-local products, including imported products, less favourably than like local products.

7.319. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Michigan Equipment and Michigan Labour Multipliers modify the conditions of competition to the detriment of renewable energy systems made from imported components, or constructed using non-local labour. These Multipliers therefore accord less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.8 Measure 9: Delaware Equipment Bonus / Delaware Workforce Bonus

7.320. India submits that the Delaware Equipment Bonus and the Delaware Workforce Bonus accord less favourable treatment to imported products than to like domestic products "by offering the additional incentives based on the in-state manufacture level of the specified renewable energy equipment".[676] According to India, this "den[ies] the effective equality of opportunity to the imported products to compete in the domestic market of Delaware".[677] India argues that "a potential buyer will prefer to purchase the specified products satisfying the in-state manufacture level than those which are imported" because of the additional incentive, thereby modifying "the conditions of competition to the detriment of the imported products and in favour of the 'like products' of Delaware-origin".[678]

7.321. The United States responds that, insofar as India has failed to show that Measure 9 affects the sale, purchase, transportation, distribution or use of the relevant products, it follows that India has "likewise" failed to show that Measure 9 modifies the conditions of competition to the detriment of imported products and thus accords less favourable treatment to such products.[679]

7.322. As explained above[680], the Delaware Equipment Bonus and the Delaware Workforce Bonus consist of an additional 10% credit towards meeting the renewable energy portfolio standards for solar or wind energy installations, provided that a minimum of 50% of the cost of renewable energy equipment, inclusive of mounting components, are manufactured in Delaware, or that the facility is constructed or installed with a minimum of 75% in-state workforce.

7.323. We find compelling India's argument that the Delaware Equipment and Workforce Bonuses accord less favourable treatment to non-local products, including imported products. Looking at the text, design, and structure of the Equipment and Workforce Bonuses, we note that both programs give retail electricity suppliers an additional 10% credit towards meeting the renewable energy portfolio standards for solar or wind energy installations sited in Delaware provided that (i) a minimum of 50% of the cost of renewable energy equipment, inclusive of mounting components, are manufactured in Delaware, or (ii) the facility is constructed or installed with a minimum of 75% of instate workforce. This means that retail electricity suppliers that sell such electricity will more easily meet the renewable energy portfolio standards. In the context of a regulatory system requiring retail electricity suppliers to obtain a certain number of credits per year, the possibility of obtaining extra credits without having to sell additional energy is a clear incentive favouring the use of renewable energy equipment, including mounting components, containing local inputs and facilities constructed using local workforce. We therefore agree with India that the "fundamental thrust and effect"[681] of the Bonuses is to incentivize the purchase of such renewable energy equipment, mounting components, and facilities.

7.324. In our view, therefore, India has made a *prima facie* case that the Delaware Equipment Bonus and the Delaware Workforce Bonus modify the conditions of competition in favour of renewable energy equipment, inclusive of mounting components, manufactured in Delaware (at least 50% of its cost) and facilities constructed or installed with a minimum of 75% in-state

[676] India's first written submission, para. 873.
[677] India's first written submission, para. 873. See also India's first written submission, para. 878.
[678] India's first written submission, para. 878.
[679] United States' first written submission, para. 125.
[680] See para. 2.52 above.
[681] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

workforce by creating a financial incentive favouring their usage.[682] We recall in this connection that past cases have consistently found that the provision of incentives or advantages for the use of domestic over imported products accord less favourable treatment to such imported products.[683]

7.325. As noted, the United States' primary response to India's claim is that, because India has failed to show that Measure 9 affects the sale, purchase, transportation or use of the relevant products, it follows that it has also failed to show that the measure accords treatment less favourable to imported than to domestic products.[684]

7.326. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 9 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[685] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 9 accords less favourable treatment to imported than to domestic products.

7.327. Finally, we recall the United States' arguments, in the context of whether Measure 9 affects the sale, purchase, transportation, distribution or use of products, concerning the tradability and monetary value of renewable energy credits and solar renewable energy credits, the absence of solar panel manufacturing activities in Delaware, and the fact that the measure is addressed to entities that distribute electricity and do not generate it. We have discussed this evidence above.[686] For present purposes, and insofar as this argument might be relied on to argue that the measure does not accord less favourable treatment, it suffices to recall that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[687] The implications for competitive conditions of the Delaware Bonuses challenged by India are explicit from the text, design, and structure of the relevant provisions. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of Measure 9.[688] Accordingly, we do not consider that the United States has rebutted India's *prima facie* case that the Delaware Equipment Bonus and the Delaware Workforce Bonus treat non-local products, including imported products, less favourably than like local products.

7.328. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Delaware Equipment Bonus and the Delaware Workforce Bonus modify the conditions of competition to the detriment of imported renewable energy equipment, mounting components, and facilities, and therefore accords less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.9 Measure 10: Minnesota production incentives and rebates

7.329. India submits that the Minnesota solar energy production incentive (SEPI) and the Minnesota solar photovoltaic (PV) rebate under Measure 10 accord less favourable treatment to imported products than to like domestic products "by incentivizing and, thereby, deny[ing] the effective equality of opportunity to the imported products to compete in the domestic market of Minnesota".[689]

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[682] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than Delaware) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. See Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).

[683] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.

[684] United States' first written submission, para. 125.

[685] See para. 7.198 above.

[686] See paras. 7.222 - 7.224 above.

[687] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.

[688] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.

[689] India's first written submission, para. 1011.

According to India, by "creating a distinction between the domestic and imported products on the basis of origin and by giving the end consumers a direct financial advantage in terms of incentives or rebates for using the domestic products", the SEPI and the Minnesota solar PV rebate "alter the conditions of competition in the market in favour of the domestic products and to the obvious detriment of the imported products".[690]

7.330. The United States responds that insofar as India has failed to show that the two programs affect the sale, purchase, transportation, distribution or use of the relevant products, India has necessarily failed to show that they accord less favourable treatment to imported products.[691]

7.331. As explained above[692], the SEPI and the Minnesota solar PV rebate provide incentives and rebates for the use of solar PV modules made in Minnesota.

7.332. We find convincing India's submission that the SEPI and the Minnesota solar PV rebate accord less favourable treatment to relevant non-local products, including imported products. Looking at the text, design, and structure of the two programs, we note that both offer an advantage to owners of grid-connected solar PV modules (SEPI), and owners of qualified properties (for the solar PV rebate) provided that they install solar PV modules made in Minnesota. The definitions of "made in Minnesota (for SEPI)[693] and "manufactured in Minnesota" (for the Minnesota solar PV rebate)[694] leave no doubt that imported solar PV modules cannot qualify for the incentives and rebates at issue. Thus, we consider that the "fundamental thrust and effect"[695] of the two programs at issue is to promote the use of solar PV modules made in Minnesota.

7.333. In our view, therefore, India has made a *prima facie* case that the SEPI and the Minnesota solar PV rebate modify the conditions of competition by creating a financial incentive favouring solar PV modules made in Minnesota.[696] We note in this connection that past cases have consistently found that the provision of incentives or advantages for the use of domestic over imported products accord less favourable treatment to such imported products.[697]

7.334. As noted, the United States' primary response to India's claim is that, because India has failed to show that Measure 10 affects the sale, purchase, transportation or use of the relevant products, it follows that it has also failed to show that the measure accords treatment less favourable to imported than to domestic products.[698]

7.335. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 10 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[699] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 10 accords less favourable treatment to imported than to domestic products.

7.336. Finally, we recall the United States' argument, in the context of whether the SEPI affects the sale, purchase, transportation, distribution or use of products, that evidence on the record shows

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[690] India's first written submission, para. 1013.
[691] United States' first written submission, para. 129.
[692] See para. 2.55 above.
[693] See para. 2.58 above.
[694] See para. 2.67 above.
[695] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[696] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than Minnesota) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. See Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).
[697] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.
[698] United States' first written submission, para. 129.
[699] See para. 7.239 above.

that only a "negligible amount" of solar installations have received incentives under the SEPI during 2016.[700] We discussed this evidence above.[701] In the present context, and insofar as this argument might be relied upon to argue that the measure does not accord less favourable treatment, it suffices to recall that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[702] The implications for competitive conditions of the SEPI are explicit from the text, design, and structure of the relevant provisions. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of the two programs at issue.[703] Accordingly, we do not consider that evidence showing that the SEPI granted incentives to a "negligible amount" of solar installations during 2016 is sufficient to rebut India's *prima facie* case that the SEPI treats non-local products, including imported products, less favourably than like local products.

7.337. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the SEPI and the Minnesota solar PV rebate modify the conditions of competition to the detriment of imported solar PV modules, and therefore accords less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.10 Conclusion on less favourable treatment

7.338. In conclusion, we find that India has shown *prima facie*, and the United States has not rebutted, that each of the measures at issue accords to imported products treatment less favourable than that accorded to like domestic products within the meaning of Article III:4 of the GATT 1994.

7.3.5 Conclusion on India's claims under Article III:4 of the GATT 1994

7.339. We have found that the relevant domestic and imported products under each measure at issue are like products within the meaning of Article III:4 of the GATT 1994. We have also found that each measure at issue is a "law", "regulation" or "requirement" "affecting the[] internal sale, offering for sale, purchase, transportation, distribution or use" of the relevant products within the meaning of Article III:4 of the GATT 1994. Finally, we have concluded that each measure at issue accords to relevant imported products[704] treatment less favourable than that accorded to like domestic products within the meaning of Article III:4 of the GATT 1994.

7.340. We therefore conclude that India has established, and the United States has not rebutted, that each measure at issue fulfils all three elements of the legal test under Article III:4 of the GATT 1994 and is therefore inconsistent with Article III:4 of the GATT 1994.

7.341. Having found that the measures at issue are inconsistent with Article III:4 of the GATT 1994, we turn to India's other claims in this dispute. As noted, India challenges the measures at issue under Articles 2.1 and 2.2 of the TRIMs Agreement, Articles 3.1(b), 3.2 and 25 of the SCM Agreement, and Article XXIII:1(a) of the GATT 1994, and we address these claims in this order.

7.4 India's claims under the TRIMs and SCM Agreements

7.342. We recall that, for India, "[its] claims under the TRIMs Agreement and the SCM Agreement clearly emanate from the violation of Article III:4 of the GATT 1994"[705], as "the core of [its] claims lie in the *discriminatory treatment* between the imported products and 'like' products of domestic origin".[706] We also recall that, according to the Appellate Body, some of the key provisions invoked

[700] United States' first written submission, para. 129.
[701] See paras. 7.237 - 7.238 above.
[702] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[703] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[704] Although we have found that India has not made a *prima facie* case that the Montana tax incentive accords less favourable treatment to imported *ethanol* (i.e. the final product), this does not affect our overall conclusion that, because Measure 4 accords less favourable treatment to imported ethanol *ingredients*, it is inconsistent with Article III:4 of the GATT 1994.
[705] India's opening statement at the first meeting of the Panel, para. 11.
[706] India's opening statement at the first meeting of the Panel, para. 11 (emphasis original).

by India in the present dispute overlap as regards discriminatory conduct involving local content requirements:[707]

> Both the national treatment obligations in Article III:4 of the GATT 1994 and the TRIMs Agreement, and the disciplines in Article 3.1(b) of the SCM Agreement, are cumulative obligations. Article III:4 of the GATT 1994 and the TRIMs Agreement, as well as Article 3.1(b) of the SCM Agreement, prohibit the use of local content requirements in certain circumstances. These provisions address discriminatory conduct …[708]

7.343. This raises the question whether a positive resolution of this dispute requires us to assess India's additional claims under the TRIMs Agreement and the SCM Agreement, or whether – in light of our findings under Article III:4 of the GATT 1994 – we should exercise judicial economy on India's claims under the TRIMs and SCM Agreements.

7.344. India has requested us to address each of its claims under the GATT 1994, the TRIMs Agreement and the SCM Agreement.[709] The United States, on the contrary, has argued that "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."[710] Recalling that rulings made by the DSB "shall be aimed at achieving a satisfactory settlement of the matter"[711], the United States adds that "the Panel should consider the extent to which it needs to reach India's claims that raise the same basic issues under three different WTO agreements".[712]

7.345. According to the Appellate Body, "[j]udicial economy refers to the discretion of a panel to address only those claims that must be addressed 'in order to resolve the matter in issue in the dispute'", and "th[is] discretion of a panel … is consistent with the aim of the WTO dispute settlement mechanism, as articulated in Article 3.7 of the DSU, to 'secure a positive solution to a dispute'".[713]

7.346. Bearing these considerations in mind, we turn to examine the appropriateness of exercising judicial economy in respect of India's claims under the TRIMs and the SCM Agreements, respectively.

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[707] The United States does not contest this, whereas India explicitly argues that the core of its claims lies in the "discriminatory treatment" between the products imported to the US and those like products of domestic origin and explains that all its claims emanate from the violation of Article III:4 of the GATT 1994. India' response to Panel question No. 54.

[708] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.5. See also Panel Reports, *Brazil – Taxation*, para. 7.48.

[709] India's first written submission, paras. 1175-1178. See also India's remarks at the first meeting of the Panel, part of the official record (minute 15:19 of the meeting on 10 October 2018), and second written submission, para. 99 and fn 76.

[710] United States' opening statement at the second meeting of the Panel, para. 5.

[711] United States' opening statement at the second meeting of the Panel, para. 8, quoting Article 3.4 of the DSU.

[712] United States' opening statement at the second meeting of the Panel, para. 8. In particular, the United States has suggested that "if the Panel finds that India has established that a measure is inconsistent with Article III:4 of the GATT 1994, the Panel could decline to make a separate finding under the TRIMs Agreement". See United States' response to Panel question No. 53.

[713] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.20 (fns omitted, referring to Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 19; *India – Patents (US)*, para. 87; *Brazil – Retreaded Tyres*, para. 257; *Canada – Wheat Exports and Grain Imports*, para. 133; *US - Lead and Bismuth II*, paras. 71 and 73; *Argentina – Footwear (EC)*, para. 145; *Australia – Salmon*, para. 223; and *Japan – Agricultural Products II*, para. 111).

7.4.1 India's claims under the TRIMs Agreement

7.347. India's claims under the TRIMs Agreement relate to Articles 2.1[714] and 2.2[715] of that Agreement, and paragraph 1(a) of the Illustrative List[716] contained in the Agreement's Annex and referenced in its Article 2.2.

7.348. We begin by observing that, according to the recent panel reports in *Brazil – Taxation*, "[a]lthough there is some overlap between these … provisions, … there are also differences in their respective scope of application"[717]: "[i]n particular, the scope of Article III:4 of the GATT 1994 is broader than that of Article 2.1 of the TRIMs Agreement …, since it refers generally to 'laws, regulations and requirements'", whereas "[a] measure is only covered by Article 2.1 of the TRIMs Agreement if it is a TRIM within the meaning of that agreement".[718] This suggests to us that, in principle, compliance with a finding of inconsistency with Article III:4 of the GATT 1994 would bring about compliance with the narrower obligations of the TRIMs Agreement, and therefore where a panel has already found a violation of Article III:4 of the GATT 1994 it may not be necessary to make additional findings on the same measure(s) under the TRIMs Agreement.

7.349. Indeed, in several past cases, panels have decided to exercise judicial economy on claims under the TRIMs Agreement after having found violations under the GATT 1994, in particular its Article III:4. Thus, in *Turkey – Rice*, the panel recognized that there is a close link between Article 2 of the TRIMs Agreement and Article III:4 of the GATT 1994. It explained that "[b]oth provisions of the TRIMs Agreement, Article 2.1 and paragraph 1(a) of the Annex, refer to the obligation of Members not to apply trade-related investment measures in a manner that is inconsistent with specific rules contained in the GATT 1994, notably in Article III and in Article XI."[719] The panel concluded that "if [it] found that the domestic purchase requirement is inconsistent with Article III:4 of the GATT 1994, [it] need not make a finding under the TRIMs Agreement".[720]

7.350. The panel in *India – Autos* followed a similar approach. It stated that, having found that the measures at issue were inconsistent with Article III:4 of the GATT 1994, "it [wa]s not necessary to consider separately whether they are also inconsistent with the provisions of the TRIMs Agreement".[721] The panel added that:

> It seems that an examination of the GATT provisions in this case would be likely to make it unnecessary to address the TRIMs claims, but not vice-versa. If a violation of the GATT claims was found, it would be justifiable to refrain from examining the TRIMs claims under the principle of judicial economy.[722]

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[714] According to Article 2.1 of the TRIMs Agreement, "[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."

[715] According to Article 2.2 of the TRIMs Agreement, "[a]n illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement".

[716] According to paragraph 1(a) of the Illustrative List contained in the Annex to the TRIMs Agreement and referenced in its Article 2.2:

> "1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
>
> (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production …".

[717] Panel Reports, *Brazil – Taxation*, para. 7.47.

[718] Panel Reports, *Brazil – Taxation*, para. 7.47 (fn omitted, referring to Panel Report, *Indonesia – Autos*, para. 14.82).

[719] Panel Report, *Turkey – Rice*, para. 7.184.

[720] Panel Report, *Turkey – Rice*, para. 7.184.

[721] Panel Report, *India – Autos*, para. 7.324.

[722] Panel Report, *India – Autos*, para. 7.161.

7.351. Likewise, the panel in *China – Auto Parts* decided to exercise judicial economy with respect to claims made under the TRIMs Agreement after having found a violation of Article III:4 of the GATT 1994. The panel explained that its findings under the GATT 1994 were "sufficient for the resolution of the dispute" because "bringing the measures into conformity with China's obligations pursuant to [its] findings under Article III:4 of the GATT 1994 would also remove any inconsistency of these measures with the TRIMs Agreement".[723]

7.352. The panel in *EC – Bananas III* decided to exercise judicial economy for similar reasons, by holding that it did not:

> [C]onsider it necessary to make a specific ruling under the TRIMs Agreement with respect to the [measures at issue]. On the one hand, a finding that the measure in question would not be considered a trade-related investment measure for the purposes of the TRIMs Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMs and, on the other hand, steps taken to bring [the measures at issue] into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMs Agreement.[724]

7.353. Like the above panels, we do not find it necessary to address India's claims under the TRIMs Agreement in order to provide a positive solution to this dispute. Bearing in mind that Article 2 of the TRIMs Agreement is only concerned with TRIMs that are inconsistent with Article III (or Article XI) of the GATT 1994[725], and also in light of the relatively consistent practice of past panels when faced with claims under Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement, we consider that steps taken by the United States to bring the measures at issue into compliance with Article III:4 of the GATT 1994 will also eliminate the alleged non-conformity of the same measures with obligations under the TRIMs Agreement.

7.354. We therefore exercise judicial economy with regard to India's claims under Articles 2.1 and 2.2 of the TRIMs Agreement.

7.4.2 India's claims under the SCM Agreement

7.355. As noted, India requests that the Panel find that all of the measures at issue are inconsistent with Articles 3.1(b), 3.2, and 25 of the SCM Agreement.[726]

7.4.2.1 Articles 3.1(b) and 3.2 of the SCM Agreement

7.356. In the above-mentioned *Brazil – Taxation* dispute, the panel explained that the scope of Article 3.1(b) of the SCM Agreement is also narrower than the scope of Article III:4 of the GATT 1994. In particular, "[a]lthough there is some overlap between these … provisions, … there are also differences in their respective scope of application"[727] insofar as "the scope of Article III:4 of the GATT 1994 is broader than that of … Article 3.1(b) of the SCM Agreement, since [Article III:4 of the GATT 1994] refers generally to 'laws, regulations and requirements'", whereas "a measure is only covered by Article 3.1(b) of the SCM Agreement if it is a subsidy within the meaning of that agreement".[728] On appeal, the Appellate Body confirmed that establishing the existence of a

[723] Panel Reports, *China – Auto Parts*, para. 7.368.
[724] Panel Reports, *EC – Bananas III*, para. 7.186.
[725] Article 2.1 of the TRIMs Agreement.
[726] India's first written submission, paras. 1175-1176.
[727] Panel Reports, *Brazil – Taxation*, para. 7.47.
[728] Panel Reports, *Brazil – Taxation*, para. 7.47 (fn omitted). Likewise, the panel in *Canada – Autos* "recognize[d] that Article 3.1(b) in some sense has its roots in Article III:4 of GATT and in certain interpretations of that provision, which relates to non-discrimination. We do not consider however that Article 3.1(b) *ipso facto* has the same scope as Article III:4. To the contrary, while Article III:4 of GATT speaks of 'treatment no less favourable' and of requirements 'affecting' internal sale, Article 3.1(b) speaks of subsidies 'contingent upon the use of domestic over imported goods'." Panel Report, *Canada – Autos*, para. 10.215.

prohibited subsidy under Articles 3.1(b)[729] and 3.2[730] of the SCM Agreement requires meeting a "more demanding standard than demonstrating that an incentive to use domestic goods exists under Article III:4 of the GATT 1994".[731]

7.357. In the context of the dispute before us, this suggests that, by bringing the challenged measures into conformity with Article III:4 of the GATT 1994, the United States would also eliminate the alleged non-conformity of the same measures with the narrower obligations of Article 3 of the SCM Agreement, and therefore where a panel has already found a violation of Article III:4 of the GATT 1994 it may not be necessary to make additional findings on the same measure(s) under Article 3 of the SCM Agreement.

7.358. We also recall that in *China – Auto Parts*, after having found a violation under Article III of the GATT 1994, the panel exercised judicial economy on claims under both the TRIMs Agreement and the SCM Agreement. The panel held that, regarding the local content requirements challenged in that dispute, addressing the complainant's SCM claims would not be necessary to secure a positive solution of the dispute, because "bringing the measures into conformity with China's obligations pursuant to [the] findings under Articles III:2 and III:4 of the GATT 1994 also would remove any inconsistency of those measures with Articles 3.1(b) and 3.2 of the SCM Agreement".[732] On appeal, the Appellate Body noted – without criticism – that "[t]he [p]anel exercised judicial economy with respect to the claims under the TRIMs Agreement … and Articles 3.1(b) and 3.2 of the SCM Agreement".[733]

7.359. Likewise, in *Canada – Autos* the Appellate Body validated the panel's exercise of judicial economy on claims under Article 3 of the SCM Agreement following findings of violation under Article III:4 of the GATT 1994. On appeal, the European Communities argued that the panel in that dispute had committed legal error by failing to address its claim under Article 3.1(a) of the SCM Agreement.[734] The Appellate Body disagreed. Although it criticised the panel for failing to make explicit its decision to exercise judicial economy[735], the Appellate Body held that the panel was entitled not to address the claim under Article 3.1(a) because, having already found that the aspects of the measure in question were inconsistent with Article III:4 of the GATT 1994 (and Article XVII of the GATS), findings under Article 3.1(a) of the SCM Agreement were not necessary to secure a positive solution to the dispute.[736]

7.360. We are cognizant that, in *EC – Export Subsidies on Sugar*, the Appellate Body reversed a panel's decision to exercise judicial economy on claims under Article 3 of the SCM Agreement. In that case, the Appellate Body concluded that the panel's exercise of judicial economy in regard to the complainants' claims under Article 3 of the SCM Agreement following findings of violation under Articles 9 and 10 of the Agreement on Agriculture constituted legal error.[737] The Appellate Body noted[738] that the SCM Agreement contains "special rules and additional procedures on dispute settlement" in respect of subsidies prohibited under Article 3, in particular, Article 4.7 of the

[729] According to Article 3.1(b) of the SCM Agreement:

> "1. Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> …
>
> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."

[730] According to Article 3.2 of the SCM Agreement, "[a] Member shall neither grant nor maintain subsidies referred to in paragraph 1".

[731] Appellate Body Reports, *Brazil – Taxation*, para. 5.254.

[732] Panel Reports, *China – Auto Parts*, para. 7.635.

[733] Appellate Body Reports, *China – Auto Parts*, para. 7.

[734] Appellate Body Report, *Canada – Autos*, para. 110.

[735] Appellate Body Report, *Canada – Autos*, para. 117.

[736] Appellate Body Report, *Canada – Autos*, para. 116.

[737] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335.

[738] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335.

SCM Agreement.[739] According to the Appellate Body, by declining to rule on the claim under Article 3 of the SCM Agreement, the panel "precluded the possibility of a remedy being made available to the Complaining Parties, pursuant to Article 4.7 of the SCM Agreement, in the event of the [p]anel finding in favour of the Complaining Parties with respect to their claims under Article 3".[740] In the Appellate Body's view, by precluding itself from making a recommendation under Article 4.7 of the SCM Agreement, the panel had failed to make "such … findings as [would] assist the DSB in making the recommendations … provided for in the covered agreements", as required by Article 11 of the DSU.[741]

7.361. We are mindful of our obligation to make an objective assessment of the matter before us, in line with Article 11 of the DSU, including an assessment of the appropriateness of exercising judicial economy on India's claims under Article 3 of the SCM Agreement. That said, in our view, the Appellate Body's analysis in *EC – Export Subsidies on Sugar* is not directly applicable to the dispute before us.

7.362. In *EC – Export Subsidies on Sugar*, the Appellate Body addressed the relationship between agreements and provisions that are different in important respects from those invoked by India in the present dispute. The provisions at issue in *EC – Export Subsidies on Sugar*, Articles 3.3 and 8 (through Articles 9.1(a) and 9.1(c)) of the Agreement on Agriculture and Article 3 of the SCM Agreement, all address subsidies. The existence of a specific relationship of these provisions is recognized in Article 3 of the SCM Agreement, which explicitly refers to the Agreement on Agriculture.[742]

7.363. Moreover, the panel's decision in *EC – Export Subsidies on Sugar* to exercise judicial economy with regard to the complainants' claim under Article 3 of the SCM Agreement was introduced by reference to its earlier finding that "the EC sugar regime [was] inconsistent with the European Community's export subsidy obligations under Articles 3.3 and 8 (through Article 9.1(a) and 9.1(c)) of the Agreement on Agriculture".[743] We also recall that in *EC – Export Subsidies on Sugar*, before exercising judicial economy, the panel had already found that the measures at issue were subsidies subject to prohibition under Article 8 of the Agreement on Agriculture, but had then declined to make findings under the SCM Agreement, or explore the possible applicability of Article 4.7 thereof, which provides for panels to make a special recommendation where they have found a challenged measure to be prohibited subsidy.[744]

7.364. In light of this, we do not read the Appellate Body's report in *EC – Export Subsidies on Sugar* as articulating a general principle that a panel may never exercise judicial economy on claims under the SCM Agreement. Rather, as we understand it, where a measure is found to be a subsidy prohibited under the Agreement on Agriculture[745], a panel should consider the implications of its subsidy-related findings under the Agreement on Agriculture for the consistency of those measures with the provisions of the SCM Agreement dealing with prohibited subsidies.

[739] According to Article 4.7 of the SCM Agreement, "[i]f the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn".

[740] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335.

[741] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335.

[742] The *chapeau* of Article 3 of the SCM Agreement is introduced with the phrase "Except as provided in the Agreement on Agriculture …". See also Article 13(c)(ii) of the Agreement on Agriculture and Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 123-124.

[743] Panel Report, *EC – Export Subsidies on Sugar*, para. 7.381.

[744] All three complainants in that dispute (i.e. Australia, Brazil, and Thailand) explicitly requested that the Panel recommend to the DSB that the European Communities bring its measures at issue into conformity with its WTO obligations in accordance with both Article 19.1 of the DSU and Article 4.7 of the SCM Agreement. See Panel Report, *EC – Export Subsidies on Sugar*, paras. 4.3, 4.5, and 4.8.

[745] According to the Appellate Body, "[i]t is clear from the plain wording of Article 8 [of the Agreement on Agriculture] that Members are *prohibited* from providing export subsidies otherwise than in conformity with the Agreement on Agriculture and the commitments specified in their Schedules". Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 216 (emphasis added).

7.365. The present dispute is, however, different from *EC – Export Subsidies on Sugar* in key respects. As noted, *EC – Export Subsidies on Sugar* addressed the issue of judicial economy in regard to provisions different from the ones invoked by India before us. Importantly, Article III:4 of the GATT 1994 and Articles 2.1 and 2.2 of the TRIMs Agreement do not relate to subsidies. Our finding that the measures at issue violate Article III:4 of the GATT 1994 neither entails nor implies that the measures at issue are or are not subsidies.[746]

7.366. Instead of *EC – Export Subsidies on Sugar*, we find the more recent *China – Auto Parts* dispute to provide more relevant and compelling guidance on the issue of judicial economy before us. That case dealt with precisely the same main provisions as the ones invoked by India before us. The circumstances of *China – Auto Parts* were also closer to the present dispute, in that the panel in that case decided to exercise judicial economy in respect of local content requirements that it had already found to be inconsistent with Article III of the GATT 1994. It was in the specific context of those local content requirements and legal provisions invoked that the panel in *China – Auto Parts* concluded that addressing the United States' SCM claims would not be necessary to secure a positive resolution of the dispute as "bringing the measures into conformity with China's obligations pursuant to [the] findings under Articles III:2 and III:4 of the GATT 1994 also would remove any inconsistency of those measures with Articles 3.1(b) and 3.2 of the SCM Agreement."[747] As summarized above, on appeal the Appellate Body explicitly noted that "[t]he [p]anel exercised judicial economy with respect to the claims under the TRIMs Agreement … and Articles 3.1(b) and 3.2 of the SCM Agreement".[748] In doing so, the Appellate Body did not make any reference to Article 4.7 of the SCM Agreement or its earlier report in *EC – Export Subsidies on Sugar*, let alone criticise the panel for having exercised judicial economy with regard to Article 3 of SCM Agreement following a finding of violation under Article III:4 of the GATT 1994.

7.367. Given the similarity of the matter in *China – Auto Parts*, i.e. local content requirements challenged under the non-discrimination provisions of Article III of the GATT, the TRIMs Agreement, and Articles 3.1(b) and 3.2 of the SCM Agreement, and the matter before us in this dispute, we consider that the United States bringing its measures at issue into conformity with its obligations pursuant to Article III:4 of the GATT 1994 would "remove any inconsistency of those measures with Articles 3.1(b) and 3.2 of the SCM Agreement".[749] As discussed above, India has argued, and we have found, that the measures at issue violate Article III:4 of the GATT 1994 because they condition an advantage on the use of domestic over imported products. It seems to us that, if the United States removed such conditionality in order to bring itself into compliance with Article III:4 of the GATT 1994, it would also eliminate the alleged non-conformity of the same conditionality with its obligations under Article 3 of the SCM Agreement, thus removing the basis or need for any finding that the measures are prohibited subsidies within the meaning of Article 3 of the SCM Agreement.

7.368. For these reasons, we exercise judicial economy on, and refrain from addressing, India's claims under Articles 3.1(b) and 3.2 of the SCM Agreement.

7.4.2.2 Article 25 of the SCM Agreement

7.369. India also challenges the measures at issue under Article 25 of the SCM Agreement. In particular, according to India, the United States has acted inconsistently with Article 25 of the SCM Agreement, specifically paragraphs 2 and 3[750], by failing to notify the measures at issue to the SCM Committee.[751]

7.370. The notification obligation under Article 25.2 of the SCM Agreement covers "any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or

[746] As the panel in *Canada – Autos* stated, "while Article III:4 of [the] GATT [1994] speaks of 'treatment no less favourable' and of requirements 'affecting' internal sale, Article 3.1(b) [of the SCM Agreement] speaks of subsidies 'contingent upon the use of domestic over imported goods'". Panel Report, *Canada – Autos*, para. 10.215.

[747] Panel Reports, *China – Auto Parts*, para. 7.635.

[748] Appellate Body Reports, *China – Auto Parts*, para. 7.

[749] Panel Reports, *China – Auto Parts*, para. 7.635.

[750] Article 25.2 of the SCM Agreement provides that "Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories", whereas Article 25.3 prescribes the content of such notifications.

[751] India's first written submission, para. 30.

maintained within their territories". An examination of a claim under Article 25.2 of the SCM Agreement thus presupposes a finding, *inter alia*, that the measure at issue is a subsidy as defined in Article 1.1, and is specific within the meaning of Article 2 of the SCM Agreement. India has not made any independent arguments regarding specificity; India merely argues that, pursuant to Article 2.3 SCM Agreement[752], the measures at issue are specific subsidies as a result of being prohibited under Article 3.1 of the SCM Agreement.[753]

7.371. Thus, India's claim under Article 25 of the SCM Agreement is directly linked to, and depends on, the outcome of its claims under Article 3.1(b) of the SCM Agreement. As we have chosen to exercise judicial economy on India's claims under Article 3.1(b) of the SCM Agreement, there is no basis for us to rule on India's claim under Article 25 of the SCM Agreement. Having decided that it is not necessary for us to determine whether the measures at issue are subsidies within the meaning of the SCM Agreement, in particular Article 3.1(b), it follows *a fortiori* that it is not necessary for us to assess whether the measures should have been notified as subsidies under Article 25 of the SCM Agreement in order to secure a positive resolution of this dispute.

7.372. Accordingly, we also exercise judicial economy on India's claims under Article 25 of the SCM Agreement.

7.5 India's claim under Article XXIII:1(a) of the GATT 1994

7.373. India has requested us to find that "the measures at issue, individually and/or collectively, have nullified and/or impaired the benefits accruing to India under Article XXIII:1(a) of the GATT [1994]".[754]

7.374. We recall that, pursuant to Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We therefore conclude that, to the extent that the measures at issue are inconsistent with Article III:4 of the GATT 1994, they have nullified or impaired benefits accruing to India under that agreement.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. As regards our terms of reference, we have found that:

a) for the reasons set forth in our preliminary ruling[755], the Los Angeles Manufacturing Credit (LAMC) Adder (Measure 3), and the Massachusetts Manufacturer Adder (Measure 11) fall outside our terms of reference, whereas the Minnesota solar thermal rebate and the Minnesota solar photovoltaic rebate under Measure 10 fall within our terms of reference; and

b) for the reasons set forth in section 7.1.1.2 of this Report, the "made in Washington" bonus in Section 82.16.165 of the Revised Code of Washington under Measure 1 does not fall within our terms of reference

8.2. In light of their amendment following the establishment of the Panel, for the reasons set forth in section 7.1.1 of this Report:

a) we have decided to make findings, and, if necessary, recommendations on Measures 1 and 8 as amended; and

b) we have decided to make findings, and, if necessary, recommendations on Measure 2 as implemented through both the 2016 and 2017 California Self-Generation Incentive Program (SGIP) Handbooks.

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[752] According to Article 2.3 of the SCM Agreement, "[a]ny subsidy falling under the provisions of Article 3 shall be deemed to be specific".

[753] India's first written submission, paras. 118, 233, 321, 424, 523, 623, 730, 831, 934, 1037, 1075, and 1167.

[754] India's first written submission, para. 1177.

[755] See Annex D-1 containing the preliminary ruling of the Panel.

8.3. In light of their repeal following the establishment of the Panel, for the reasons set forth in section 7.1.2 of this Report, we have decided:

a) to make findings, and, if necessary, recommendations on the Minnesota solar energy production incentive (SEPI) program under Measure 10; and

b) not to make findings and recommendations on the Minnesota solar thermal rebate under Measure 10.

8.4. For the reasons set forth in this Report, we conclude that the following measures are inconsistent with the United States' obligations under Article III:4 of the GATT 1994:

a) the Washington State additional incentive (Measure 1), as contained in Sections 82.16.110 to 82.16.130 of the Revised Code of Washington, and Section 458-20-273 of the Washington Administrative Code;

b) the California Manufacturer Adder (Measure 2), as embodied in Section 379.6 of the California Public Utilities Code, and implemented through the 2016 and 2017 SGIP Handbooks;

c) the Montana tax incentive (Measure 4), as embodied in Sections 15-70-502, 15-70-503, and 15-70-522 of the Montana Annotated Code, and Administrative Rules of Montana, Sections 18.15.701 – 18.15.703 and 18.15.710 – 18.15-712;

d) the Montana tax credit (Measure 5), as embodied in Section 15-32-703 of the Montana Annotated Code;

e) the Montana tax refund (Measure 6), as embodied in Section 15-70-433 of the Montana Annotated Code;

f) the Connecticut additional incentive (Measure 7), as embodied in Section 16-245ff of the General Statutes of Connecticut, and Request for Qualification for Eligible Contractors and Third Party PV System Owners;

g) the Michigan Equipment and Labour Multipliers (Measure 8), as embodied in Public Act No. 342;

h) the Delaware Equipment and Workforce Bonuses (Measure 9), as embodied in Sections 356(d) and (e) of the Renewable Energy Portfolio Standards Act, and Rules and Procedures to Implement the Renewable Energy Portfolio Standard;

i) the Minnesota solar photovoltaic rebate under Measure 10, as embodied in Section 116C.7791 of the 2016 Minnesota Statutes; and

j) the Minnesota solar energy production incentive (SEPI) under Measure 10, as embodied in Sections 216C.411 – 216C.415 of the 2016 Minnesota Statutes.

8.5. For the reasons set forth in this Report, we conclude as follows:

a) With respect to India's claims under Articles 2.1 and 2.2 of the TRIMs Agreement, the Panel exercises judicial economy for the reasons set forth in section 7.4.1 of this Report.

b) With respect to India's claims under Articles 3.1(b), 3.2, and 25 of the SCM Agreement, the Panel exercises judicial economy for the reasons set forth in section 7.4.2 of this Report.

8.6. In light of Article 3.8 of the DSU, the Panel concludes that, to the extent that the measures at issue are inconsistent with Article III:4 of the GATT 1994, they have nullified or impaired benefits accruing to India under that agreement within the meaning of Article XXIII:1(a) of the GATT 1994.

8.7. Pursuant to Article 19.1 of the DSU, we recommend that the DSB request the United States to bring the following measures into conformity with its obligations under Article III:4 of the GATT 1994:

a) the Washington State additional incentive (Measure 1), as embodied in Sections 82.16.110 to 82.16.130 of the Revised Code of Washington, and Section 458-20-273 of the Washington Administrative Code;

b) the California Manufacturer Adder (Measure 2), as embodied in Section 379.6 of the California Public Utilities Code, and implemented through the 2017 SGIP Handbook; and additionally, as implemented through the 2016 SGIP Handbook to the extent that the latter continues to govern certain aspects of the California Manufacturer Adder for past applicants;

c) the Montana tax incentive (Measure 4), as embodied in Sections 15-70-502, 15-70-503, and 15-70-522 of the Montana Annotated Code, and Administrative Rules of Montana, Sections 18.15.701 – 18.15.703 and 18.15.710 – 18.15-712;

d) the Montana tax credit (Measure 5), as embodied in Section 15-32-703 of the Montana Annotated Code;

e) the Montana tax refund (Measure 6), as embodied in Section 15-70-433 of the Montana Annotated Code;

f) the Connecticut additional incentive (Measure 7), as embodied in Section 16-245ff of the General Statutes of Connecticut, and Request for Qualification for Eligible Contractors and Third Party PV System Owners;

g) the Michigan Equipment and Labour Multipliers (Measure 8), as embodied in Public Act No. 342;

h) the Delaware Equipment and Workforce Bonuses (Measure 9), as embodied in Sections 356(d) and (e) of the Renewable Energy Portfolio Standards Act, and Rules and Procedures to Implement the Renewable Energy Portfolio Standard;

i) the Minnesota solar photovoltaic rebate under Measure 10, as embodied in Section 116C.7791 of the 2016 Minnesota Statutes; and

j) the Minnesota solar energy production incentive (SEPI) program under Measure 10, as embodied in Sections 216C.411 – 216C.415 of the 2016 Minnesota Statutes, to the extent that incentive payments under this program continue following its repeal.

WORLD TRADE ORGANIZATION

WT/DS510/R/Add.1

27 June 2019

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UNITED STATES — CERTAIN MEASURES RELATING TO THE RENEWABLE ENERGY SECTOR

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS510/R.

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WORKING PROCEDURES OF THE PANEL

Adopted as amended on 27 June 2018[1]

General

1. (1) In this proceeding, 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 apply.

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

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If 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. Non-confidential summaries shall be submitted no later than the relevant due dates for submitting integrated executive summaries set forth in the timetable adopted by the Panel, unless a different due date is granted by the Panel upon a showing of good cause.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) 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.

(2) 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.

(3) Each third party that chooses to make a written submission prior to the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings.

Preliminary rulings

4. A party shall submit any request for a preliminary ruling not later than its first written submission to the Panel. If the complaining party requests such a ruling, the respondent shall submit its response to the request in its first written submission. If the respondent requests

[1] These Working Procedures were originally adopted on 6 June 2018. The amendment of 27 June 2018 concerns paragraph 2(3).

such a ruling, the complaining party 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 may be granted upon a showing of good cause.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) 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, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by India should be numbered IND-1, IND-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered IND-5, the first exhibit in connection with the next submission thus would be numbered IND-6.

(2) Each party shall provide a list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

Editorial Guide

8. 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 (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Prior to any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally in the course of a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall be responsible for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure the availability of interpreters.

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

a. The Panel shall invite India to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States 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.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 7 days prior to the meeting, and provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with India presenting its 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 closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. If the United States chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00 p.m. (Geneva time) three working days day prior to the meeting. In that case, India shall present its opening statement first, followed by the United States. The party that presented its opening statement first shall present its closing statement first.

Third party session

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the third party session of the meeting with the Panel.

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

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. In the event that interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 7 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

22. 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.

23. Each party shall submit two integrated executive summaries. The first integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first written submission, its first oral statement, and where possible, its responses to questions following the first substantive meeting. The second integrated executive summary shall summarize its second written submission, its second oral statement, and where possible, its responses to the second set of questions and comments thereon following the second substantive meeting. The timing of the submission of these two integrated executive summaries shall be indicated in the timetable adopted by the Panel.

24. Each integrated executive summary shall be limited to no more than 15 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

27. 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.

28. 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.

Interim and Final Report

29. 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

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties in the course of the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

b. Each party and third party shall submit two paper copies of its submissions and two paper copies of its exhibits by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and 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 both Microsoft Word and PDF format, either on a CD-ROM, a DVD, or as an email attachment. If the electronic copy is provided by email, it should be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties in the course of the proceeding. If a CD-ROM or DVD is provided, it should 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 any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email, or on a CD-ROM or DVD, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

e. Each party and third party shall submit 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.

f. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX B
ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

A. Introduction

1. India has challenged eleven renewable energy programs of the United States providing certain incentives contingent upon the use of domestic goods over imported goods inconsistent with its obligations under the GATT 1994, the TRIMs Agreement and the SCM Agreement.

2. More specifically, India challenges the discriminatory measures maintained through the following sub-federal programs of the United States:

(a) Washington Renewable Energy Cost Recovery Incentive Payment Program ("**RECIP**");
(b) California Self-Generation Incentive Program ("**SGIP**");
(c) Los Angeles Department of Water and Power's Solar Incentive Program ("**LADWP SIP**");
(d) Montana Tax Incentive for Ethanol Production ("**MTIEP**");
(e) Montana Tax Credit for Biodiesel Blending and Storage ("**MTCB**");
(f) Montana Tax Refund for Biodiesel ("**MTRB**");
(g) Connecticut Residential Solar Investment Program ("**CRSIP**");
(h) Michigan Renewable Energy Standards Program;
(i) Delaware Renewable Energy Standards Program;
(j) Minnesota Solar Incentive Program ("**MSIP**"); and
(k) Massachusetts Commonwealth Solar Hot Water Program ("**CSHWP**").

B. Measures at Issue

(a) RECIP

3. RECIP was instituted by the State of Washington with a view to provide incentives for the greater use of renewable energy technologies/equipment manufactured locally, support existing local industries, create jobs for local industries and develop new opportunities for renewable energy industries in Washington.

4. Pursuant to Chapter 82.16 of Revised Code of Washington ("**RCW**") read with the Washington Administrative Code ("**WAC 458-20-273**"), the measures at issue provide that generation of electricity using renewable energy equipment consisting of certain specified inputs/ components manufactured in Washington will result in entitlement to additional incentives. The key elements of the program are as follows:

(i) Any individual, business, local government entity (which is not in the light and power business or in the gas distribution business) or a participant in a community solar project may apply to the light and power business for investment cost recovery incentive for each kilowatt-hour of electricity produced from a customer-generated electricity renewable energy system;

(ii) The investment cost recovery incentive amount is calculated by multiplying appropriate base rate by the applicable economic development factor and the product thereof is then multiplied by the gross kilowatt-hours. The economic development factor has been statutorily specified and is based on "in-state manufacture level" of the renewable energy system. If the specified components used in a renewable energy system are manufactured in Washington state, the economic development factor is higher than in cases where the components are not manufactured in Washington state;

(iii) The investment cost recovery incentive is paid by the appropriate light and power business serving the situs of the system in accordance with the applicable laws; and

(iv) The light and power business, in turn, is allowed to claim tax credit from the Department of Revenue against its public utility taxes in an amount equal to the incentive payments made to its customers or participants in a nonutility solar project in any fiscal year.

5. Some of the provisions of the RCW were modified pursuant to the Substitute Bill 5939 ("**2017 Amendment Act**") with effect from 7 July 2017. However, these changes do not alter or modify the essence of the measures at issue.

6. India takes issue with the additional investment cost recovery incentives provided by the State of Washington for generating electricity contingent upon the use of domestic over imported goods under the RECIP.

(b) SGIP

7. California Public Utilities Commission ("**CPUC**") instituted the SGIP to initiate load control and distributed generation activities. CPUC directed investor-owned utilities to administer SGIP. These utilities, which act as Program Administrators, issue the SGIP Handbook from time to time. The most recent version was issued on 18 December 2017 ("**2017 SGIP Handbook**"). This 2017 SGIP Handbook was preceded by the SGIP handbook dated 8 February 2016 ("**2016 SGIP Handbook**"). Both the Handbooks explain that the SGIP provides "financial incentives for the installation of new qualifying technologies that are installed to meet all or a portion of the electric energy needs of a facility".

8. The Handbooks marginally differ in terms of the kinds of incentives provided to the applicants as well as the types of technologies that can avail these incentives. The 2016 SGIP Handbook offered an additional incentive of 20% for the installation of eligible distributed generation or AES technologies from a "California Supplier". Further, the 2016 SGIP Handbook provided that the 20 percent adder for using a California Supplier would be calculated on the non-renewable incentive rate before adding the additional $1.31 per watt incentive for using biogas. Applicants using the specified equipment's were eligible to receive the 20% additional incentives ("**California Manufacturer Adder**") offered under the program.

9. The criteria for providing incentives underwent minor modifications in the 2017 SGIP Handbook. Presently, SGIP offers three types of incentives to eligible applicants: generation incentive rates; energy storage incentive rates; and, incentives for technologies from a California manufacturer (also, "**California Manufacturer Adder**").

10. Under the 2017 SGIP Handbook, additional incentive of 20% is added to the technology incentive for projects in which the equipment used is manufactured in California. In order for a project to be eligible for the 20% adder, it must demonstrate that at least 50% of its capital equipment value is manufactured by an approved California Manufacturer. Therefore, the California Manufacturer Adder is provided to applicants for generating electricity contingent upon the use of the eligible equipment manufactured in California.

(c) LADWP SIP

11. Los Angeles Department of Water and Power ("**LADWP**"), a public utility, introduced the Solar Incentive Program ("**SIP**") in 2000. In September 2007, the Board of Commissioners of LADWP approved the SIP Guideline Revisions to comply with California's Senate Bill 1 ("**SB 1**").

12. The SIP provides an estimated performance-based incentive to LADWP customers that install solar photovoltaic systems. These incentives provide payment to customers that purchase or lease solar photovoltaic systems generating electricity for their home or business while still being connected to the city of Los Angeles' power-grid. Further, as per the design of the scheme, the levels of incentive provided decline when pre-determined megawatt ("**MW**") targets of the scheme are fulfilled.

13. The SIP is only open to LADWP customers. The solar photovoltaic systems have to be connected to the LADWP's electrical grid. An applicant of the SIP has the option of retaining ownership of the RECs or selling them to LADWP.

14. Besides other incentives, the SIP also provides additional incentive payments for solar photovoltaic modules that are manufactured in Los Angeles, California. This origin-based incentive credit is termed as Los Angeles Manufacturing Credits ("**LAMC**").

15. In order to qualify for LAMC, owners of the PV modules and solar power equipment have to demonstrate that a minimum of 50% of the components of the finished solar photovoltaic modules or the qualifying equipment were manufactured and/or assembled within the city of Los Angeles, California.

16. After the manufacturer receives LAMC-status, related payments are released to the customers. These payments are made from the Public Benefits Funds for Renewables and Efficiency ("**PBFRE**"). PBFRE is a public fund that is administered by California Energy Commission ("**CEC**"). LADWP budgets an average of USD 30 million per fiscal year to fund SIP for direct incentive payments from the PBFRE.

(d) MTIEP

17. Designed to stimulate the development of ethanol production in Montana, MTIEP was introduced by the Ethanol Tax Incentive and Administration Act of 1983 and is administered by the Montana Department of Transportation. Tax incentives under the MTIEP are available for producers of ethanol blended gasoline and are paid from the tax imposed on the distributors of gasoline and the special fuel tax collected by the Department as per rates specified under Section 15-70-403 of the MAC.

18. Pursuant to the Montana Annotated Code 2015 ("**MCA**") particularly, Sections 15-70-501 to 15-70-527, Montana's MTIEP provides tax incentives to ethanol producers for distilling alcohol, contingent and proportionate to the use of Montana agricultural products, including Montana wood or wood products. The tax incentive on each gallon of ethanol distilled is 20 cents a gallon for each gallon that is 100% produced from Montana products. Tax incentives are also available when non-Montana based agricultural or wood products are used in the ethanol production. However, in such cases, the amount of tax incentive is reduced in a proportionate manner, based on the amount of agricultural or wood products not produced in Montana that is used in the production of the ethanol.

19. India takes issue with the tax incentives which is provided to ethanol producers for distilling alcohol, contingent and proportionate to the use of Montana agricultural products, including Montana wood or wood products.

(e) MTCB

20. Pursuant to Section 15-32-703 of the MCA, MTCB provides certain credit against taxes to an individual, corporation, partnership, or small business corporation for tax imposed on cost of investments in depreciable property used for storing or blending biodiesel with petroleum diesel for sale, provided that the biodiesel is entirely made from Montana produced feedstock. MTCB is administered by the Montana Department of Revenue.

21. The tax credit can be claimed by a special fuel distributor or an owner or operator of a motor fuel outlet for the costs incurred in the 2 tax years before the taxpayer begins blending biodiesel fuel for sale or in any tax year in which the taxpayer is blending biodiesel fuel for sale.

22. India takes issue with the tax credit which is provided against individual tax or corporate tax for costs of investments in depreciable property used for storing or blending biodiesel with petroleum diesel for sale, provided the biodiesel is produced entirely from Montana feedstock.

(f) MTRB

23. The state of Montana provides certain refund on special fuel tax to: (i) a licensed distributor; and (ii) an owner or operator of a retail motor fuel outlet who purchased the biodiesel from a licensed distributor and on which the special fuel tax has been paid, provided that the biodiesel is produced entirely from biodiesel ingredients produced in Montana. The scheme is administered by the Montana Department of Transportation.

24. As per Section 15-70-403 of the MCA, the special fuel tax is payable by any distributor of special fuel i.e. biodiesel for the privilege of engaging in and carrying on business in Montana. The total amount of tax refund that a distributor can claim is 2 cents a gallon, while an owner or operator of a retail motor fuel outlet may claim a refund equal to 1 cent a gallon on biodiesel. Tax refund payments under this measure are statutorily appropriated from the state general fund.

(g) CRSIP

25. Pursuant to Connecticut's Public Act 15-194, a financial incentive is offered for the purchase or lease of qualifying residential solar photovoltaic systems. Depending on the models of ownership of the solar photovoltaic system, there are two distinct kinds of direct financial incentives offered under the CRSIP: performance-based incentive ("**PBI**"); and expected performance-based buy-down ("**EPBB**").

26. Under both types of incentives, homeowners are offered additional incentives of up to 5% of the applicable incentive amount provided that 'major system components' are manufactured or assembled in Connecticut. Further, another additional incentive of up to 5% of the applicable incentive would be provided for the use of major system components manufactured or assembled in a distressed municipality, or a targeted investment community as defined by the Connecticut General Statute.

27. CRSIP is administered by Connecticut's Green Bank which is responsible for supporting and developing programs that promote clean energy. Notably, while the component of the additional incentive is available for both EPBB and PBI, EPBB and PBI payments cannot be combined for a single project under the CRSIP.

(h) Michigan Renewable Energy Standards Program

28. Clean, Renewable and Efficient Energy Act, Public Act 295 of 2008 ("**PA 295**") renamed as Clean and Renewable Energy and Energy Waste Reduction Act by an amendment through Public Act 342 of 2016 ("**PA 342**") prescribes certain renewable energy standards in the State of Michigan. Section 28 of PA 342 mandates electric providers (i.e. municipally-owned electric utilities, co-operative electric utilities, alternative electric suppliers and any commission-regulated person or entity which sell electricity to retail customers in Michigan) to achieve the specified renewable energy standards.

29. It aims to generate not less than 35% of Michigan's energy need through a combination of energy waste reduction and renewable energy by 2025 and encourage private investment in renewable energy, among others.

30. In order to promote renewable energy, it provides certain Renewable Energy Credits ("**REC**") to electric providers. It also provides certain additional credits called Incentive Renewable Energy Credits ("**IREC**") to electric providers. The following two categories of IRECs are pertinent:

(i) 1/10 renewable energy credit for each MWh of electricity generated from a renewable energy system constructed using equipment made in this state as determined by the MPSC ("**Michigan Equipment Multiplier**") The additional credit under this subdivision is available for the first 3 years after the renewable energy system first produces electricity on a commercial basis.

(ii) 1/10 renewable energy credit for each megawatt hour of electricity from a renewable energy system constructed using a workforce composed of residents of this state as determined by the MPSC ("**Michigan Labour Multiplier**") The additional credit under this subdivision is available for the first 3 years after the renewable energy system first produces electricity on a commercial basis.

31. The RECs and IRECs may be used to meet the renewable energy credit standards. MIRECS, which was set up by the MPSC, issues, tracks, and enables retirement and trading of RECs generated from renewable energy systems.

(i) Delaware Renewable Energy Standards Program

32. The Renewable Energy Portfolio Standard Act, 2005 as incorporated in the Delaware Code ("**RESPA**") prescribes certain renewable energy portfolio standards to incentivize the use of renewable sources of energy. RESPA authorizes the Delaware Public Service Commission ("**DPSC**") to determine, verify and assure compliance with the standards. To implement these standards, DPSC framed the Rules and Procedures to Implement the Renewable Energy Portfolio Standard, 2005 ("**REPSA Rules**"). Specifically, REPSA sets a standard which requires that the retail electricity suppliers must procure an increasing percentage of their electricity from renewable sources each

year with the eventual aim of generating a minimum of 25% of all energy produced in Delaware from renewable sources by 2025.

33. To track and verify compliance, RESPA provided for the use of accumulated RECs or solar renewable energy credits ("**SRECs**") by retail electricity suppliers could for meeting the standards. Suppliers could also sell or transfer any RECs or SRECs in excess of those needed to meet the standards. Therefore, both RECs and SRECs were designed to work as tradable instruments equivalent to 1 megawatt-hour of retail electricity sales in Delaware derived from eligible energy resources.

34. The incentives under this program are provided to retail electricity suppliers in Delaware in terms of 10% additional RECs and SRECs if: (a) a minimum of 50% of the cost of the renewable energy equipment comprising the generation unit (including mounting components) is manufactured in Delaware ("**Delaware Equipment Bonus**"); and (b) the generation unit is constructed and/or installed either with a workforce at least 75% of whom are Delaware residents or by a company that employs at least 75% Delaware residents ("**Delaware Workforce Bonus**"). Retail electricity suppliers that meet both criteria are entitled to an aggregate 20% bonus.

(j) MSIP

35. Pursuant to the Minnesota Statute (2016), particularly MINN. STAT. 216C.411 through 216C.416 and MINN. STAT. 116C.7791, Minnesota provides for the following three types of incentives for the use of solar system or components manufactured in Minnesota.

36. "Made in Minnesota" Solar Energy Production Incentive ("**SEPI**"): SEPI is designed to provide incentives and rebates to the end-consumers of the public electric utilities that install solar PV modules and solar thermal systems, respectively, certified as "Made in Minnesota". Under MINN. STAT. 216C.411 to 216C.415, the incentive offered is in the nature of "performance-based financial incentive expressed as a per kilowatt-hour amount" which is provided only to an owner of solar PV modules.

37. Rebate for installation of Solar Thermal Systems: In addition to the SEPI, certain rebates are offered for installation of "Made in Minnesota" solar thermal systems pursuant to MINN. STAT. 216C.416, subdiv. 2. The rebate refunds certain cost of installation of a solar thermal system to the owners who install the same on their residential or commercial property. The rebates are available for solar thermal systems which are installed in residential or commercial property/facilities which are used for, inter alia, hot water, space heating, or pool heating purposes.

38. Rebate for Solar PV Modules: Pursuant to MINN. STAT. 116C.779, rebates are also offered to an owner of a qualified property for installation of solar PV modules. To be eligible for a rebate, the solar PV modules must be "Made in Minnesota" and the applicant must have been awarded financial assistance available exclusively to owners of properties that is offered by: (a) the utility serving the property on which the solar PV modules are to be installed; or (b) by the State of Minnesota, under an authority other than MINN. STAT. Section 116C. 7791.761 976. However, an applicant who is otherwise ineligible for the rebate by reason of not having been awarded any other form of financial assistance described above, is eligible if the applicant's failure to secure such assistance is solely due to a lack of available funds with a utility.

39. All the three types of incentives under the MSIP have one feature in common – the requirement that the product qua which the incentive or the rebate has been claimed viz., solar PV modules and solar thermal systems should fulfil the criterion of being "Made in Minnesota" i.e. manufactured in the State of Minnesota.

(k) Massachusetts Commonwealth Solar Hot Water Residential Program

40. The Massachusetts Commonwealth Solar Hot Water Residential Program and the Massachusetts Commonwealth Solar Hot Water Commercial Program (collectively, the Massachusetts Commonwealth Solar Hot Water Program or "**CSHWP**") are two separate programs that are administered by the Massachusetts Clean Energy Centre ("**MassCEC**"), a public body.

41. MassCEC authorized USD 10 million budget for the CSHWP. This amount will be utilized by providing incentives in the form of rebates to customers that install solar hot water ("**SHW**") systems between 2012 through 2020.

42. Applications under the Massachusetts Commonwealth Solar Hot Water Residential Program are limited to "residential projects serving one to four units and small-scale commercial, industrial, institutional, or public projects that have eight or fewer solar hot water collectors". Similarly, applications under the Massachusetts Commonwealth Solar Hot Water Commercial Program are permitted for "multi-family projects serving five or more units and for commercial, industrial, institutional, and public projects with more than eight collectors". Further, these incentives are only provided upon fulfilling specified procedures and terms and conditions that are listed under the program manuals for both schemes.

43. Besides these rebates and incentives, the CSHWP also provides the "**Massachusetts Manufacturer Adder**". The eligibility criteria for this adder requires the system to use "eligible Massachusetts manufactured components". System owners that seek to apply for this incentive are required to submit photographs of the system components that are manufactured in Massachusetts. Upon confirmation by MassCEC, the successful system owners are granted the adder of USD 200.

B. Legal Claims

1. The measures at issue are inconsistent with the United States' national treatment obligation under Article III:4 of the GATT 1994.

44. India submits that domestic content requirements, as a form of discrimination between domestic and imported products, are contrary to the basic principle of national treatment enshrined in Article III:4 of the GATT 1994. It is well established that for a measure to be inconsistent with national treatment obligation of Article III:4 of the GATT, three elements need to be shown: *first*, the imported and domestic products in question are 'like' products. *Second*, the measure is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use". *Third*, the imported products are accorded "less favourable" treatment than that accorded to "like" domestic products. India has demonstrated that the measures at issue meet all these requirements.

(a) Imported and domestic products at issue are "like" products

45. India submits that the only distinguishing criteria for obtaining the additional/ higher incentives under each of the measures at issue is whether or not certain specified components/ products are of United States-origin. The WTO jurisprudence is clear that if origin is the sole distinguishing criteria between the imported and the domestic products, such products are "like" products within the meaning of Article III:4 of the GATT 1994. Accordingly, under each of the measures at issue, India has identified relevant imported products and the domestic products which are "like" for the purposes of Article III:4 of the GATT 1994.

(b) The measures at issue are 'laws, regulations and requirements' that affect internal sale, offering for sale, purchase, transportation, distribution, or use'.

46. The WTO jurisprudence shows that the phrase 'laws, regulations or requirements' have been interpreted broadly. Notably, for a governmental policy or action to fall within the scope of 'laws, regulation or requirement', it need not necessarily have a substantially binding or compulsory nature. The measures at issue are laws, regulations and/or requirements which affect the internal sale, offering for sale, purchase or use of the imported "like" products in the United States within the meaning of Article III:4 of the GATT 1994:

- RECIP: The measures at issue are law, regulations and/or requirements. More specifically, *RCW 82.16.110* through *RCW 82.16.130* and the *WAC 458-20- 273* are clearly legislative enactments. Together, they enable individuals, businesses, local government entities (not in the light and power business) and/or participants in community solar projects to avail investment cost recovery incentive upon fulfilling specified procedures and terms and conditions.

- SGIP: The measures at issue are implemented through several legal instruments including the Public Utilities Code and the Handbooks. The Public Utilities Code and the Handbooks are laws, regulations and/or requirements. For example, the California Manufacturer Adder is a result of the 2006 Amendment to Section 379.6 of the Public Utilities Code.

- MTIEP: The measures at issue are laws, regulations and/or requirements. The provisions of the MCA (in particular Section 15-70-501 till Section 15-70-527) are laws which have been passed by the legislature of the State of Montana.

- MTCB: The measures at issue emanate out of the act of the legislature of Montana (i.e. 15-32-703, MCA) and therefore, are laws, regulations and/or requirements.

- MTRB: The measures at issue emanate out of the act of the legislature of Montana (i.e. Section 15-70-403, MCA) and therefore, are laws, regulations and/ or requirements.

- CRSIP: The measures at issue emanate from legislative act of the State of Connecticut (in particular, the 2016 Supplement to the General Statute of Connecticut, Title 16, Chapter 283, Section 16-245ff) and, therefore, clearly qualify as laws.

- Michigan Renewable Energy Standards Program: The measures at issue are laws, regulations and/or requirements. PA 342 and its predecessor, PA 295, are public legislations that are passed and enacted in conformity with the legislative process that a bill must go through before it is enacted into law in the United States. The MPSC formulates rules regarding renewable energy standards compliance based on the authority provided to it by PA 342. Procedural issues such as the application for registering with MIRECS, which are "requirements", also flows from provisions laid out in PA 342.

- Delaware Renewable Energy Standards Program: The measures at issue are laws, regulation and/or requirements. The measures at issue are implemented through the REPSA which is a state law that was passed by the General Assembly of Delaware. The RESPA Rules are "regulations" which were enacted to implement the measures at issue, among others. Further, the REPSA and the REPSA Rules together provide "requirements" such as eligibility criteria and application guidelines which must be fulfilled to obtain the additional incentives.

- Minnesota: The measures at issue are laws, regulations and/or requirements since they arise from the act of the legislature of Minnesota (in particular, Minnesota Statute Section 216C.411 through 216C.416, and Section 116C.7791).

47. The WTO jurisprudence clarifies that the term "affect" should be understood to have a broad scope of application. In particular, the panel in *Canada – Autos* has held that a measure which provides that an advantage can be obtained by using domestic products but not by using imported products has an impact on the conditions of competition between domestic and imported products and thus affects the "internal sale,… or use" of imported products. Accordingly, each of the measures at issue affect the internal sale, offering for sale, purchase or use of the imported products.

48. Further, actual implications of a discriminatory measure in the marketplace, as the United States seems to argue, is not required to be demonstrated by a complaining party. In this regard, the Appellate Body report in *US – FSC (Article 21.5 – EC)* stated "[A]t the same time, however, the examination need not be based on the actual effects of the contested measure in the marketplace". Further, the Appellate Body in *Thailand – Cigarettes (Philippines)*, has stated that an analysis under Article III:4 must begin with careful scrutiny of the measure, including consideration of the design, structure, and expected operation of the measure at issue. Such scrutiny may well involve – but does not require – an assessment of the contested measure in the light of evidence regarding the actual effects of the measure in the market place (emphasis added). The panel in *Canada – Autos* rejected Canada's argument that domestic content requirement were "so low" that they do not in practice 'affect' the market conditions.

(c.) 'treatment no less favourable'.

49. India contends that all the identified measures at issue accord less favourable treatment to the imported products than that accorded to the "like" products of United States-origin. India submits that by incentivizing the use of the specified components/ products manufactured in the United States and thereby denying the effective equality of opportunity to the imported products to compete in the domestic market in the relevant State in the United States.

50. Given that the measures at issue incentivizes the use of certain specified products manufactured in United States, the imported products do not get the equality of opportunity to

compete in the domestic market of one of the States that provides the challenged incentives. The measures at issue, therefore, also modify the conditions of competition to the detriment of the imported products and in favour of the "like" products of these States in the United States.

51. Therefore, only products originating in the United States can satisfy the conditions or requirements to receive certain additional or incremental incentives. Imported "like" products cannot satisfy the origin requirements, and thus can never qualify for those incentives. Consequently, imported products are treated less favourably than the "like" products of domestic origin with respect to their "purchase", "sale" or "use".

2. The measures at issue are inconsistent with the United States' obligations under the TRIMs Agreement.

52. India has made two separate claims for each of the measures at issue under the TRIMs Agreement: *first*, India has argued that each of the measures at issue is inconsistent with Article 2.1 of the TRIMs Agreement; *second*, although not needed, India has demonstrated that the measures at issue also fall within the scope of Article 2.2 read with paragraph 1(a) of the Illustrative List of the TRIMs Agreement.

(a.) The measures at issue are inconsistent with Article 2.1 of the TRIMs Agreement.

53. India submits that the measures at issue are inconsistent with Article 2.1 as they are trade related investment measures that are inconsistent with Article III:4 of the GATT 1994. A violation of Article 2.1 of the TRIMs Agreement is established by demonstrating two elements: (i) the existence of an investment measure related to trade in goods (i.e., a TRIM); and (ii) the inconsistency of that measure with Article III or Article XI of the GATT 1994.

54. Since India has already established the second element, i.e. the measures at issue are inconsistent with Article III:4 of the GATT 1994, it proceeds to establish the first element, i.e. that the measures at issue are TRIMs within the meaning of Article 1 of the TRIMs Agreement. More specifically, India shows that the measures are "trade related" "investment measures".

55. As regards "trade related", India submits that since the measures at issue are local content requirements, they would necessarily be "trade-related" because such requirements, by definition, always favour the use of domestic products over imported products, thereby affecting trade. As regards "investment measures", India recalls that the several panels have analyzed the aims and objectives of a measure to determine if it qualifies as an "investment measure". For example, the panels in *Indonesia – Autos, Canada – Renewable Energy* and *India – Solar Cell*s analyzed the objectives of the challenged measure to conclude if the measures were "investment measures".

56. It is India's contention that the measures at issue in the present dispute are aimed to provide incentives, *inter alia*, for the greater use of renewable energy technologies/equipment manufactured locally, support existing local industries, create jobs for local industries and new opportunities for renewable energy industries to develop in the relevant United States jurisdictions. Therefore, each of the measures at issue are necessarily trade-related investment measures (i.e. TRIMs).

57. The United States argues that the TRIMs Agreement concerns itself only with measures that impose requirements or conditions on purchase, use, importation, or exportation of goods by an "enterprise". In other words, the United States seems to suggest that a trade related investment measure must necessarily be defined with reference to an "enterprise". It draws this conclusion primarily on the basis of reference to the term "enterprise" in Article 5 and the Illustrative List of the TRIMs Agreement. Notably, the United States seemingly does not dispute that the measures at issue are TRIMs. Rather, it argues that those measures at issue that do not impose requirements on an "enterprise" are outside the scope of the TRIMs Agreement.

58. India fundamentally disagreed with the United States that a TRIM must necessarily be understood with reference to an "enterprise". Neither the text, context and the object of the TRIMs Agreement nor the WTO jurisprudence supports this interpretation introduced by the United States. *First*, contrary to what the United States' notes, the TRIMs Agreement does not define a trade related investment measure or otherwise specify the scope of that term. *Second*, the text of Article 1 of the TRIMs Agreement, which deals with the *coverage* of the Agreement, does not, in any manner, restrict the scope of a TRIM. To the contrary, Article 1 is widely worded with no reference to the term

"enterprise". *Third*, the TRIMs Agreement limits the prohibited categories of TRIM and not the definition of TRIM *itself*. *Fourth*, even the language in Article 5.5 of the TRIMs Agreement on which the United States relies, does not state that a TRIM must impose requirements or conditions on an enterprise. *Fifth*, the reference to the term "enterprise" in the Illustrative List is unhelpful. The Illustrative List, by its very name, is illustrative in nature and not exhaustive. Previous panels have recognised that there could be other types of TRIMs that are inconsistent with Article III:4 of the GATT 1994.

(b.) The measures at issue also fall within the scope of Article 2.2 read with paragraph 1(a) of the Illustrative List of the TRIMs Agreement.

59. As India has already demonstrated that the measures at issue are: *first*, inconsistent with Article III:4 of the GATT 1994; *second*, trade-related investment measures; and *third*, inconsistent with Article 2.1 of the TRIMs Agreement, it is not necessary to prove that the measures at issue under fall within the scope of Article 2.2 of the TRIMs Agreement and in particular under paragraph 1(a) of the Illustrative List of the TRIMs Agreement. That being said, India, for the sake of completeness, also establishes that the measures at issue fall within the scope of Article 2.2 of the TRIMs Agreement and, in particular, under paragraph 1(a) of the Illustrative List of the TRIMs Agreement.

60. India notes that the measures at issue require use or purchase of specified products of domestic origin by an enterprise and the compliance with the measures at issue is necessary to obtain an advantage. For example, under the RECIP, in order to obtain an advantage (e.g. additional incentive), it is necessary that certain specified products of Washington-origin are used.

61. It seems to be the United States' understanding that paragraph 1(a) of the Illustrative List would trigger only if an enterprise that uses or purchases domestic products is the one that obtains an advantage. Further, the United States seems to argue that the term enterprise covers only a 'business firm' or 'company'. As a result, the United States extrapolates this to argue that for a measure to fall under the TRIMs Agreement, it must require the recipient of an advantage to be an enterprise.

62. India disagrees with the above characterizations. *First*, the term "enterprise" cannot be restricted in a manner as has been suggested by the United Sates. It must be interpreted in context and object of the TRIMs Agreement. In such context, the term "enterprise" must be viewed akin to engagement in an economic activity. Viewed in such manner, the term "enterprise" would include natural persons who engage in any economic activity such as purchasing a renewable energy equipment from a firm to receive incentives offered by a government.

63. *Second*, even if the term "enterprise" is given a restrictive meaning, the measures at issue are covered under paragraph 1(a) of the Illustrative List. There is no requirement that an enterprise that uses or purchases domestic products is the one that obtains an advantage. The use of the word "and" clearly shows that Paragraph 1(a) has two separate requirements. It does not say that the advantage must be obtained by the very same enterprise which uses or purchases a product of domestic origin, as the United States seems to claim. Each of the measures at issue satisfy these two separate elements of Paragraph 1(a) of the Illustrative List. For example, under the RECIP, in order to obtain an advantage, a person (whether individuals, businesses, local government entities with few exceptions) must use a renewable energy equipment made of certain specified components manufactured in Washington. This satisfies the first element of necessity to fulfil certain conditions to obtain an 'advantage'. The measures at issue under RECIP require that certain specified components manufactured in Washington be used by an enterprise in manufacturing the relevant renewable energy equipment. This satisfies the second element, i.e. 'purchase or use by an enterprise.'

64. *Third*, assuming arguendo, the enterprise using or purchasing the product of domestic origin must obtain an advantage, the same is also fulfilled under each of the measures at issue given the established legal position that the term "advantage" must be widely interpreted. Therefore, an advantage under paragraph 1(a) would include indirect benefits by way of pass-through from a purchaser or additional sales.

3. The measures at issue are inconsistent with the United States' obligations under the SCM Agreement.

65. India claims that the measure at issue (except the Delaware Workforce Bonus and Michigan Labour Multiplier) constitute import substitution (or local content) subsidies which inconsistent with Article 3.1(b) read with Article 3.2 of the SCM Agreement.

(a) The measures at issue are "subsidies" that are inconsistent with Article 3.1(b) read with Article 3.2 of the SCM Agreement.

66. More specifically, in order to establish a violation of Articles 3.1(b) and 3.2 of the SCM Agreement, three elements must be satisfied: *first*, the existence of a subsidy, i.e. there is a financial contribution by a government or any public body within the territory of a Member and a benefit is thereby conferred; *second*, the subsidy must be specific; and *third*, the grant of subsidy is contingent upon the use of domestic over imported goods.

67. India recalls that for a subsidy to exist, two elements must be proved: *first*, a financial contribution by a government or a public body; and *second*, a benefit is conferred.

(i) Financial Contribution

68. A measure may constitute a financial contribution in one or more ways as set out in Article 1.1(a)(1) of the SCM Agreement. India submits that the measures at issue constitute financial contribution in the form of direct transfer of funds, revenue forgone which is otherwise due, and/ or provision of goods, as may be relevant.

69. Specifically, India submits that ten out of the eleven programs constitute a direct transfer of funds by the government or by a public body under Article 1.1(a)(1)(i) of the SCM Agreement or through entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement. Examples of such transfers of funds include the payment of certain incentive directly or indirectly through intermediaries. In some case, the transfer of funds may also be through entrustment or direction to private bodies.

70. Further, India argues that three of the eleven programs also provide a financial contribution in the form of revenue foregone (in addition to a direct transfer of funds) and that the financial contribution of one program exclusively consists of revenue foregone which is otherwise due.

71. Lastly, India claims that two programs provide for a financial contribution (as an alternative to the direct transfer of funds) in the form of the provision of goods under Article 1.1(a)(1) of the SCM Agreement in the form of tradeable certificates that are granted to beneficiaries at *nil* price.

72. The United States has made a generic argument that India has failed to make a *prima facie* case that the measures at issue involve a financial contribution because it failed to provide evidence of actual contribution. India does not consider that the actual evidence of financial contribution under the measures at issue is relevant for the Panel to assess WTO-inconsistency of the measures. A complaining WTO Member cannot be required to wait till such time that actual contributions are made for the first time under a subsidy measure before being able to bring a WTO dispute. The obligation that a Member "neither grant nor maintain subsidies", referred to in Article 3.1 provides relevant context confirming that Article 1.1(a)(1), may encompass commitments by the government, e.g. to forego revenue that would otherwise be due or to transfer funds. If a "subsidy" could not be deemed to exist until government revenue is actually foregone or a transfer of funds is actually made, the reference in Article 3.2 to "maintain[ing] subsidies" would be redundant. Article 3.2 clarifies that "maintain[ing]" a subsidy programme tied to the prohibited contingencies may violate the SCM Agreement, even when the financial contribution is yet to be "grant[ed]", i.e. is not yet actually disbursed.

(ii) Benefit

73. The second and final element of a subsidy is that the financial contribution must confer a benefit. A benefit may be conferred on one or more natural or legal persons. Further, a benefit may be conferred on a person different than the who is the direct recipient of the financial contribution.

74. India has identified two sets of beneficiaries: (i) direct recipients of financial contribution; and (ii) local manufacturers of renewable energy system/equipment (which contains the specified incentivised components) or "indirect beneficiaries". Notably, India does not use the terms "direct beneficiary" or "indirect beneficiary" as legal concepts; rather they are terms of nomenclature used for identification purposes.

75. As regards the direct beneficiaries, India has shown that a benefit has been conferred through the grant of the financial contribution. In cases of revenue forgone, where a tax measure constitutes a financial contribution in the form of foregone revenue, it may be readily concluded that a benefit is conferred. India has also provided the relevant tax levels for comparison. In cases where the financial contribution is in form of grants by a government or a public body, a benefit is deemed to be *ipso facto* conferred. That said, India has in each case demonstrated the existence of benefit in the relevant market. In cases of provision of goods, Article 14(d) of the SCM Agreement provides the methodology to determine relevant the benchmark. India has explained that the renewable energy credits (i.e. goods) have been granted at no cost to the recipient, while these credits are traded at market determined prices that are far higher than the 'nil' cost at which they were obtained. Therefore, India has demonstrated that a benefit is conferred under each of the measures at issue.

76. With respect to the "indirect beneficiaries" (i.e. the local manufacturers/producers of renewable energy equipment/system who use the incentivised products/components of domestic origin), benefit may be conferred in two ways: (i) pass-through of benefit from the "direct beneficiaries"; and (ii) increased/additional sales of their product. "Additional sales" is an attribute of benefit. While it may be difficult and complex to quantify this attribute – "additional sales", the quantification of this attribute is not necessary. A benefit may have two attributes: (i) one that is quantifiable – this is relevant in cases of countervailing measures where the subsidy margin is calculated based on the quantification of the benefit; and (ii) trade effects such as "additional sales" which need not be quantified. In any event, in cases of prohibited subsidies, quantification of benefit is not required.

77. Finally, the measure at issue which constitute subsidies are contingent upon the use of domestic over imported goods. India submits that Article 3.1(b) must be interpreted in a manner which does not restrict the scope of the SCM Agreement.

(b) <u>The United States has acted inconsistently failed to notify the subsidies to the SCM Committee.</u>

78. Given that the measures at issue are specific subsidies, the United States has acted in contravention of Article 25 of the SCM Agreement by failing to notify the same to the SCM Committee.

4. The measures at issue, individually and/or collectively, nullify or impair the benefits accruing to it under Article XXIII:1(a) of the GATT.

79. For the reasons stated above, India contends that the measures at issue, individually and/or collectively, nullify or impair the benefits accruing to it under Article XXIII:1(a) of the GATT 1994.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

EXECUTIVE SUMMARY OF INDIA'S SECOND WRITTEN SUBMISSION

I. Introduction

1. Except for making unsubstantiated claims that India has failed to present a *prima facie* case, the United States has not produced any evidence to rebut India's claims. Therefore, should the Panel find that India has made a *prima facie* case – which India has – as matter of law the Panel should rule in favor of India's claims in this dispute.

II. India has discharged its burden to establish a *prima facie* case with respect to all the claims for each measure at issue

2. India strongly rejects the recurring and unjustified theme of the United States' claim that India has failed to establish a *prima facie* case. India sets out below the key principles that must guide the Panel in assessing the United States' claim and India's response on the issue of *prima facie* case:

- The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.
- Precisely *how much* and *what kind* of evidence will be required to establish a *prima facie* case varies from measure to measure, provision to provision, and case to case;
- A complainant does not need to put forward *all* evidence and arguments relevant to the question of the measure's consistency with the covered agreements;
- A *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case;
- Whether or not the facts already on the record deserve the qualification of a *prima facie* case, drawing of inferences is an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute.

3. The key principles set out above when applied to the present dispute would show India has established a *prima facie* case for each claim.

III. The United States has not disputed India's claims under Article III:4 of the GATT 1994

4. In its First Written Submission, United States contends if a measure does not affect the "use", "purchase", "sale" of a product, then it cannot "modify the conditions of competition". India has already responded to this argument and submitted that a demonstration of *actual* trade effects or implications in the marketplace is not required for proving inconsistency with Article III:4 of the GATT 1994. Therefore, any measure which has the potential to adversely modify the conditions of competition (between the imported and domestic product) to the detriment of the imported product is prohibited under Article III:4 of the GATT 1994.

5. In response to the United States' argument that India has used "incentivization" as a vector and therefore it must show how the incentivization has affected the use of the products in question, India notes that this argument is tantamount to that of actual trade effects. However, the United States, in response to a question from the Panel clarified that it agrees that demonstration of actual trade effects is not essential for a claim under Article III:4 of the GATT 1994. With that clarification, India considers that there is no disagreement between the parties with respect to India's claims under Article III:4 of the GATT 1994 and the Panel may rule on India's claims in its favour.

IV. The United States' argument that the TRIMs Agreement covers only measures that impose requirements or conditions on an enterprise is without any merit

6. India has made two separate claims for each of the measures at issue under the TRIMs Agreement. First, India has argued that each of the measures at issue is inconsistent with Article 2.1 of the TRIMs Agreement; and second, although not needed to resolve this dispute, India has demonstrated that the measures at issue also fall within the scope of Article 2.2 read with paragraph 1(a) of the Illustrative List.

7. The United States has not offered any comments on India's claims under the TRIMs Agreement with respect to: (i) Montana Tax Incentive for Ethanol Production; (ii) Montana Tax Credit for Biodiesel Blending and Storage; (iii) Montana Tax Refund for Biodiesel; (iv) Michigan Renewable Energy Standards Program and (v) Delaware Renewable Energy Standards Program. Therefore, if the Panel finds the measures at issue under the aforementioned programs to be inconsistent with Article III:4 of the GATT 1994 (which they are), there is no disagreement between the parties on claims with respect to these measures under the TRIMs Agreement.

(a) Nothing in the TRIMs Agreement suggests that it covers only those measures that impose requirements or conditions on an "enterprise".

8. India fundamentally disagrees with the United States that the TRIMs Agreement concerns itself only with measures that impose requirements or conditions on purchase, use, importation, or exportation of goods by an "enterprise". Neither the text, context and the object of the TRIMs Agreement nor the WTO jurisprudence supports this interpretation introduced by the United States. India's position is corroborated by the following reasons:

9. *First*, the TRIMs Agreement does not define a trade-related investment measure or otherwise specify the scope of that term.

10. *Second*, TRIMs Agreement must not be narrowly interpreted so as to impose restrictions which the Members have not expressly provided in the text of the Agreement. For instance, the text of Article 1 of the TRIMs Agreement, which deals with the *coverage* of the Agreement, does not, in any manner, restrict the scope of a TRIM. To the contrary, Article 1 is widely worded with no reference to the term "enterprise". Similarly, Article 2.1 prohibits Members from applying any TRIM that is inconsistent with the provisions of Article III or Article XI of the GATT 1994. Therefore, Members had *expressly* put limitations where they intended. This reasoning is supported by the objects of the Agreement which aim to discourage Members from applying TRIMs that can cause "trade-restrictive and distortive effects". Till date, no panel or the Appellate Body report has limited the scope of "investment measure" in a manner that the United States proposes. Indeed, limiting TRIMs to "enterprises" alone undermines the purpose of the TRIMs Agreement.

11. *Third*, the reference to the phrase "enterprise which are subject to a TRIM" in Article 5.5 of the Agreement, as relied upon by the United States, does not suggest that a measure must impose requirements or conditions on an "enterprise". Assuming, *arguendo*, a TRIM must necessarily relate to an enterprise, such enterprise may be subject to a TRIM in a variety of ways as contemplated by the panel in *Indonesia – Autos*.

12. *Fourth*, the United States' argument that each of the illustrations under the Illustrative List refers to an enterprise is irrelevant. An illustrative list, by its very definition, is non-exhaustive. In other words, there can be other possible TRIMs that are inconsistent with Article III:4 and Article XI:1 of the GATT 1994 but which do not impose any requirement on an enterprise.

13. *Finally*, the reference to the term "enterprise" in the Illustrative List and by extension in Article 2.2 of the TRIMs Agreement cannot control the scope of Article 1 or Article 2.1 of the Agreement. Based on the evidence submitted by India, it is evident that the measures are TRIMs.

(b) The measures at issue squarely fall within the scope of Article 2.2 read with paragraph 1(a) of the Illustrative List of the TRIMs Agreement.

14. At the outset, India submits that its claims under Article 2.2 are not determinative for resolving this dispute. Should the Panel agree with India's claims under Article 2.1, the question whether the measures fall within the scope of Article 2.2 would have little relevance.

15. India submits that each of the measures at issue, as contested by the United States, fall within the scope of Article 2.2 read with paragraph 1(a) of the Illustrative List for the following reasons:

(i) There is no requirement that the recipient of the advantage must necessarily be the enterprise using or purchasing the product of domestic origin.

16. Paragraph 1(a) provides certain examples of TRIMs that are inconsistent with Article III:4 of the GATT 1994. It includes those measures that fulfil the two separate elements set out below:

- TRIMs that are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage; **AND**
- TRIMs that require the purchase or use by an enterprise of products of domestic origin.

17. A plain reading of the text of the paragraph 1(a) of the Illustrative List does not support the argument that it would be triggered only if (a) an enterprise that uses or purchases domestic products is the one that obtains an advantage; or (b) the recipient of the advantage must be an enterprise. Moreover, the advantage could be provided to a wide variety of economic actors and not necessarily to an enterprise or to the very same enterprise using the products of domestic origin, as the United States seems to claim. Therefore, each of the measures at issue satisfy these two separate elements of paragraph 1(a) of the Illustrative List.

(ii) Assuming arguendo, the recipient of the advantage is necessarily the enterprise using or purchasing the product of domestic origin, each of the measures at issue satisfies this element.

18. The United States relies on the Oxford Dictionary to argue that the term "enterprise" is restricted to legal entities such as a "business firm" or a "company". However, the dictionary meaning of a term cannot replace the context, object and purpose of an agreement. The object and purpose of the TRIMs Agreement is crystallized in its preamble, Article 1 and Article 2. The primary object of the TRIMs Agreement is to discipline investment measures that may cause trade-restrictive and distortive effects. In this context, the term "enterprise" cannot be restricted to a narrow and rigid construct that the United States proposes.

19. Further, the term "enterprise" must be viewed akin to engagement in an economic activity. Indeed, the Appellate Body, in *US – Washing Machines* took the view that an individual or a natural person may be an "economic actor" for purposes of the SCM Agreement. India considers that the Appellate Body's views are instructive in interpreting the meaning of the term "enterprise" under the TRIMs Agreement. For the purposes of TRIMs Agreement, an "enterprise" would include natural persons who engage in any economic activity such as purchasing a renewable energy equipment from a firm to receive incentives offered by a government.

20. Based on the interpretation above, each of the measures at issue squarely fall within the scope of paragraph 1(a) of the Illustrative List of the TRIMs Agreement. To illustrate, under the RECIP, if an individual uses or purchases a renewable energy equipment containing specified components manufactured in Washington, such individual receives an incentive (i.e. advantage). The individual, here, is an enterprise for the purposes of paragraph 1(a) of the Illustrative List. This analysis, *mutatis mutandis*, applies to all the measures whose coverage under the TRIMs Agreement has been contested by the United States. India has provided a non-exhaustive list of persons/entities who may be considered as enterprises for the purposes of paragraph 1(a) of the Illustrative List.

(iii) Alternatively, even a restrictive meaning of a 'TRIM' and an "enterprise", as proposed by the United States, will result in the measures at issue being covered under Article 2.2 read with paragraph 1(a) of the Illustrative List of the TRIMs Agreement.

21. *Alternatively*, assuming the United States' excessively restrictive interpretation of the terms "TRIM" and "enterprise" as well as its misreading of paragraph 1(a) were to hold, all the measures at issue are TRIMs which, *directly* or *indirectly*, subject an enterprise to certain requirements or conditions. The Appellate Body in *Canada – FIT* noted that the term 'advantage' in the context of the TRIMs Agreement is broader than the term 'benefit' under the SCM Agreement.

22. By way of an example, the measures at issue under RECIP require that if a person (whether individual, business, local government entity with few exceptions) generates electricity through a renewable energy equipment consisting of certain specified *inputs* (such as blade, inverter or solar sterling) manufactured in Washington, then such a person shall be entitled to an incentive. The measure, therefore, in effect, *indirectly* induces enterprises engaged in manufacturing of renewable energy equipment to use specified inputs manufactured in Washington to obtain an advantage. The advantage to these enterprises may be in the form of additional price, increased demand or protection from fair competition from 'like' imported products.

23. A similar analogy applies to all other measures at issue that the United States has contested to not fall within the scope of the TRIMs Agreement. In other words, merely because a measure has been structured in a manner that it does not, *prima facie*, seem to *directly* impose requirements on an enterprise, it cannot escape the scrutiny of the TRIMs Agreement. Therefore, the measures at issue may be viewed as *directly* imposing requirements/conditions on enterprises engaged in the manufacturing of end-products to use inputs of domestic origin in order to obtain an advantage. The measures at issue may also be viewed as *indirectly* imposing requirement on the enterprises engaged in manufacturing of end-products through direct imposition of requirements/conditions on consumers of end-product.

24. In light of the above, India reiterates that all the measures at issue are TRIMs that: (i) are inconsistent with Article 2.1 of the TRIMs Agreement because they are inconsistent with Article III of the GATT 1994; and (ii) also fall squarely within the scope of Article 2.2 read with the Illustrative List of the TRIMs Agreement.

V. The United States has failed to rebut India's claims on financial contribution and benefit under the SCM Agreement.

25. The United States argument on India's failure to demonstrate that any of the measures at issue meet the definition of subsidy within the meaning of Article 1 of the SCM Agreement is without any merit for the following reasons.

(a) There is no requirement to demonstrate actual financial contribution under Article 1.1(a) of the SCM Agreement.

26. The United States has made a generic argument that India has failed to make a *prima facie* case of financial contribution because it failed to provide evidence of actual contribution. India has argued that evidence of actual contribution is not necessary to prove existence of financial contribution. The arguments of the United States do not find support in the WTO jurisprudence and text of the SCM Agreement. The panel in *US – Tax Incentives*, while interpreting the phrase "government revenue that is otherwise due is foregone" held that a commitment by a government or public to make a direct transfer of funds or to forego revenue would constitute a financial contribution, and not only particular instances of it being done. In addition to the clear WTO jurisprudence on this issue, India has systemic concerns on the view proposed by the United States.

27. If the United States' views were to be a correct reading of Article 1.1 of the SCM Agreement, it would mean that a Member State can challenge a measure adopted by another Member only if that measure is actually applied. Moreover, if the information with respect to actual financial contribution (or application of measure in a broad sense) is not available in public domain, a complaining Member can never resort to the dispute settlement process. This would not only erode the effectiveness of the dispute settlement process but also defeat the rule-based system of the WTO.

(b) India has adequately demonstrated that each of the measures at issue confer benefit within the meaning of Article 1.1(b) of the SCM Agreement.

28. The United States has argued that India has failed to establish the measures at issue confer any 'benefit'. To recall, India's claims with respect to financial contribution fall under the category of direct transfer of funds in the form of grants, revenue foregone and/or provision of goods. In case of prohibited subsidies, the Panel only needs to determine that a benefit exists as opposed to its precise quantification. However, the Panel does not need to determine a benchmark to find existence of benefit in every case.

29. On the issue of benefit in cases of revenue forgone, previous panels have noted that where the financial contribution is in the form of the foregoing of revenue otherwise due, the conclusion that a benefit exists has been made with little difficulty. Therefore, in cases where the Panel concludes that any of the measures at issue involve financial contribution in the form of revenue foregone, it need not examine that a benefit exists. This is not disputed by the United States.

30. India will now address the question of benefit with respect to financial contribution in the form of grants. Article 14 of the SCM Agreement provides guidelines for determining benefit with respect to financial contributions in the form of equity investments, loans, loan guarantees etc. However, it does not provide any guidelines with respect to financial contributions in the form of grants. The reason for this conscious omission is obvious. There cannot be such a benchmark and one does not need a benchmark for a comparison when a government makes a grant as opposed to loan or equity

infusion etc. The inference, therefore, is that in cases of grants by a government or a public body, a benefit is *ipso facto* conferred.

31. The Panel may have noted that all of India's claims with respect to direct transfer of funds pertain to grants and not loans or equity infusion. Therefore, once the Panel determines that a financial contribution is in the form of grants, the existence of benefit is automatically deduced. Accordingly, the United States' assertion that India has failed to show existence of benefit is without any merit. In any event, India has made detailed submissions with respect to "benefit" in the relevant market for each of the measures at issue.

32. On the question of recipient of the benefit, the Appellate Body has noted that a subsidy may be conferred to a wide variety of economic actors, including individuals, groups of persons, or companies. India has demonstrated that for each of the measures at issue, there may be two categories of beneficiaries namely, (i) direct recipients of the financial contribution; and (ii) the local producers of the 'like' products of domestic origin.

(i) India has demonstrated that measures at issue confer benefit on direct recipients of financial contribution

33. With regard to the category of direct recipients of the financial contribution, India reiterates that it has made a *prima facie* case that these recipients have received benefits as they are "better off" in the relevant market. The United States' thematic argument is that the seller of the specific product may have increased the prices to the extent of financial contribution and therefore, the direct recipients are left with no benefit. However, India reiterates that effective cost to the purchaser would not change due to such increase as the purchaser receives the differential from the government or public body. Therefore, the purchaser is "better off" in the market than what it would have been absent such financial contribution.

(ii) India has demonstrated that measures at issue confer benefit on "indirect beneficiaries" in each case.

34. At the outset, India submits that the issue of benefit to the "indirect beneficiaries" is not determinative for assessing existence of subsidy in this dispute. A subsidy exists if the existence of financial contribution and benefit is proven. It does not matter which all economic actors may be the recipients of the benefit. In any event, India has responded to the arguments made by the United States below:

(a) United States argument that India's approach does not leave any room for any benefit to the indirect beneficiaries is incorrect. India does not claim that direct recipients of financial contribution receive the same benefits as "indirect beneficiaries".

(b) For the purposes of benefit analysis with respect to "indirect beneficiaries", only one market for renewable energy equipment/system that contains the incentivized products/components of domestic origin is relevant.

VI. Each of the measures at issue constitute subsidies that are "contingent, . . . upon the use of domestic over imported goods.

35. India recalls that the United States did not contest or provide any reasons in its First Written Submission on why the subsidies are not "contingent, . . . upon the use of domestic over imported goods". However, given the nature of questions from the Panel, India understands the issue to be identification of the economic actor in a trade chain (from upstream producer to the ultimate consumer) who has to "use" the domestic goods over imported goods to satisfy the elements of Article 3.1(b) of the SCM Agreement. India submits that this issue is not determinative for resolving the present dispute. This is because the concept of subsidy and the phrase "contingent, . . . upon the use of domestic over imported goods" are agnostic to economic actors.

36. Article 1 of the SCM Agreement, which defines a subsidy, does not provide for who could be the recipient of a financial contribution or benefit. Similarly, Article 3.1(b) does not state who has to be the "user" of domestic goods. Any restrictive meaning of the term "use" or a restrictive construct of Article 3.1(b) would result in an overly narrow interpretation. Therefore, given that the definition of subsidy and the phrase "upon the use of domestic over imported goods" is agnostic to economic actors, it is not necessary for the Panel to identify economic actors.

37. Assuming the term "use" is given a restrictive meaning such that only a manufacturer or producer may "use" domestic goods over imported within the meaning of Article 3.1(b), the

measures at issue will still fall within its scope. Article 3.1(b) has three separate elements: (i) the existence of subsidy; (ii) contingency; and (iii) "use of domestic over imported goods". Whether the Panel considers that a non-manufacturer can "use" the domestic goods or only a manufacturer can "use" the domestic goods, the conclusions with respect to India's claims will not change. In the case of former, each measure at issue would fall within the scope of Article 3.1(b) as they constitute subsidy to certain persons (economic actors whether they are called retail consumers or end-users or intermediate purchasers) contingent upon use (purchase or consumption) by such person of certain renewable energy equipment containing domestic goods. In the case of latter, each measure at issue would constitute subsidy to a person (it could be the end-user or intermediate purchaser, or it could be the manufacturer who receives a benefit by pass-through) contingent upon the manufacturer using specified domestic components in manufacturing the final renewable energy equipment or product.

EXECUTIVE SUMMARY OF INDIA'S OPENING ORAL STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. The United States has failed to rebut India's claims under Article III:4 of the GATT 1994.

38. The United States, in its Second Written Submission, repeats its previous arguments on "incentivization" and argues that India must show how each of the measures operate in the relevant market. India has already described the design, structure and expected operation of each of the challenged measures at issue to show the "affect" requirement. The very design and structure of the measures at issue reveal their discriminatory nature which is in blatant violation of the mandate under Article III:4 of the GATT 1994. The discriminatory element of these measures also demonstrate the expected operation of these measures i.e., they *might* adversely modify the conditions of competition between the imported products and "like" domestic products to the detriment of the former. Whether the measures *actually* modify the conditions of competition and manner in which they operate and the extent to which such modifications occurs – all of these are not required to be demonstrated to make a claim under Article III:4 of the GATT 1994.

39. The United States' arguments are particularly problematic given it asserts that the existence of "actual trade effects" is not an essential element of a claim under Article III:4 of the GATT 1994. Yet, it argues that India must show how "incentivization" operates in the relevant market. The United States' attempt to create an imaginary standard for demonstration of "actual trade effects" for a claim under Article III:4 is obvious. Not only are these arguments contrary to established WTO jurisprudence but they are also contradictory to the United States' own position.

II. The TRIMs Agreement applies to the measures at issue.

40. India has argued that each of the measures at issue is inconsistent with Article 2.1 of the TRIMs Agreement and fall within the scope of Article 2.2 read with paragraph 1(a) of the Illustrative List. India submits that the United States' arguments with respect to India's claims under the TRIMs confuse between Article 2.1 and Article 2.2 of the TRIMs Agreement.

(a) The text, object and purpose of the TRIMs Agreement do not show that the Agreement covers only those measures that impose requirements or conditions on enterprises.

41. The core of the United States' arguments is that the TRIMs Agreement concerns only with those measures that impose requirements or conditions on an enterprise. The United States broadly raises two arguments to show that the "object and purpose" of the TRIMs Agreement does not support the view that the Agreement's scope extends beyond measures that "impose purchase or use requirements" on an enterprise. The United States further argues that the phrase "to facilitate investment across international frontiers" in the preamble of the TRIMs Agreement suggests that the Agreement only deals with enterprises since "investments are typically in the form of an investment in an enterprise".

42. If the United States' arguments were to be accepted and assuming if the *only* purpose of the TRIMs Agreement is "to facilitate investment across international frontiers so as to increase the economic growth of all trading partners", then the question is whether the challenged measures at issue are compatible or antithetical to this objective. If a measure rewards use of products manufactured within the domestic territory of a country and does not offer the same rewards to competing "like" imported products, it is natural that some entities would move their investments and manufacturing into the territory of the importing country. This will result into a concentration of

investment into the importing country as opposed to the diversification of investments across international frontiers, against the economic interests of other trading partners. This is directly antithetical to the object and purpose of the TRIMs Agreement as relied by the United States. India has demonstrated that the challenged measures are not only designed to boost local manufacturing and investments but, for example in case of RECIP, also expressly state their intent to foster local manufacturing and industries. Needless to say, the stated objectives such measures prevent investment across international frontiers as opposed to facilitating it.

(b) Response to the United States' arguments on direct or indirect imposition of requirements or conditions and meaning of the term "enterprise".

43. The United States makes two broad claims with respect to imposition of requirements or conditions on enterprises. (i) India has not demonstrated that a manufacturer would need to source inputs from local suppliers to obtain an advantage; (ii) even if there is an implicit requirement to manufacture locally, this does not mean that manufacturer would need to purchase or use locally produced inputs as it can source inputs from any jurisdiction.

44. The text of paragraph 1(a) of the Illustrative List contains the phrase "the purchase or use by an enterprise of products of domestic origin." Therefore, it is any product and not any input which is of concern. Contrary to the United States' argument, India has demonstrated the imposition of requirements to use or purchase the products of domestic origin to obtain an advantage. On the question of whether such imposition is on an enterprise, India submits that irrespective of how the term "enterprise" is interpreted, it has previously demonstrated that the measures at issue directly or indirectly impose requirements on an enterprise to use or purchase products of domestic origin to obtain an advantage.

45. The United States' second argument that a manufacturer is free to source inputs from any jurisdiction so long as the manufacturing process takes place within the relevant State of the United States is misplaced at two levels. *First*, the United States assumes that the economic entity availing the advantage has to be a manufacturer. This is not the case as India has explained previously. The enterprise need not necessarily be a manufacturing firm and it need not necessarily obtain the advantage. *Second*, while a manufacturer may use or purchase *inputs* from any source to manufacture an *intermediate product*, the use or purchase of "like" imported *intermediate product* does not attract the same advantage.

III. The measures at issue are inconsistent with Article 3.1(b) read with Article 3.2 of the SCM Agreement.

46. The United States has broadly repeated its previous arguments on existence of financial contribution, benefit, contingency and use. India has briefly addressed these arguments below.

(a) The United States' arguments on existence of financial contribution are without any merit.

47. The core of the United States' argument is that a complaining party must provide evidence of actual financial contribution or actual transaction showing a financial contribution to make a *prima facie* case for the existence of financial contribution under Article 1.1 of the SCM Agreement. In particular, the United States relies on the word "is" under Article 1.1(a)(1), which in part, reads that "a subsidy shall be deemed to exist if [inter alia] there is a financial contribution by a government or any public body". It is the United States' position that the use of the operative term "is" indicates that a subsidy can be said to exist only where the government *has* actually made a financial contribution under the measure at issue.

48. India through its previous submissions has demonstrated the fallacy of this argument. Interestingly, the United States had made very same arguments in a prior dispute. The panel in that dispute rejected these arguments and noted that "[T]he foregoing of revenue is constituted by the government's promise to do so, and not only by particular instances of it being done". Therefore, a commitment or promise by a government or public body to make a direct transfer of funds or to forego revenue would constitute a financial contribution. This does not require showing of actual transactions.

49. India reiterates its previous submissions on this issue and concludes that India has made a *prima facie* case with respect to existence of financial contribution. Given the United States has made no efforts to substantively refute India's claims on financial contribution, the Panel, as matter of law, should rule in India's favour.

(b) The United States' arguments on existence of benefit are without any merit.

50. Similar to the issue of existence of financial contribution, the United States argues that India has failed to establish a *prima facie* case with respect to existence of benefit. Interestingly, the United States submits that "India did not even present a single theory of benefit". A paragraph later, the United States argues that "India appears to advance inconsistent theories" and that India [presents] yet another possible theory of benefit. The contradictions in the United States' statements need not be called out.

51. The records available before this Panel speak for themselves. India has made detailed submissions and analysis with respect to existence of benefit in its very First Written Submission. The United States' argument that India has advanced multiple theories of benefit and therefore, proven that it did not meet its burden in its First Written Submission seems to be based on a misunderstanding of concept of a *prima facie* case and the due process. However, assuming, India has introduced any new arguments, it has the right to do so throughout the course of the present proceedings. This is without prejudice to India's submissions in First Written Submission where it had indeed made more than a *prima facie* case on the existence of benefit.

52. Due process implies that India has the right to rebut arguments made by the United States or respond to the questions from the Panel. India's arguments in its subsequent submissions were in response to the United States' claims. For the foregoing reasons, the United States' arguments that India has failed to show existence of benefit are without any merit.

(c) The United States' arguments on "contingency" and "use" are without any merit.

53. The United States has not advanced any new arguments on the issue of "contingency" and "use" under Article 3.1(b) of the SCM Agreement. India, therefore, reiterates its previous submissions on this issue. To summarise, India has adequately addressed the issue of contingency in its First Written Submission for each measure. Further, the interpretation of the term "use" under Article 3.1(b) is not determinative for India's claims. Whether it is given a restrictive interpretation or a wider interpretation, India has demonstrated that each of the measures at issue satisfy the "use" element.

EXECUTIVE SUMMARY OF INDIA'S RESPONSES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

54. India submits that the amendments to / replacement measures to the original Measures 1, 2 and 8 properly fall within the terms of reference of the Panel. These amendments/ replacements do not change the essence of the original measures and ruling on them is necessary to resolve the dispute. This has not been disputed by the United States either in its request for Preliminary Ruling or in subsequent submissions.

55. Accordingly, India requests the Panel to issue findings and recommendations on Measure 1 (RECIP) *as amended* (which would include amendments to the original measure and also the additions in form of RCW 82.16.165 read with relevant rules framed thereunder). Measure 2 (SGIP) is administered by the Program Administrators through handbooks which are issued from time to time. The 2016 SGIP Handbook and the 2017 SGIP Handbook are examples of such periodic handbooks through which the Program Administrators implement the legislative mandates. Therefore, the relevant parent legislations together with the handbooks constitute a 'series of measures' or successors in series. Accordingly, India requests the Panel should issue findings and recommendations on the 'series of measures' taken together.

56. With respect to Measure 8 (Michigan Renewable Energy Standards Program), India requests that the Panel should issue findings and recommendations with respect to the measure *as amended*. With respect to Measure 10 (Minnesota Solar Incentive Program), India requests that Panel to issue both findings and recommendations because the challenged measures continue to be in operation and have an ongoing effect.

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

I. Introduction

1. In this dispute, India addresses a number of state and local measures in which India has no trade interest. India provides minimal evidence on the extent to which these measures have been applied or are currently being applied, and provides no evidence that the measures have ever affected a single export of an Indian renewable energy good.

II. Factual Background & Measures at Issue

2. First, India appears to have no significant trading interest in the measures at issue in this dispute. Second, most of the measures at issue are no longer in legal effect or are due to expire within the next two years, as India is aware. Third, records confirm that nearly half of the measures at issue have fallen into general disuse and are essentially moribund. Fourth, at any rate, India has failed to establish that any of the measures at issue breach United States' obligations under a covered agreement.

A. WASHINGTON - Renewable Energy Cost Recovery Incentive Program ("RECIP")

3. Under RECIP, Washington State utility "customers" that own grid-connected "renewable energy systems" are eligible to receive annual "incentive payments" from their servicing utility company based on the amount of electricity (*i.e.*, kilowatt-hours) produced by the customer's renewable energy system over the previous fiscal year.

B. CALIFORNIA - Self-Generation Incentive Program ("SGIP")

4. SGIP provides certain incentive payments to California utility "customers" that install qualifying renewable energy generation or storage systems on their property. California's four major investor-owned utility companies provide the funding for SGIP incentives, with specific funding amounts determined and directed by the California Public Utilities Commission ("CPUC").

C. LOS ANGELES – Solar Incentive Program ("SIP")

5. Under SIP, the Los Angeles Department of Water and Power ("LADWP") provides "one-time" upfront "incentive payments" to residential, commercial, and non-profit customers that install grid-connected solar rooftop systems on their property.

D. MONTANA – Tax Incentive for Ethanol Production ("MTEIP")

6. MTIEP is a tax incentive payable to ethanol producers located in the State of Montana. Qualifying ethanol producers are eligible for a tax incentive of up to USD $0.20 per gallon of ethanol produced for the first six years of their production.

E. MONTANA – Tax Credit for Biodiesel Blending and Storage ("Biodiesel Tax Credit")

7. The Biodiesel Tax Credit is a tax credit available to individuals and business that "store or blend biodiesel with petroleum for sale." To qualify for the Biodiesel Tax Credit, an individual or business must own or lease a biodiesel blending facility, or have a "beneficial interest" therein.

F. MONTANA – Tax Refund for Biodiesel ("Biodiesel Refund")

8. The Montana Biodiesel Refund is a $0.01 - $0.02 per gallon tax refund available to certain gasoline "distributors" and "retail motor vehicle outlets" in Montana.

G. CONNECTICUT – Residential Solar Investment Program ("RSIP")

9. RSIP provides incentives to Connecticut homeowners that install solar power systems on their residential property.

H. MICHIGAN – Renewable Energy Standards Program ("Michigan RESP")

10. The Michigan Legislature established the RESP as part of Michigan's Clean, Renewable, and Efficient Energy Act of 2008 ("PA 295"). Under the RESP, "electricity providers" in Michigan are required to source a growing percentage of their electricity retail sales from renewable energy sources each year, with a target of at least 15% renewables by 2021.

I. DELAWARE – Renewable Energy Standards Program ("Delaware RESP")

11. Under Delaware's RESP, "retail electricity suppliers" are required to source a growing percentage of their retail electric sales from renewable energy sources (e.g., solar, wind, hydro-power). Electricity suppliers demonstrate yearly compliance by purchasing "renewable energy credits" (RECs) from renewable energy power generators ("generation units").

J. MINNESOTA – Minnesota Solar Incentive Program ("MSIP")

12. India's first written submission refers to a program called the MSIP. The United States understands India to use that nomenclature as an umbrella term for three "distinct" programs.

1. Made in Minnesota Solar Energy Production Incentives ("Solar PV Incentive")

13. The Solar PV Incentive was a "performance-based" incentive available to residential and commercial property owners in Minnesota that installed "grid connected solar photovoltaic modules" on their property.

2. Rebates for Installation of Solar Thermal Systems ("Solar Thermal Rebates")

14. The Solar Thermal Rebates was an incentive program that provided "rebates" to Minnesota residential and commercial property owners that installed on their property a "solar thermal system" with components "made in Minnesota."

3. Rebate for Solar PV Modules ("Solar PV Rebate")

15. The Solar PV Rebate was an incentive program that provided rebates to Minnesota property owners that installed "solar photovoltaic modules" on their property.

K. MASSACHUSETTS – Commonwealth Solar Hot Water Program ("SHWP")

16. Under the SHWP, the Massachusetts Clean Energy Technology Center ("MassCEC") provides "rebates" to offset the cost of installing "solar hot water systems (SHWs) at residential, commercial, industrial, institutional, and public facilities."

III. Requests for Preliminary Rulings

17. The LAMC Adder (formally provided for under the Los Angeles SIP) and the Massachusetts Manufacturer Adder (formally provided for under the SHWP) were no longer in legal force when the Panel was established on March 21, 2017.

18. In addition, the (i) Solar Thermal Rebates; and (ii) Solar PV Rebates under the MSIP were not included in India's request for consultations, and were not the subject of consultations between India and the United States.

A. The "LAMC Adder" and "Massachusetts Manufacturing Adder" fall outside of the Panel's terms of reference

19. The LAMC Adder and the Massachusetts Manufacturing Adder fall outside the Panel's terms of reference because both measures were no longer in legal force – and therefore were "not in existence" – when the Panel was established on March 21, 2017.

1. The LAMC Adder falls outside the Panel's terms of reference because it was no longer in legal effect as of January 1, 2017 and therefore was not "in existence" when the Panel was established on March 21, 2017

20. The Los Angeles Board of Water and Power Commissioners ("the Board") approved the *2017 SIP Guidelines* on December 6, 2017 and specified that they "shall become effective January 1, 2017."

21. In addition to approving the *2017 SIP Guidelines*, the Board explicitly terminated the LMAC Adder in its resolution of December 6, 2016. Specifically, the Board adopted the following proposal to "remove" the LMAC Adder as a feature of the SIP.

> Similarly, the Los Angeles Manufacturing Credit *will be removed*. There have been no requests for this manufacturing credit for over three years. (Emphasis added).

22. India has failed to meet its burden to establish that the LAMC Adder was a measure "in existence" when the Panel in this dispute was established on March 21, 2017.

23. India's assertion that "there is a risk that the LMAC Adder or similar measures are re-introduced" is wholly unsupported. Indeed, India does not even attempt to explain why it perceives such a risk or why the Panel should take this risk seriously.

2. The Massachusetts Manufacturer Adder falls outside the Panel's terms of reference because it was no longer in legal effect as of January 1, 2017 and therefore was not "in existence" when the Panel was established on March 21, 2017

24. The Massachusetts Manufacturer Adder ("the Adder") was not a measure "in existence" when the Panel was established on March 21, 2017. The legal instruments that allegedly provide for the Adder were not in legal force as of October 5, 2016, and thus not in force on March 21, 2017, when the Panel was established.

25. Accordingly, the Massachusetts Manufacturing Adder was not in existence when the Panel was established, and there is no jurisdictional basis for the Panel to examine or make legal findings with respect to the LAMC Adder.

B. The "Solar Thermal Rebate" and "Solar PV Rebate" were not the subject of consultations between India and the United States and therefore fall outside of the Panel's terms of reference

26. India seeks legal findings with respect to the (1) Solar Thermal Rebate; and (2) Solar PV Rebate as provided under the program India characterizes as the "Minnesota Solar Incentive Program." India, however, did not identify either of these two measures in its request for consultations of September 9, 2016. Therefore, both measures fall outside the Panel's terms of reference, and the Panel should reject India's request for legal findings with respect to these measures.

1. The "Solar Thermal Rebates" does not fall within the Panel's terms of reference because India did not identify that measure in its request for consultations

27. India's request for consultations identifies the MSIP as a measure "administered pursuant the criterion established under [*Minnesota Statute § 216C.414, subd. 2 (2013)*]." The "criterion established under Minnesota Statute § 216C.414 *subd. 2*" pertains to the Solar PV Incentive (*see,* section II.J.1), under which Minnesota provides incentives to property owners that install "*solar photovoltaic modules*" not "solar thermal systems."

28. Therefore, the scope of India's request for consultations was limited to the "Minnesota Solar Energy Production Incentive" – that is, the measures "administrated pursuant to the criterion established under Minnesota Statutes § 216C.414 *subd. 2*."

29. Because India limited the scope of its request for consultations to measures "administered pursuant to the criterion established under Minnesota Statutes § 216C.414 ***subd. 2***," the Solar Thermal Rebates necessarily falls outside the scope of India's request and the Panel's terms of reference.

2. The "Solar PV Rebate" does not fall within the Panel's terms of reference because India did not identify that measure in its request for consultations

30. The scope of India's request for consultations was limited to the Solar PV Incentive – that is, the measures "administrated pursuant to the criterion established under Minnesota Statutes § 216C.414 *subd. 2*". Accordingly, measures administered pursuant to different "criterion" necessarily fall outside the scope of India's request for consultations and the Panel's terms of reference.

31. Because India limited to scope of its request for consultations to measures "administered pursuant to the criterion established under Minnesota Statutes § 216C.414 *subd. 2*", the Rebate for Solar PV Modules necessarily falls outside the scope of India's request for consultations and the Panel's terms of reference.

IV. India Has Not Demonstrated a Breach of Article III:4 of the GATT 1994

32. India has failed to establish that the measures at issue breach Article III:4 of the GATT 1994. In particular, India has not met its burden of demonstrating that these measures (1) "affect", *inter alia*, the internal "use", "purchase" or "sale" of products; or (2) accord "less favourable" treatment to imported products within the meaning of that provision.

A. India has failed to establish that the "cost recovery incentives" provided under RECIP are inconsistent with Article III:4 of the GATT 1994

33. India has provided no evidence that substantiates its assertion that "the measures at issue create a demand for equipment [manufactured in Washington] and insulate them from competing 'like products' outside of Washington." Nor has India provided evidence that demonstrates that the measure at issue has modified the "conditions of competition" in Washington's market for renewable energy products "to the determinant of imported products."

B. India has failed to establish that the California Manufacture Adder ("SGIP Adder") provided for under SGIP is inconsistent with Article III:4 of the GATT 1994

34. India has provided no evidence that substantiates its assertion that the SGIP Adder operates to "induce []" buyers to "purchase specified products of California-origin." Nor has India provided evidence demonstrating that the availability of the SGIP Adder otherwise operates to modify the "conditions of competition" in the market for renewable energy equipment in California "to the determinant of imported products."

C. India has failed to establish that the LAMC Adder provided for under SIP is inconsistent with Article III:4 of the GATT 1994

35. Affirmative evidence demonstrates that the LAMC Adder has not incentivized the "use" of solar power equipment or components manufactured in the city of Los Angeles. As noted above, the LADWP terminated the LAMC Adder on December 6, 2016 because no one had sought to avail of the LAMC Adder since at least 2013. Specifically, the Board Resolution stated that

> Similarly, the Los Angeles Manufacturing Credit will be removed. There have been no requests for this manufacturing credit for over three years. (emphasis added).

36. The fact that no one has even requested (much less received) the LAMC Adder since 2013 contradicts India's assertion that the Adder has incentivized the "use of certain components manufactured in Los Angeles."

D. India has failed to establish that the MTIEP is inconsistent with Article III:4 of the GATT 1994

37. The Montana Department of Transportation records indicate no entity has availed of MTIEP since 1995. The fact that no entity has received a tax incentive under MTIEP in over two decades contradicts India's assertion that MTIEP has incentivized the "use" of products of Montana-origin.

E. India has failed to establish that the Montana Biodiesel Tax Credit is inconsistent with Article III:4 of the GATT 1994

38. Montana Department of Revenue records indicate that no taxpayer has sought to claim the Biodiesel Tax Credit since 2011. The fact that no entity has sought (much less received) the Biodiesel Tax Credit in seven years contradicts India's assertion that the Biodiesel Tax Credit has incentivized the "use" of products of Montana-origin.

F. India has failed to establish that the Biodiesel Refund is inconsistent with Article III:4 of the GATT 1994

39. Montana Department of Transportation records indicate that no taxpayer has ever applied for (much less received) the Biodiesel Refund. This clearly rebuts India's assertion that the Biodiesel Refund has created a preference (*i.e.*, "incentivized") "for biodiesel manufactured from Montana products."

G. India has failed to establish that the Connecticut Component Incentive ("CCI") provided for under Connecticut's RSIP is inconsistent with Article III:4 of the GATT 1994

40. India has provided no evidence to substantiate its suggestion that the CCI has played a "decisive" role in inducing consumers to "purchase" or "use" renewable energy components manufactured in Connecticut.

H. India has failed to establish that the "Michigan Equipment Multiplier" provided for under the RESP is inconsistent with Article III:4 of the GATT 1994

41. The evidence submitted by India with respect to the Michigan RESP in fact rebuts India's own contentions that the Michigan Equipment Multiplier has "induced" (*i.e.*, incentivized) buyers to purchase renewable energy systems of "Michigan–origin" or rendered "'like' imported products… undesirable in the eyes of [] potential buyer[s]."

I. India has failed to demonstrate the "Delaware Equipment Bonus" provided under REPSA is inconsistent with Article III:4 of the GATT 1994

42. India has not demonstrated that the prospect of receiving Bonus RECs incentivizes retail electricity suppliers to purchase renewable energy generation equipment made in Delaware. Under Delaware's statutory scheme, "retail electricity suppliers" (*i.e.*, companies that sell electricity to end-use consumers) and "generation units" (*i.e.*, the facilities that generate electricity) are distinct entities. "Generation units" *generate* power, whereas retail electricity units *distribute* the generated power to end-use customers. This means that "generation units" – *not* retail electricity providers – make purchasing decisions with respect to renewable energy *generation* equipment. 26 Del. C. § 351(d), however, does not refer to "generation units" (*vice* retail electricity suppliers) much less indicate that *they* are eligible to earn Bonus RECs based on the amount of Delaware-made equipment or components used in their facilities.

J. India has failed to demonstrate the Incentives and Rebates provided for under the MSIP are inconsistent with Article III:4 of the GATT 1994

43. Contrary to India's assertion, affirmative evidence demonstrates that incentives and rebates available under the MSIP have not incentivized the "use" or "purchase" solar "products of Minnesota-origin."

44. The fact that solar installations linked the Solar PV Incentive have accounted for a negligible amount of overall solar PV installations in Minnesota, rebuts the suggestion that this measure has incentivized buyers to "purchase" or "use" Solar PV systems or components made in Minnesota.

K. India has failed to demonstrate the "Massachusetts Manufacturer Adder" provided for under the SHWP is inconsistent with Article III:4 of the GATT 1994

45. India has provided no evidence demonstrating that the Massachusetts Manufacturer Adder operates to incentivize the "use" of solar hot water systems or components made in Massachusetts. In particular, India does not proffer any data concerning how many individuals have availed themselves of the Manufacturer Adder, a notable omission given that the SHWP operated for nearly ten years.

46. For the foregoing reasons, India has failed to demonstrate the "measures at issue" in this dispute "affect" the "purchase" or "use" of products within the meaning of Article III:4 of the GATT 1994.

V. India Has Not Demonstrated a Breach of Article 2.1 of the TRIMs Agreement

47. Given that India has failed to establish that the measures at issue are inconsistent with Article III:4 of the GATT 1994, India has *necessarily* failed to establish they are inconsistent with Article 2.1 of the TRIMs Agreement. The scope of the TRIMs Agreement extends only to measures that impose requirements or conditions on an *enterprise's purchase or use of goods*.

48. The TRIMs Agreement does not define "trade-related investment measure" or otherwise specify the scope of that term. However, the context provided by the text of Agreement makes clear that the Agreement's disciplines are concerned with measures that impose requirements or conditions on purchase, use, importation, or exportation of goods by *enterprises*. Conversely, measures that do not regulate such actions of *enterprises* fall outside the scope of the TRIMs Agreement.

49. Most of the "measures at issue" in the present dispute fall outside the scope of the TRIMs Agreement because they impose no requirements or conditions on enterprises' purchases or uses of goods.

A. The "cost recovery incentives" provided under RECIP impose no requirements or conditions on *enterprises' purchases or uses of goods* and therefore fall outside the scope of the TRIMs Agreement

50. There is no requirement that an entity be an "enterprise" (*i.e.,* a "business firm" or "company") in order to qualify to receive incentive payments under RECIP.

B. The SGIP Adder imposes no requirements or conditions on enterprises' purchases or uses of goods and therefore falls outside the scope of the TRIMs Agreement

51. There is no requirement that a retail electricity customer be an "enterprise" (*i.e.*, a "business firm" or "company") in order to receive incentive payments under SGIP. Certainly, India has not demonstrated that any such requirement exists.

C. The LAMC Adder under the Los Angeles SIP imposes no requirements or conditions on enterprises' purchases or uses of goods and therefore fall outside the scope of the TRIMs Agreement

52. There is no requirement that a LADWP customer be an "enterprise" (*i.e.*, a "business firm" or "company") in order to receive incentive payments under SIP; India has certainly not demonstrated that any such requirement exists.

D. The "incentives" provided under the RSIP impose no requirements or conditions on enterprises' purchases or uses of goods and therefore fall outside the scope of the TRIMs Agreement

53. As explained above, incentive payments under RSIP are available only to utility customers that own and occupy residential "family homes" in Connecticut. To qualify of incentives under RSIP,

a residential property owner-occupier must purchase or lease a "solar photovoltaic (PV) system" and install the system on their residential property.

54. Given that owner-occupiers of a residential property are the only legal entities eligible to receive RSIP incentive payments, RSIP necessarily excludes "enterprises" (*i.e.,* business firms or companies) from receiving such incentive payments.

E. The incentives and rebates provided under the MSIP impose no requirements or conditions on enterprises' purchases or uses of goods and therefore fall outside the scope of the TRIMs Agreement

55. There was no requirement that a property owner be an "enterprise" (*i.e.*, a "business firm" or "company") in order to receive incentive payments under the MSIP.

F. The rebates provided under the SHWP impose no requirements on enterprises' purchases or uses of goods therefore fall outside the scope of the TRIMs Agreement

56. The rebates provided under the SHWP are broadly available to residential, institutional, and commercial customers that install "solar hot water systems" on their premises. An entity is not required to be an "enterprise" (*i.e.*, a "business firm" or "company") in order to qualify for a rebate under program.

VI. Response to India's Claims Under Article 3 of the SCM Agreement

57. First, India has failed to make a prima facie case that the measures at issue involve a financial contribution by a government or public body. At most, India has presented evidence that certain government entities had the legal authority to provide a contribution under the challenged measures.

58. Second, India has failed to demonstrate that any of the measures at issue confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

A. India has failed to establish that the "cost recovery incentives" provided under RECIP confer a "benefit"

59. India has failed to establish that the measure at issue under RECIP (hereinafter the "Washington Adder") is a "subsidy" within the meaning of Article 1 of the SCM Agreement because India has not demonstrated that Washington Adder confers a "benefit" within the meaning of Article 1.1(b) of the Agreement.

60. India argues that the Washington Adder confers a benefit on "two categories" of recipients: (1) individuals and entities that "receive" incentive payments under the Washington Adder; and (2) "local producers" of renewable energy equipment or components.

61. India has failed to demonstrate that the Washington Adder confers a "benefit" on direct recipients *or* local producers.

B. India has failed to establish that the SGIP Adder confers a "benefit"

62. India, has failed to establish that the SGIP Adder is "subsidy" within the meaning of Article 1 of the SCM Agreement because India has not demonstrated that the Adder confers a "benefit" within the meaning of Article 1.1(b) of the Agreement. In particular, India has failed to demonstrate that the SGIP Adder confers a "benefit" either on direct recipients, or on local suppliers/producers.

C. India has failed to establish that the LAMC Adder confers a "benefit"

63. The LAMC Adder is not within the Panel's terms of reference because the LAMC Adder was no longer in legal effect when the Panel was established on March 21, 2017.

64. India has failed to establish that the LAMC Adder is "subsidy" within the meaning of Article 1 of the SCM Agreement because India has not demonstrated that the Adder confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

65. India has failed to demonstrate that the LAMC Adder confers "benefit" on either direct recipients or local producers.

D. India has failed to establish that the MTIEP confers a "benefit"

66. India has failed to demonstrate that the MTIEP confers a "benefit" on ethanol distributors or local producers of Montana wood and wood products.

E. India has failed to establish that Biodiesel Tax Credit confers a "benefit"

67. India has failed to demonstrate that the Tax Credit confers a "benefit" on individual/corporate taxpayers or local producers of Montana feedstock.

F. India has failed to establish that the Biodiesel Refund confers a "benefit"

68. India has failed to demonstrate that the Biodiesel Refund confers a "benefit" on biodiesel distributors and the owners/operators of retail motor fuel outlets.

G. India has failed to establish that the CCI provided for under Connecticut's RSIP confers a "benefit"

69. India has failed to establish that the CCI is a "subsidy" within the meaning of Article 1 of the SCM Agreement because it has not demonstrated that the CCI confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

70. India argues that the CCI confers a benefit on "two categories" of recipients: (1) Solar PV "System Owners" and the homeowners (*i.e.*, direct recipients); and (2) the local producers/ assemblers of the major system components (*i.e.*, indirect recipients).

71. India has failed to demonstrate that the CCI confers a "benefit" on solar PV system owners/homeowners *or* local producers/assemblers of major system components.

H. India has failed to demonstrate that the "Michigan Equipment Multiplier" confers a "benefit"

72. India has failed to establish that RECs issued under the Michigan Equipment Multiplier are "subsidies" within the meaning of Article 1 of the SCM Agreement because it has not demonstrated that Michigan Equipment RECs confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

I. India has failed to establish the "Delaware Equipment Bonus" provided under REPSA confers a "benefit"

73. India has failed to establish that RECs issued under the Delaware Equipment Bonus are "subsidies" within the meaning of Article 1 of the SCM Agreement because it has not demonstrated that the Delaware Equipment Bonus confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

J. India has failed to demonstrate the "Incentives" or "Rebates" provided for under the MSIP confer a "benefit"

74. India has failed to establish that "incentive" and "rebate" measures at issue under the MSIP are "subsidies" within the meaning of Article 1 of the SCM Agreement because it has not demonstrated that such measures confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

K. India has failed to demonstrate the "Massachusetts Manufacturer Adder" confers a "benefit"

75. India has failed to establish that the Massachusetts Manufacturer Adder (provided for under the Commonwealth SHWP) is "subsidy" within the meaning of Article 1 of the SCM Agreement because it has not demonstrated that the Adder confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

VII. Response to India's Claims under Article 25.2 of the SCM Agreement

76. As the United States has explained in section VI above, India has failed to establish that the measures at issue in this dispute meet the definition of a "subsidy" within the meaning of Article 1 of the SCM Agreement. Consequently, India has also failed to establish that the United State was obligated to notify the measures at issue pursuant to Article 25.2 of the SCM Agreement.

VIII. Conclusion

77. The United States requests that the Panel find that India has failed to meet its burden of showing that the U.S. measures at issue are inconsistent with Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Articles 3.1(b), 3.2, and 25.2 of the SCM Agreement.

78. In addition, the United States requests that the Panel find that the LAMC Adder, the Massachusetts Manufacturing Adder, the Solar Thermal Rebate, and the Solar PV Rebate fall outside of the Panel's terms of reference and deny India's request for legal findings with respect to those measures.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

1. As explained in the United States' first written submission, India has failed to make a *prima facie* case that any of the measures at issue in this dispute are inconsistent with U.S. obligations under the GATT 1994, the TRIMs Agreement, or the SCM Agreement.

II. INDIA HAS NOT DEMONSTRATED A BREACH OF ARTICLE III:4 OF THE GATT 1994

2. The Appellate Body has found that the determination of whether a measure accords "less favourable" treatment to imported products within the meaning of Article III:4 cannot rest on a "simple assertion", but must also assess the measure's "implications in the marketplace." In this dispute, India's chosen framework for meeting this fundamental burden is to attempt to prove that that the measures at issue "incentivize" the purchase or use of locally manufactured products.

3. None of the evidence proffered by India demonstrates that the measures at issue have incentivized the purchase or use of locally manufactured renewable energy products. First, for some of the measures at issue, the data that India relies upon *at most* suggests that the measures may have incentivized the purchase or use of renewable energy equipment in *general* – that is, irrespective of origin. Second, in some cases, India's own evidence refutes the conclusion that the measures at issue have incentivized the purchase or use of locally made renewable energy equipment. Third, for some of the programs, the record evidence shows that few individuals have *ever* applied to receive incentives or benefits under the challenged measures.

4. Having failed to demonstrate that the measures at issue operate to incentivize the purchase or use of locally manufactured renewable energy products, India has thus failed to establish that the measures "affect" the "use" of such products within the meaning of Article III:4 (much less demonstrate that the measures accord "less favorable" treatment to imported products). Accordingly, India has failed to make a *prima facie* case that the measures at issue are inconsistent with Article III:4 of the GATT 1994.

III. INDIA HAS NOT DEMONSTRATED A BREACH OF ARTICLE 2 OF THE TRIMs AGREEMENT

5. Most of the measures at issue in this dispute do not fall within the scope of the TRIMs Agreement. Rather, the TRIMs Agreement covers measures that impose requirements or conditions on purchase, use, importation, or exportation of goods by *enterprises*. Conversely, measures that do not regulate such actions of *enterprises* fall outside the scope of the TRIMs Agreement.

6. First, the numerous references to "enterprises" in Article 5 of the TRIMs Agreement – in particular, the phrases "enterprises which are subject to a TRIM" and "a TRIM…applicable to [] established enterprises" – indicates that TRIMs are measures that impose requirements or conditions on *enterprises*. Second, the text of the Illustrative List of the Annex to the TRIMs Agreement provides further evidence that the scope of the TRIMs Agreement is limited to measures that impose requirements on *enterprises*. Based on this context, TRIMs are measures that impose requirements on *enterprises.*

7. Most of the measures at issue in this dispute are focused on end-consumers, and impose no requirements or conditions on *enterprises* with respect to purchase or use of goods. In particular, as explained in the United States' first written submission, the Washington State, Los Angeles, California, Connecticut, Minnesota, and Massachusetts measures are not within the scope of the TRIMs Agreement because they impose no requirements on enterprises with respect to the purchase or use of goods.

IV. INDIA HAS NOT DEMONSTRATED A BREACH OF ARTICLE 3 OF THE SCM AGREEMENT

8. India has failed to establish that the measures at issue are inconsistent with U.S. obligations under the SCM Agreement. In particular, India has not met its burden of demonstrating that the measures at issue involve a "financial contribution" within the meaning of Article 1.1(a) of the SCM Agreement, or confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

9. First, India has not presented evidence that any "financial contributions" have been disbursed under the measures at issue. At most, India has presented evidence that certain entities had the legal authority to provide such a contribution under the challenged measures.

10. Second, with respect to the element of "benefit," India appears to advance contradictory arguments. On the one hand, India argues that the measures at issue confer a "benefit" on the homeowners, businesses, etc. that install qualifying renewable energy equipment by allowing them to purchase renewable energy products at an effective discount. On the other hand, India argues that measures at issue *also* confer a "benefit" on "local producers" of renewable energy equipment. However, as the United States has explained, India's own approach to calculating the "benefit" conferred on direct recipients appears to leave no room for any additional "benefit" to be conferred on local producers.

11. Instead, India argues that the measures at issue confer a "benefit" on local producers in the form of "increased sales." As the United States has explained, India has failed to show that the measures at issue have incentivized the purchase of locally made renewable energy equipment in a way that would result in additional sales for local producers.

12. For the foregoing reasons, India has not met the burden of demonstrating that the measures at issue are inconsistent with U.S. obligations under the SCM Agreement.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL

1. As noted in the following U.S. responses to the Panel's questions, the United States is not in a position to provide detailed answers to a number of questions because India failed to make out its *prima facie* case in its first written submission.

2. In particular, India failed to explain how each requisite element of each of its legal claims specifically applied to the specific measures at issue. This fundamental flaw in India's first written submission is particularly acute with respect to India's claims under the TRIMs Agreement and the SCM Agreement. In prior disputes, the types of measures challenged by India have been addressed under Article III:4 of the GATT 1994. In contrast, and as India does not dispute, the purported application of the TRIMs Agreement and the SCM Agreement to consumer incentive programs is novel. To make out such claims, a complaining Member would need to present a well-formed legal argument explaining its interpretation of the relevant provision, and further explain how under that interpretation, each element of its claims could apply to consumer programs. India has not done so. Indeed, when pressed at the first substantive meeting, India in essence repeated the conclusory allegations in India's request for panel establishment, without providing any supporting argumentation.

3. In making this introductory comment, the United States should not be understood as suggesting that India may attempt to establish its *prima facie* case in subsequent submissions. To the contrary, under paragraph 3 of the Panel's Working Procedures, India was required to present its arguments in its first written submission. In contrast, also under paragraph 3 of the Working Procedures, the second written submission is for purposes of rebuttal. India has not presented any basis for why India should be excused from the fundamental requirement that a complaining Member must present its *prima facie* case in its first submission.

4. Furthermore, it would be completely inconsistent with the Working Procedures, as well as procedural fairness, for India to wait until after it had first reviewed responses of the United States and third parties on the general interpretive issues raised in the Panel's questions (but unaddressed in India's first submission) in order to attempt to make out a *prima facie* case. The Panel-questions-and-response process is not intended to be an exercise in which the complaining Member can conduct an initial exploration of the relevant legal issues, after which the complaining Member can then attempt to formulate its legal arguments.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

I. Introduction

1. In this submission, the United States primarily responds to certain new arguments that India advanced at the first meeting of the Panel with the parties and in written responses to questions from the Panel. In short, none of these arguments are convincing or serve to make out India's case that the measures at issue are inconsistent with U.S. obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement"), or the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

II. India Has Not Made out a Case that the Measures at Issue are Inconsistent with Article III:4 of the GATT 1994

2. To prevail on a claim under Article III:4, a complaining party must meet its basic burden of argument. India argues that the measures at issue accord "less favorable" treatment within the meaning of Article III:4 because they incentivize the "purchase" or "use" of locally manufactured renewable energy products. Accordingly, having asserted this approach as the basis for its case, India must meet its burden of showing – through specific and detailed analysis – how each measure at issue operates in the manner India asserts. India failed to do so.

3. India's arguments on the purported "incentivizing" effects of the measures at issue are comprised primarily of conclusory statements that are unsupported by an analysis of the challenged measures or the markets in which the measures operate.

4. At paragraph 57 of its first written submission India describes certain aspects of the measures at issue under **RECIP (Measure 1)** and then – without providing any intervening analysis – begins paragraph 58 with the declaration that "*Given the measures at issue incentivize [] the use of certain specified products manufactured in Washington*..." In other words, India simply takes it as a "given" that the **RECIP** measures incentivize the "use" of products made in Washington *without* first analyzing whether the measures – in light of their "design, structure, and expected operation" – are even likely to have such an incentivizing effect. This pattern is repeated through India's first written submission.

5. At paragraph 176 of its first written submission, India briefly characterizes the measures at issue under **SGIP (Measure 2)** and then immediately declares that "a potential buyer will prefer to purchase" locally made products "over those which are imported."

6. At paragraph 679 of its first written submission, India briefly describes the measures at issue under the **CRSIP** (**Measure 7**) and then declares that "*any* incentive would play a decisive role in the choice a consumer makes between domestic and imported products."

7. At paragraph 782 of its first written submission, India characterizes the measures at issue under **RESPM (Measure 8)**, and then states "Since the buyers are induced to purchase 'renewable energy system' [sic] of Michigan -origin, the 'like' imported products, which are negated the *equality of opportunity*, become undesirable in the eyes of a potential buyer."

8. Similarly, after briefly characterizing the measures at issue under **RESPA (Measure 9)** at paragraphs 877 and 878 of its first written submission, India immediately states that "In view of the additional incentives, a potential buyer [*i.e.*, a "retail electricity supplier"] will prefer to purchase" locally-manufactured renewable energy equipment.

9. India's analytical omissions with respect to the measures at issue under **SEPI (Measure 10)** are particularly glaring. India is challenging three separate measures under SEPI. Again, India appears to simply presume that each of the measures incentivize the purchase or use of products made in Minnesota because there are certain "financial advantages" or "rebates" available to consumers under SEPI. India, however, does not support this presumption with an analysis of the measures' design, structure, or expected operation on Minnesota's market for renewable energy products.

10. Given that India has chosen to argue that the measures at issue accord "less favorable treatment" to imported products *by* incentivizing the purchase or use of domestic products, India *does* bear of the burden of demonstrating that the challenged measures are bound or likely to have such incentivizing effects. For the foregoing reasons, India has failed to do so. Accordingly, the Panel should find that India has failed to establish that the measures at issue are inconsistent with Article III:4 of the GATT 1994.

III. India Has Not Made out a Case that the Measures at Issue are Inconsistent with Article 2.1 of the TRIMs Agreement

11. The text of the relevant provisions of the TRIMs Agreement makes clear that the Agreement's disciplines are concerned with measures that impose requirements or conditions on the purchase, use, importation, or exportation of goods by *enterprises*.

12. In its statements to the Panel and responses to Panel questions, India has advanced several new arguments to support its view that the measures at issue fall within the scope of the TRIMs Agreement. As explained below, each of India's new arguments is without merit.

A. The measures at issue do not impose any direct or indirect purchase or use requirements on enterprises that manufacture renewable energy equipment

13. India does not appear to dispute that most of the measures at issue impose no explicit purchase or use requirement on enterprises. Instead, India now argues that the measures impose "indirect" or implicit requirements that enterprises must fulfill to obtain an "advantage" within the meaning of paragraph 1(a) of the Illustrative List of the Annex to the TRIMs Agreement. These arguments are unconvincing.

14. India has not demonstrated that a renewable-equipment-manufacturing enterprise would need to source *any* of the inputs used in the manufacturing process from local suppliers in order to obtain the advantages alluded to by India.

15. Even if a manufacturing enterprise must conduct its manufacturing activities *within* a certain jurisdiction in order to obtain an advantage, this does not mean that the enterprise would need to "purchase" or "use" products that are made in that jurisdiction. As India appears to acknowledge, a manufacturing enterprise could simply "shift[] investments" into a local jurisdiction instead of "purchasing" or "using" any "products of local origin" in the production process.

16. For the foregoing reasons, India has failed to establish that the measures indirectly or implicitly require manufacturing enterprises to purchase or use "products of domestic origin" in order to "obtain an advantage" within the meaning of paragraph 1(a) of the Illustrative List.

B. The "object and purpose" of the TRIMs Agreement does not support the view that the Agreement's scope extends beyond measures that impose purchase or use requirements on *enterprises*

17. India suggests that measures with the potential to have trade-restrictive, distortive, or discriminatory effects fall within the scope of the TRIMs Agreement, *even if* they impose no requirements or conditions on enterprises. India argues that this interpretation flows from the object and purpose of the TRIMs Agreement. India's argument has two unsurmountable problems.

18. First, under customary rules of interpretation, the text of the agreement must be interpreted in accordance with their ordinary meaning, in their context, and in light of the object and purpose

of the agreement. Here, the terms of the agreement explicitly state that the relevant purchase or use is "by an enterprise."

19. Second, and furthermore, India's proposed "object and purpose" of the TRIMs Agreement is not correct. As the United States explained in its prior submissions, the preamble of the TRIMs agreement states that an objective of the agreement is "to facilitate investment across international frontiers." Thus, it makes sense for the relevant text in the TRIMs Agreement to impose disciplines on measures affecting purchase or use *by an enterprise,* as an enterprise could potentially be associated with an investment across international frontiers.

20. Indeed, the similarity between the object and purpose of the GATT 1994 and India's position on the object and purpose of the TRIMs Agreement undermines India's argument regarding the intended scope of the TRIMs Agreement. In particular, the measures that fall within the scope of the TRIMs Agreement are, *by definition*, a narrower subset of measures that fall within the scope of Article III:4 of the GATT 1994. India's interpretive approach would render the TRIMs Agreement essentially superfluous in light of Article III:4 of the GATT 1994. India's litigation position thus contravenes core principles of treaty interpretation.

21. In sum, India's "object and purpose" argument does not support the view that the scope of the TRIMs Agreement extends to measures that impose no requirements or conditions on enterprises' purchases or use of goods.

C. India has failed to establish that the term "enterprise" can encompass "persons who engage in *any* economic activity such as purchasing renewable energy equipment"

22. The ordinary meaning of "enterprise" refers to a "business firm" or "company." In light of the preambular language of the TRIMs Agreement, the relevant business firm or company would be of the type that could be involved in a cross-border investment. India's response is to rely on irrelevant findings by the Appellate Body in *US – Washing Machines.* In particular, based on that report, India argues that the term "enterprise" can encompass any "person engaged in any economic activity, such as purchasing renewable energy equipment." As explained below, however, none of the Appellate Body's reasoning in *US – Washing Machines* supports such an interpretation for the term "enterprise" within the meaning of the TRIMs Agreement (or any other covered Agreement for that matter).

23. First, the United States notes that the Appellate Body did not interpret the meaning of the term "enterprise" in *US – Washing Machines*, but rather the phrase "certain enterprises" within the meaning of Article 2.2 of the SCM Agreement.

24. Second, the issue in *US – Washing Machines* was whether the term "certain enterprises" pertained only to where a *company* was legally incorporated or whether other parts of a business could be the recipient of a "subsidy" within the meaning of the SCM Agreement. 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, it did not state or imply that any "person[] who engages in any economic activity" is an "enterprise" within the meaning of the SCM Agreement.

25. India has therefore failed to adduce any legal support for the contention that the term "enterprise" can encompass "persons who engage in *any* economic activity such as purchasing renewable energy equipment." India has provided no basis to consider that a special meaning should replace the ordinary meaning of the term "enterprise," *i.e.*, a "business firm" or company.

26. For the foregoing reasons, the United States reiterates that the Panel should find that India has not made out its case by demonstrating that each of the measures at issue is an investment measure within the scope of the TRIMs Agreement.

IV. India Has Not Made Out a Case That the Measures at Issue Are Inconsistent With Article 3 of the SCM Agreement

27. In its statements to the Panel and responses to Panel questions, India makes some new arguments to attempt to bolster its claim that the measures at issue provide for subsidies that are

inconsistent with Article 3.1(b) and 3.2 of the SCM Agreement. As explained below, however, India's new arguments do not cure the deficiencies in India's first written submission.

A. India has failed to establish that the measures at issue involve a "financial contribution" within the meaning of Article 1.1(a) of the SCM Agreement

28. India argues that it need not demonstrate that a financial contribution has been made in order to establish that a "subsidy" exists within the meaning of the SCM Agreement. Specifically, India references Article 3.2 of the SCM Agreement, which provides that Members "shall neither grant nor maintain" the subsidies prohibited under Article 3.1. India asserts that the inclusion of the term "maintain" in Article 3.2 of the SCM Agreement indicates that "whether a Member has actually made a financial contribution is *irrelevant*" to establishing whether "there *is* a financial contribution" within the meaning of Article 1.1(a)(1) of the Agreement.

29. India's reliance on the term "maintain" is misplaced. Under Article 3.2 of the SCM Agreement, the object of the verb "maintain" is the noun "subsidies." The term "subsidy" is in turn defined in Article 1 of the SCM Agreement, and Article 1 requires a financial contribution. Thus, nothing in the use of the verb "maintain" indicates any derogation from the requirement that a subsidy requires a financial contribution.

30. Furthermore, the ordinary meaning of the term "maintain" – read in context with Article 3.2 – does not support India's implicit argument that "there is a financial contribution" within the meaning of Article 1.1(a)(1) of the SCM Agreement whenever a measure gives certain entities the legal authority to provide such a contribution. The ordinary meaning of "maintain" is to "preserve or maintain" or "cause to continue." The inclusion of the term "maintain" in Article 3.2 (*i.e.*, Members "shall neither grant nor maintain") simply means that Members may not maintain prohibited subsidies beyond the initial grant of the subsidy.

31. For the foregoing reasons, India has failed to support its argument that "there is a financial contribution" within the meaning of Article 1.1(a)(1) of the SCM Agreement, whenever certain entities may have the legal authority to provide such a contribution under a measure at issue.

B. India has failed to establish that the measures at issue confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement

32. In its first written submission, India did not even present a single theory of "benefit". Rather, India argued that the measures at issue might confer a "benefit" on (1) direct recipients in the amount of the "financial contribution" granted to the recipient; and/or (2) local/seller producers in the form of "additional sales." India's arguments in this regard are based on India's "assumptions" and not supported by record evidence or relevant economic analyses.

33. India now appears to advance an alternative factual scenario. Specially, India posits that the entirety of the "benefit" initially conferred on direct recipients (*i.e.*, homeowners) is somehow transferred to local sellers/producers of renewable energy equipment. This differs, however, from the fact-pattern that India set out in its first written submission.

34. Therefore, India appears to advance inconsistent theories in support of its argument that the measures at issue confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. As the complaining party, however, India bore the burden of establishing its *prima facie* case in its first written submission, by demonstrating what it believes the facts *are*. This means that it is not sufficient for India to simply put forward different versions of what the facts *might* be. And, by now presenting yet another possible theory of benefit, India has in fact further confirmed that it did not present a *prima facie* case of benefit in its first written submission.

35. 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).

C. India has failed to establish that the measures at issue are "contingent ... upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement

36. In its statements to the Panel and responses to questions from the Panel, India does not appear to have set out any new arguments in support of its claim that the measures at issue are "contingent … upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement. The United States therefore reiterates its view that India has failed to make out a case that the measures at issue are so "contingent" within the meaning of that provision.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. Introduction

37. As the United States has noted, India has brought this dispute not to enhance its ability to export products to the United 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. For India to bring a dispute for this purpose amounts to a misuse of the dispute settlement system.

38. Nonetheless, the DSB has established this panel, with standard terms of reference, and the panel must issue a report in accordance with the DSU. 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." Particularly where there is no trade interest involved, the Panel should consider the extent to which it needs to reach India's claims that raise the same basic issues under three different WTO agreements.

39. 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 Still Not Made Out a Case That The Measures At Issue Breach Article III:4 of the GATT 1994

40. The argumentation in India's first written submission does not 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. First, India made conclusory statements that are unsupported by any analysis of the challenged measures or the markets in which the measures operate. Second, 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. India's reliance on conclusory allegations, and flawed evidence of supposed trade effects, does not meet India's burden of argument.

III. India Has Still Not Made Out a Case That the Measures At Issue Are Inconsistent with Article 2 of the TRIMs Agreement

41. Measures that are *not* inconsistent with Article III:4 of the GATT are necessarily *not* inconsistent with Article 2 of the TRIMs Agreement. 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.

42. Moreover, as the United States has explained, most of the measures at issue in this dispute fall outside the scope of the TRIMs Agreement because they are focused on final end-use consumers, *not* enterprises. 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.

43. 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. India

contends that the Appellate Body Report in *US – Washing Machines* supports this expansive definition of the term "enterprise." India's reliance on *US – Washing Machines* is misplaced.

44. 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, it did not – as India suggests – 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 a corporate facility. Accordingly, India has given the Panel no reason to depart from the ordinary meaning of the term—that is, a "business firm" or "company."

45. 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. In short, India mischaracterizes the "object and purpose" of the TRIMs Agreement. The objective of the TRIMs Agreement – as reflected in its preamble – is "to facilitate investment across international frontiers." Cross-border investments are typically made in the form of investment *in* enterprises, *not* through payments or incentives to homeowners 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 "purchase" or "use" requirements on *enterprises*.

46. 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. 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. 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.

47. 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.

IV. India Has Not Demonstrated a Breach of the SCM Agreement

48. 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. 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.

49. India's inability to articulate a coherent theory of "benefit" is fatal to its claims under the SCM Agreement 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. It is not sufficient for India to simply put forward different versions of what the facts "may" 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).

50. In this regard, the United States takes note of the extraordinary statement from India's second written submission that "It does not matter which all [sic] economic actors may be the recipients of a benefit." Of course, the question of *who* receives a "benefit" 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." 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.

EXECUTIVE SUMMARY OF CERTAIN RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL

RESPONSE TO QUESTION 115 (a) and (b)

51. As with all the measures at issue in this dispute, India's legal claims in relation to Measure 9 rely on the threshold understanding that the measure requires government conduct that would be inconsistent with the aforementioned agreements (or precludes conduct consistent with those agreements). Accordingly, India bore the burden of putting forth evidence and argumentation sufficient to demonstrate that Measure 9 meets this threshold condition.

ANNEX C
ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. THE GATT 1994 AND THE SCM AGREEMENT PERMIT THE PAYMENT OF SUBSIDIES EXCLUSIVELY TO DOMESTIC PRODUCERS

1. Paragraph 8 of Article III of GATT 1994 is an exemption to the national treatment principle enshrined in the other paragraphs of Article III[1]. By stipulating that Article III does not prevent the payment of subsidies exclusively to domestic producers, paragraph 8(b) clearly allows WTO Members to discriminate between domestic and foreign producers when it comes to programs designed to subsidize national industry[2]. By their definition, subsidies affect the conditions of competition in the domestic market and, were it not for Article III:8(b), would entail a violation of Article III of the GATT 1994.

2. Moreover, Article 3.1(b) of the SCM Agreement proscribes the granting of subsidies "contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods". Consistently with Article III:8(b) of the GATT 1994, Article 3 of the SCM Agreement does not prohibit the subsidization of domestic production. According to the Appellate Body in *US – Tax Incentives*, "Article 3.1(b) does not prohibit the subsidization of domestic 'production' per se but rather the granting of subsidies contingent upon the 'use', by the subsidy recipient, of domestic over imported goods". The Appellate Body affirmed that subsidies "that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement".[3]

II. TRADE EFFECTS DO NOT SUFFICE AS EVIDENCE OF A BENEFIT UNDER ARTICLE 1.1(B) OF THE SCM AGREEMENT

3. In order to establish the existence of a subsidy, the complainant must demonstrate both a financial contribution and a benefit. While the benefit to a direct recipient of a financial contribution may be easily discernable, for example in cases of grants or revenue foregone, an "indirect beneficiary" cannot be considered a recipient of the benefit without further scrutiny.

4. In the present case, India seems to allege that, because of the requirement upon recipients of certain financial contributions to buy local goods, the producers of such goods would be, *ipso facto*, better off, because the demand for their products would increase, which would suffice to demonstrate the benefit to "indirect beneficiaries". India raises the precedent in *Brazil – Aircraft (Article - 21.5 - Canada II)*, stating that an aircraft producer could benefit from an export guarantee provided to the purchaser of the aircraft.[4]

5. Brazil understands that a simple presumption of additional sales is not enough to demonstrate that certain producers which might be affected positively by the subsidy are themselves recipients of that subsidy. The Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* noted that "additional sales" should be characterized as "trade effects" rather than a benefit within the meaning of Article 1.1(b) of the SCM Agreement[5]. The Arbitrator also addressed the panel's decision in *Brazil – Aircraft* noting that, in that case, "it was incumbent on Canada 'to establish that the benefit derived from PROEX III payments is *passed through* in some way to producers of regional aircraft'"[6].

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[1] *US – Tax Incentives*, Appellate Body Report, para 5.16; Appellate Body Report, *EC and certain member states – Large Civil Aircraft (21.5)*, para. 5.62.
[2] *Brazil – Taxation*, Panel Report, para. 7.84.
[3] *US – Tax Incentives,* Appellate Body Report, para. 5.16.
[4] See, for instance, India's First Written Submission, paras. 103 – 105.
[5] *US – Upland Cotton (Article 22.6 – US I),* Decision by the Arbitrator, para. 4.149.
[6] *US – Upland Cotton (Article 22.6 – US I),* Decision by the Arbitrator, footnote 199.

6. Brazil believes that a similar standard should be applied in the present dispute. It would be incumbent on India to demonstrate if and how the financial contributions granted to the direct beneficiaries passed through to the indirect beneficiaries, beyond the mere assertion of possible trade effects. While trade effects are relevant for claims brought under Part III of the SCM Agreement (which India chose not to do), it does not suffice for a proper benefit analysis under the SCM Agreement.

III. TRADE EFFECTS ARE NOT SUFFICIENT EVIDENCE UNDER ARTICLE 3.1(B) OF THE SCM AGREEMENT

7. Brazil believes that an assertion of additional sales which might occur as an effect of a subsidy is, as mentioned, relevant for actionable subsidies and adverse effects violations, but is not apposite for an "import substitution" contingency. The Appellate Body has been clear in this regard, understanding that "subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports"[7]. Additional sales of domestic products can be properly understood as an expected effect of a subsidy, but it does not demonstrate, without more, a contingency on the use of domestic over imported goods.

IV. CONSIDERATIONS REGARDING THE TRIMS AGREEMENT

8. The TRIMS Agreement aims to eliminate conditions attaching to investments that may distort or restrict trade in goods in a manner that is, for example, inconsistent with Articles III or XI of the GATT 1994. Although the Agreement does not contain a definition of "investment measure", it can be expected that such a definition would include governmental measures aimed at promoting or regulating investment in the local economy. The panel in *Indonesia – Autos*, for instance, found that measures "aimed at encouraging the development of a local manufacturing capability" and which "necessarily have a significant impact on investment" are investment measures.[8]

9. Brazil does not see any a priori reason to assume that measures applying to individuals would fall outside the scope of the TRIMS Agreement. Although the Illustrative List of the TRIMS Agreement only makes reference to actions of enterprises, e.g. "the purchase or use by an enterprise of products of domestic origin or from any domestic source" and "the importation by an enterprise of products used in or related to its local production", Brazil understands that the general concept of "investment" does not rule out an interpretation whereby both legal and natural persons could be affected by an investment measure.

10. Article 2 of the TRIMs Agreement makes it clear that certain investment measures, including the ones listed in the Annex, are subject to the national treatment provisions of Article III of the GATT 1994, including Article III:4. The Appellate Body has explained that a measure that is inconsistent with Article III:4 of the GATT 1994 would also be a TRIM that is incompatible with Article 2.1 of the TRIMs Agreement[9]. To the extent, however, that subsidies and government procurement measures are exempted from the disciplines of Article III of the GATT 1994, such measures cannot be found to be "inconsistent" with Article III within the meaning of Article 2 of the TRIMs Agreement.

[7] *US - Tax Incentives*, Appellate Body Report, para. 5.16.
[8] Panel Report, *Indonesia – Autos*, para. 14.80.
[9] Appellate Body Report, *Canada – Renewable Energy and Feed-in Tariff*, para. 5.20.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA*

I. INTRODUCTION

1. Mr. Chair, Members of the Panel. China welcomes the opportunity to address you today.

2. As the parties to the dispute have explained in their submissions, it alleges that the United States may be using certain sub-federal schemes or programs pertaining to the renewable energy sector to provide subsidies to the relevant persons contingent upon the use of domestic goods over imported goods. In China.'s view, the alleged United States.' subsidy measures have brought unfair competitive advantages to its domestic renewable energy industries, seriously distorted the relevant international markets. Part of the measures at issue in the present dispute overlaps with the measures at issue in the dispute *United States-Certain Measures Related to Renewable Energy* (DS563), which China filed the consultations request in this August.

3. China wishes to underscore the systemic importance of the issues raised in the present dispute with respect to the relevant provisions of the GATT 1994, the TRIMS Agreement as well as the SCM Agreement, which are the fundamental rules for the multilateral trading system, and are inter-related because of the local content allegation of the measures at issue. China would like to express its views on some of the critical issues that arise in relation to the claims made by India regarding United States.' sub-federal schemes or programs pertaining to the renewable energy sector.

II. ISSUES ARISING IN CONNECTION WITH INDIA'S CLAIMS UNDER ARTICLE III:4 OF THE GATT 1994

4. It generally requires that three elements must be demonstrated to determine a violation of Article III:4 of the GATT 1994, (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and (iii) the imported products are accorded "less favourable" treatment than that accorded to like domestic products. [1] It appears that the United States makes no substantive effort to contest the first "like products" element, while focuses on arguing the second the third elements. China will follow the same approach.

5. China notes, according to the United States arguments, it has to be demonstrated that the measures at issue have operated to incentivize the installation[2] or purchases of domestically made renewable energy products, have driven the installation[3] of domestically made renewable energy and storage equipment, or any purchasing decisions[4] with respect to domestically made renewable energy generation equipment. It appears that in the United States.' view, in cases where no evidence provided demonstrating that potential recipients have availed themselves of the sub-federal schemes or programs in question, then such schemes or programs have not operated to "affect" the internal use, purchase or sale of products that in favor of domestically manufactured products and, consequently, not accorded "less favourable" treatment to "imported products" within the meaning of Article III:4 of the GATT 1994.[5]

6. China understands that, as the Appellate Body noted in *Korea-Various Measures on Beef* that according "treatment no less favourable" means according conditions of competition no less favourable to the imported product than to the like domestic product[6], the "treatment no less favourable" emphasizes the equality of opportunities or conditions of competition, the discipline

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* China has requested that its Oral Statement serve as Integrated Executive Summary.
[1] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.
[2] US' first written submission, paras.88.
[3] Ibid. paras.90.
[4] Ibid. paras.121.
[5] Ibid. paras. 95-98,101,and 103-104.
[6] Appellate Body Report, *Korea – Various Measures on Beef*, para. 135.

established here is to prevent the conditions of competition from being modified to the detriment of the imported products and in favor of the domestic products.

7. Even though China takes no position of whether India has fulfilled its burden of proof and established a prima facie case regarding the "affecting" and "less favourable" issues, China views that the United States intends to set up a different and unjustifiable standard of actual effects of the contested measure in the marketplace, which has been rejected by the Appellate Body in *US – FSC* (Article 21.5 – EC). The Appellate Body found that the examination of whether a measure involves "less favourable treatment" of imported products within the meaning of Article III:4 of the GATT 1994 need not be based on the actual effects of the contested measure in the marketplace. In this respect, it is well established in the previous WTO jurisprudence that the relevant inquiry for the purposes of establishing a violation of Article III:4 of the GATT 1994 is whether the incentives modify the conditions of competition in the relevant market to the detriment of imported products.[7]

III. ISSUES ARISING IN CONNECTION WITH INDIA.'S CLAIMS UNDER ARTICLE 2.1 OF THE TRIMS AGREEMENT

8. A violation of Article 2.1 of the TRIMS Agreement is established by demonstrating two elements: (i) the existence of an investment measure related to trade in goods (i.e. a TRIM); and (ii) the inconsistency of that measure with Article III or Article XI of the GATT 1994.

9. China recalls that In *Indonesia – Autos* and *Canada – Renewable Energy*, the aims of the programs in question will be useful for the analysis of the TRIMS measure, which necessarily have a significant impact on investment or encourage the investment in local industries. If it is properly described by India, the measures at issue in the present dispute are aimed to provide incentives for the greater use of renewable energy technologies/equipment manufactured locally, support existing local industries, and create jobs for local industries and new opportunities for renewable energy industries to develop in the relevant United States.' jurisdictions.

10. China notes that the United States does not contest the local content allegation, i.e. the measures at issue require use or purchase of specified products of domestic origin. In *Indonesia – Autos*, the Panel noted that if measures are local content requirements, they would necessarily be "trade-related" because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade.

11. Bearing this in mind, China views that if the measures at issue involve the use of products from a domestic source and compliance with such local content requirement in the present dispute is necessary for the applicants to obtain the additional incentives, i.e. an advantage, and therefore, the measures at issue would properly fall within paragraph 1(a) of the Illustrative List and thus, under Article 2.2 of the TRIMS Agreement.

IV. ISSUES ARISING IN CONNECTION WITH INDIA.'S CLAIMS UNDER ARTICLES 3.1(B) AND 3.2 OF THE SCM AGREEMENT

12. Article 3.1(b) of the SCM Agreement prohibits subsidies contingent or conditioned upon the use of domestic over imported goods, alone or as part of other conditions. China refers to Appellate Body case law according to which the word "contingent" means "conditional" or "dependent for its existence on something else." The Appellate Body has explained that the word "contingent" means "conditional" or "dependent for its existence on something else", contingency "in law" is demonstrated "on the basis of the words of the relevant legislation, regulation or other legal instrument. It can also be derived by necessary implication from the words actually used in the measure.[8] In the present dispute, it appears that such contingency wordings and elements have been incorporated in the relevant documents under which the alleged sub-federal schemes or programs are in operation, which would be of use for the examination by the Panel.

13. In addition, China reiterates that the Appellate Body stated a subsidy would be "contingent" upon the use of domestic over imported goods "if the use of those goods were a condition, in the sense of a requirement, for receiving the subsidy. It appears that India bases its arguments on the

[7] Ibid. para. 137.
[8] Appellate Body Report, *Canada – Autos*, para. 123.

actual text of the measures and hence appears to argue that the measures in question are *de jure* contingent.

V. CONCLUSION

14. Mr. Chair, Members of the Panel, thank you for your attention. The delegation of China wishes to thank you, and the Secretariat team supporting you, for the work that has been undertaken to date. We look forward to your questions.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. GENERAL

1. The European Union intervenes in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement"), and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. As regards the relationship between Article III:4 of the GATT 1994, Article 2 of the TRIMs Agreement and Article 3 of the SCM Agreement, previous panels and the Appellate Body have acknowledged the existence of differences and overlaps. These three sets of provisions prohibit the use of local content requirements in certain circumstances and address discriminatory conduct.[1] Nonetheless, a finding of inconsistency with Article III.4 of the GATT 1994 does not necessarily imply that a measure at issue will also meet the specific conditions for being held inconsistent with Article 2 of the TRIMs Agreement or with Article 3 of the SCM Agreement.[2]

II. CLAIMS UNDER THE GATT 1994

3. The United States does not dispute that the renewable energy systems and products originating in the relevant U.S. sub-federal jurisdictions are "like" imported systems and products. It does not dispute either that the measures at issue set up requirements for the use of certain quantities or values of domestically produced goods for the purpose of obtaining the subsidies or other financial advantages instituted through the relevant schemes/programs supporting the renewable energy sector.

4. According to the Appellate Body in Dominican Republic – Import and Sale of Cigarettes, "a measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products".3

5. Given the aim and nature of the measures at issue, inconsistency with Article III:4 of the GATT 1994 need not be based on actual market effects. It is well established in the case law that incentives to favour domestic products are inconsistent with Article III:4 of the GATT 1994.

III. CLAIMS UNDER THE TRIMs AGREEMENT

6. While most of the measures at issue in the present dispute apply also to enterprises, in addition to other natural or legal persons that do not necessarily pursue an economic activity, the requirement to purchase or use domestic goods imposed on all potential beneficiaries of the schemes/programs does not appear to be related to an "investment measure" within the meaning of the TRIMs Agreement. The enterprises that are eligible to apply for the incentives granted under each scheme/program are not themselves active in the markets for energy generation and distribution nor are they producers of renewable energy systems or products. Therefore, they are in the same position as individuals and other non-commercial entities that may purchase such systems or products.

7. The European Union suggests, without taking a firm or definite position on this matter, that incentives granted to enterprises as end-users of renewable energy systems or products may fall outside the scope of the description in Paragraph 1(a) of the Illustrative List, just like the incentives given to individuals for the purchase and installation of such systems in their homes.

8. In its view, the present case potentially raises the question of whether a measure is properly characterized as an "investment measure" within the meaning of the TRIMs Agreement if its central

[1] Panel report *Brazil – Taxation*, para. 7.48, quoting the Appellate Body report in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.5

[2] Panel report *Brazil – Taxation*, para. 7.49.

[3] Panel report, *Dominican Republic – Import and Sale of Cigarettes,* para. 93.

objective is not to encourage the development of a local manufacturing capability for certain products, but rather to encourage the use of those products, while the development of a local manufacturing capability is an ancillary aim of that measure.

9. The European Union also considers that for the local content requirements to have an appreciable effect on the development of the sector favoured by the WTO Member, enterprises subject to those requirements should have an economic activity that entails a regular purchase or use of the locally produced goods. One-off purchases or use of those goods would not achieve the desired effect of encouraging investment in producing those inputs locally. It is therefore arguable that the "enterprises" referred to in paragraph 1(a) of the Illustrative List are those engaged in economic activities that provide a stable demand for the local production in which investment is encouraged.

10. Moreover, in order to fit the description of TRIMs provided for in paragraph 1(a) of the Illustrative List, the recipient of the advantage is necessarily the enterprise subject to the local content requirements.

IV. CLAIMS UNDER THE SCM AGREEMENT

11. In terms of the question of who needs to be a recipient of "benefit" under Article 3.1(b) SCMA, the European Union emphasizes that it considers that it is sufficient in this context that the existence of benefit is determined for a (i.e. any) recipient. Article 1 SCMA provides that a subsidy is deemed to exist if there is a financial contribution and *a benefit is thereby conferred*: it does not specify to whom the benefit must be conferred nor require that the identity of the beneficiary or beneficiaries be established. A benefit simply has to be conferred on someone.

12. The existence of benefit for final customers does not appear to be contested in the present case. Therefore, whether or not the benefit is then further passed-through from the final purchaser/customer to other recipients (e.g. to producers of energy systems) would not seem to be determinative for the outcome of the present case.

13. Regarding the issue of "contingency", the European Union considers that the SCM Agreement is in principle neutral as to whether measures are "directed" to consumers or to non-consumers, as long as the conditions under Article 1 and Article 3.1(b) are fulfilled, notably the requirements of "subsidy" and "contingency". The European Union takes the position that a subsidy – if the conditions of Article 1 are fulfilled - can be "contingent" upon the use of domestic over imported goods even if the subsidy is provided to consumers and irrespective of whether or not consumers are the "users" of domestic over imported goods. The Appellate Body found that "the ordinary connotation of 'contingent' is 'conditional' or 'dependent for its existence on something else. This conditionality appears to be present since the consumer (purchaser) will only obtain the subsidy if it can be shown that the purchased item (e.g. the energy system) was produced using local over imported goods. Hence the use of the local components (by the manufacturer) is an explicit requirement for the consumer/purchaser to receive the subsidy. This condition appears to be stated in the respective US legal instruments and hence would appear to constitute a case of *de iure* contingency.

14. Regarding the interpretation of the term "use" in Article 3.1(b), the European Union notes that previous statements by the Appellate Body referred to "use" in the context of manufacturing and hence strongly indicate that the "use" of the domestic good refers to production or manufacturing activities and not, e.g. to the activity of purchasing a product. The European Union considers that the term "use" must be read in conjunction with the phrase "of domestic over imported goods". When reading the phrase together it becomes apparent that it is only a manufacturer that can "use domestic over imported goods." A purchaser cannot "use a domestic product over an imported product." That phrase simply makes no sense in the context of a purchase.

15. Regarding the distinction between the benefit of a subsidy and other trade effects (e.g. additional sales by component producers), the European Union recalls that the Appellate Body found, *inter alia*, that a determination of "benefit" under Article 1.1(b) SCMA seeks to identify whether the financial contribution has made "the recipient 'better off' than it would otherwise have been, absent that contribution".[4] In addition, Article 1.1(b) SCMA states that a benefit is "thereby" conferred. This also seems to refer to the financial contribution, otherwise the text would simply read "is conferred".

[4] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 635 – 636, 662, and 690.

16. Benefit in the present case is the benefit that is conferred to customers (at least initially) through the financial contributions at issue, in particular direct transfers of funds and revenue foregone. The additional sales by local component producers are not linked to the financial contribution of direct transfer of funds or revenue foregone. Taking into account trade effects other than the actual benefit - such as "additional sales" - would also risk to unduly overstate the benefit amount. Benefit can be distinguished from other trade effects through a method of "exclusion". The Panel may first define the benefit in relation to the respective financial contribution at issue. Everything that is not covered by the benefit so identified (e.g. additional sales) will constitute a "trade effect" that does not fall within Article 1.1(b) SCMA.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. LEGAL STANDARD UNDER ARTICLE III:4 OF THE GATT 1994

1. Japan would like to comment on two of the requirements under Article III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") that are discussed in this case, namely: (a) whether the measure at issue is a "law[], regulation[] and requirement[] affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use" of imported products; and (b) whether the imported products are accorded "less favourable" treatment than that accorded to like domestic products.

A. "Laws, Regulations and Requirements Affecting . . . Internal Sale, Offering for Sale, Purchase, Transportation, Distribution or Use"

2. With regard to the requirement under Article III:4 of the GATT 1994 that the measure at issue must constitute a "law[], regulation[] and requirement[] affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use" of imported products, Japan understands the United States to emphasize that the term "affecting" implies that a measure must actually alter market conditions for a violation to occur.[1]

3. However, the term "affecting" has been interpreted to mean having "'an effect on', which indicates a *broad scope of application.*"[2] According to the panel in *China – Publications and Audiovisual Products*, "[t]he word 'affecting' covers not only measures which directly regulate or govern the sale of domestic and imported like products, but also measures which create incentives or disincentives with respect to the sale, offering for sale, purchase, and use of an imported product 'affect' those activities."[3]

4. The panel in *Canada – Autos* also noted that "[t]he word 'affecting' in Article III:4 of the GATT has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which *might* adversely modify the conditions of competition between domestic and imported products."[4] The panel therefore found "no merit" in Canada's argument that its domestic content requirements were "so low" that they "do not in practice 'affect'" the market conditions.[5]

5. Thus, the Panel should interpret the term "affecting" broadly, as encompassing anything that "has an effect on" or "might" affect any aspect of the sale, purchase, transportation, distribution or use of the products at issue. Whether a measure actually *succeeds* in "affecting" the "sale, purchase, transportation, distribution or use" of the product at issue is irrelevant. Such an inquiry would be at odds with the general principle that a showing of trade effects is not necessary to establish a violation of Article III of the GATT 1994.[6]

B. "Treatment No Less Favourable"

6. As to the requirement of "less favourable treatment" in the Article III:4 analysis, the United States argues that a measure that does not "affect" the "use" of a product necessarily does not "modify the conditions of competition", and thus fails to satisfy the requirement.[7] In conjunction

[1] For example, United States' first written submission, paras. 84, 87-88.

[2] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 209 (quoting Appellate Body Report, *EC – Bananas III*, para. 220 that interpreted the meaning of "affecting" similarly to its use in Article I:1 of the General Agreement on Trade in Services ("GATS")) (emphasis original).

[3] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1450.

[4] Panel Report, *Canada – Autos*, para. 10.80 (citing Panel Report, *Italian Agricultural Machinery*, para. 12) (emphasis added).

[5] Panel Report, *Canada – Autos*, para. 10.83.

[6] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16; Appellate Body Report, *Canada – Periodicals*, p. 18.

[7] For example, United States' first written submission, paras. 87-88, 92 and 96.

with its argument regarding the term "affecting", the United States basically argues that a measure must, in fact, alter market conditions for a violation of the "less favourable treatment" standard to occur as well.

7. With regard to the Appellate Body's finding that "[w]hether or not imported products are treated 'less favourably' than like domestic products should be assessed […] by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products",[8] the Appellate Body, in *Dominican Republic – Import and Sale of Cigarettes*, clarified that a measure accords "less favourable treatment" when "it gives domestic like products a competitive advantage in the market over imported like products."[9] Provision of "equality of competitive conditions for imported products in relation to domestic products" in internal markets is also the general purpose of Article III.[10]

8. Japan considers that an examination of whether a measure accords equality of competitive conditions, and thus whether it accords imported products "no less favourable" treatment, should be based on the overall structure and design of the measure itself. In this regard, Japan again notes that disparate trade effects are neither necessary for nor relevant to a finding of inconsistency with Article III:4.[11]

9. Such an interpretive standard accords with jurisprudence. For example, the Appellate Body in *Thailand – Cigarettes (Philippines)* explained that analysis under Article III:4 should include "consideration of the design, structure, and expected operation of the measure at issue."[12] The Appellate Body in *US – FSC (Article 21.5 – EC)* also noted that an analysis under Article III:4 should be "grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'", and "need not be based on the *actual effects* of the contested measure in the marketplace."[13] Similarly, the Appellate Body explained further in *Japan – Alcoholic Beverages II* and *Korea – Alcoholic Beverages* that "it is *irrelevant* [to Article III inconsistency] that the 'trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent."[14] And as the Panel in *China – Publications and Audiovisual Products* phrased it: "the phrase 'treatment no less favourable' is not qualified by a *de minimis* standard."[15]

10. Thus, it is Japan's view that it is unnecessary for a complaining Member to identify or produce actual data to substantiate a *prima facie* case that a measure modifies the conditions of competition to the detriment of imported products, thereby providing "less favourable" treatment under Article III:4 of the GATT 1994. Applying the same logic, it is also Japan's view that data produced by a responding Member purporting to show that the measure did not modify the competitive conditions of the market or that market participants did not avail themselves of the uncompetitive market conditions created by the measure cannot rebut a claim of "less favourable" treatment.

II. RELATIONSHIP BETWEEN THE REQUEST FOR CONSULTATION AND THE PANEL'S TERMS OF REFERENCE

11. The United States requested that the Panel make a preliminary ruling on some of the measures at issue as claimed by India. Japan would like to comment specifically on the United States' request for a preliminary ruling that the Minnesota "Solar Thermal Rebate" and "Solar PV Rebate" are outside the Panel's terms of reference.

12. Japan understands the United States' position to be that these two measures fall outside the Panel's terms of reference because India did not identify the specific statutory subdivisions (MINN.STAT.216.416.*subd.1-3* and MINN.STAT.116C.7791.*subd.3*) describing the measures in its

[8] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137 (emphasis original).
[9] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.
[10] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16.
[11] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16; Appellate Body Report, *Canada – Periodicals*, p. 18.
[12] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134.
[13] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (emphasis original).
[14] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 119 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16) (emphasis added).
[15] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1537 (emphasis original).

request for consultations.[16] However, Japan notes that India appears to have referenced the applicable statutory subdivisions (MINN.STAT.216.416 and MINN.STAT.116C.7791) as to both measures in its request for the establishment of a panel.[17]

13. Japan focuses its remarks on the relevant text of Articles 4 and 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") as well as the standard of review set out by the Appellate Body for examining differences in requests for consultations and requests for the establishment of a panel.

A. Textual Analysis of the DSU

14. Japan considers that the text of the DSU contemplates that a panel request will be more specific with respect to the identification of the measures at issue than a consultation request. Article 4.4 of the DSU provides that the consultation request must "give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint." The relevant requirement with respect to requests for the establishment of a panel is that the request must "identify the *specific* measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[18]

15. In *Argentina – Import Measures*, the Appellate Body explained the textual difference between identification of "the measures" in Article 4.4 and "the specific measures" in Article 6.2, noting that "greater specificity is required in a panel request than in a consultations request."[19] The Appellate Body also found in this case that the consultations process is an opportunity to "define and delimit the scope of the dispute" and to "refine the contours of the dispute to be subsequently set out in the panel request."[20]

16. Japan therefore encourages the Panel to review India's consultation request and its panel request in light of the different purposes of the two requests within the dispute settlement process, as noted by the Appellate Body.

B. Unnecessity of "Precise and Exact Identity"

17. Japan further notes that the Appellate Body has found that a "precise and exact identity" between the measures in the request for consultations and those in the request for establishment of a panel is not required. For example, the Appellate Body in *Brazil – Aircraft* explained as follows:

> In our view, Articles 4 and 6 of the DSU, as well as paragraphs 1 to 4 of Article 4 of the SCM Agreement, set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel. Under Article 4.3 of the SCM Agreement, moreover, the purpose of consultations is "to clarify the facts of the situation and to arrive at a mutually agreed solution."
>
> We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel.[21]

18. Japan notes that the United States relies on the first sentence of the above quoted passage for its argument that India must have identified the "Solar Thermal Rebate" and the "Solar PV Rebate" in its request for consultations for the measures to be included in the panel's terms of reference. However, the Appellate Body stressed in the language immediately following that a "precise and exact identity" is not required between the request for consultations and the panel request. In *Argentina – Import Measures*, the Appellate Body concluded, after having reviewed its prior case law, that "there is no need for a 'precise and exact identity' between the measures

[16] India's request for consultations, WT/DS510/1.
[17] India's request for the establishment of a panel, WT/DS510/2.
[18] Article 6.2 of the DSU (emphasis added).
[19] Appellate Body Report, *Argentina – Import Measures*, para. 5.9.
[20] Appellate Body Report, *Argentina – Import Measures*, para. 5.10.
[21] Appellate Body Report, *Brazil – Aircraft*, paras. 131-132 (emphasis added).

identified in the consultations request and the specific measure identified in the panel request, provided that the latter does not expand the scope of the dispute or change its essence."[22]

19. The Panel should therefore carefully examine whether these two measures on which the United States requests preliminary rulings are in fact outside scope of the terms of reference, accounting for the above-mentioned textual analysis and explanation as expressed by the Appellate Body.

[22] Appellate Body Report, *Argentina – Import Measures*, para. 5.16.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. THE MEASURES AT ISSUE MUST BE "LAWS, REGULATIONS [OR] REQUIREMENTS AFFECTING THEIR INTERNAL SALE, OFFERING FOR SALE, PURCHASE, TRANSPORTATION, DISTRIBUTION OR USE".

1. The term "affecting" indicates a broad scope of application.[1] Also past panels and the Appellate Body have understood the term "affecting" in Article III:4 of the GATT 1994 to have a "'broad scope of application' in the specific context of the impact of domestic content requirements on private operators' choices and incentives".[2]

2. Panels have repeatedly found that measures covered by Article III:4 of the GATT 1994 include "conditions that an enterprise accepts in order to receive an advantage", and the Appellate Body has confirmed that measures that "create an incentive" for use of domestic over imported goods can be considered to "affect" the internal sale, purchase, or use of those goods.[3]

3. Along the same lines, the panel in *Canada – Autos* maintained that "[t]he word 'affecting' in Article III:4 of the GATT has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which *might* adversely modify the conditions of competition between domestic and imported products".[4]

4. The panel in *China – Publications and Audiovisual Products* stated, moreover, that "the word 'affecting' covers not only measures which directly regulate or govern the sale of domestic and imported like products, but also measures which create incentives or disincentives with respect to the sale, offering for sale, purchase, and use of an imported product [that] 'affect' those activities".[5]

5. WTO panels and the Appellate Body have, consequently, consistently opted for wide interpretations of the term "affecting". Under this term, measures that not only actually, but also *potentially* and/or *indirectly* affect trade have been subject to judicial review. It is well established in WTO jurisprudence that incentives to favour domestic products are inconsistent with Article III:4 of the GATT 1994.

6. A measure can thus be considered to be a measure affecting, i.e. having an effect on, the internal sale or use of imported products even if it is not shown that *under the current market circumstances* the measure has had an impact on the decisions of private parties to buy imported products. It can therefore not be required that a measure actually succeed in "affecting" the "sale, purchase, transportation, distribution, or use" of the product at issue, for a measure to be inconsistent with Article III:4.

7. Given the aim and nature of the measures at issue, inconsistency with Article III:4 of the GATT 1994 need not be based on actual market effect(s). The Panel should, therefore, interpret the term "affecting" broadly, as encompassing any measure that "has an effect on" or "might" affect any aspect of the sale, purchase, transportation, distribution, or use of the products at issue. Whether an actual effect has indeed materialised from a measure may, to varying degrees, also depend on other, alternative and independent circumstances and conditions influencing the market.

II. THE MEASURES AT ISSUE MUST ACCORD IMPORTED PRODUCTS TREATMENT NO LESS FAVOURABLE THAN THAT ACCORDED TO LIKE DOMESTIC PRODUCTS.

8. Is it necessary to assess the measure's "implications in the marketplace" to determine whether the measure accords "less favourable" treatment?

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[1] Panel Report, *Canada – Autos*, para. 10.80 (emphasis added).
[2] Panel Report, *India Solar Cells*, para. 7.87.
[3] Panel Report, *India Solar Cells*, para. 7.87.
[4] Panel Report, *Canada – Autos*, para. 10.80 (citing GATT Panel Report, *Italy – Agricultural Machinery*, para. 12) (emphasis added).
[5] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1450.

9. In *US – Section 337 Tariff Act* the GATT panel interpreted "treatment no less favourable" as requiring "effective equality of opportunities"[6]. This interpretation has been confirmed consistently by WTO panels and the Appellate Body.

10. The Appellate Body found in *Dominican Republic – Import and Sale of Cigarettes* that a measure accords "less favourable" treatment when it "gives domestic like products a competitive advantage in the market over imported like products".[7]

11. In *US – FSC (Article 21.5 – EC)* the Appellate Body elaborated further on this standard by noting that an analysis under Article III:4 of the GATT 1994 "must be grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'. This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the *actual effects* of the contested measure in the marketplace".[8]

12. The Appellate Body explained, more specifically, in Japan – Alcoholic Beverages II and Korea *Alcoholic Beverages* that "it is irrelevant [to Article III inconsistency] that the 'trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are *insignificant or even non-existent*".[9]

13. Following the same line of reasoning, the Appellate Body in *EC – Bananas III* outlawed an EC scheme that provided traders with an incentive to trade EC goods at the expense of imported like products, even in the absence of any tangible evidence suggesting that there was a quantified trade impact stemming from this measure.[10]

14. Therefore, Norway considers it unnecessary for a complaining Member to identify or produce actual data to substantiate a *prima facie* case that a measure modifies the conditions to the detriment of imported products, thereby providing "less favourable" treatment under Article III:4 of the GATT 1994.

15. Applying the same logic, Norway concurs with the view of other third parties, that data produced by a responding Member purporting to show that the measure did not modify the competitive conditions of the market, or that market participants did not avail themselves of the uncompetitive market conditions created by the measure, cannot rebut a claim of "less favourable" treatment.

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[6] GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.11.

[7] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.

[8] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (original emphasis).

[9] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 119 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16 (emphasis added).

[10] Appellate Body Report, *EC – Bananas*, paras 213-214.

ANNEX D

PRELIMINARY RULING OF THE PANEL

ANNEX D-1

US – RENEWABLE ENERGY (D510)

PRELIMINARY RULING OF THE PANEL

This preliminary ruling was issued to the parties and third parties as a confidential document on 27 September 2018. Subject to any editorial corrections, it forms an integral part of the Panel's Report in this dispute.

Table of Contents

1 INTRODUCTION

1.1. On 7 August 2018, the United States filed its first written submission. The submission contained requests for preliminary rulings on jurisdictional issues concerning specific measures challenged by India.

1.2. On 9 August 2018, the Panel invited India to respond to the United States' preliminary ruling requests, and the third parties to comment on the same requests as part of their third party submissions.

1.3. Accordingly, on 16 August 2018, India responded to United States' preliminary ruling requests, and on 21 August 2018 the Panel received comments from the European Union and Japan. Finally, on 23 August 2018 the Panel received additional comments from the parties.

2 THE UNITED STATES' REQUESTS FOR PRELIMINARY RULINGS

2.1. The United States requests that the Panel make preliminary rulings to exclude the following from its terms of reference[1]:

a. the Los Angeles Manufacturing Credit (LAMC Adder) provided for under the Los Angeles Solar Incentive Program (SIP);

b. the Massachusetts Manufacturer Adder provided for under the Massachusetts Commonwealth Solar Hot Water Residential Program and the Massachusetts Commonwealth Solar Hot Water Commercial Program (jointly CSHWP);

c. the Solar Thermal rebate under the Minnesota Solar Incentive Program (MSIP); and

d. the Solar PV rebate under the MSIP.

2.2. The United States requests the Panel to find that these adders and rebates as challenged by India fall outside its terms of reference.[2] The United States claims that the LAMC Adder and the Massachusetts Manufacturer Adder were no longer in force when the Panel was established on 21 March 2017.[3] As for the Solar Thermal rebate and the Solar PV rebate, the United States contends that these were not included in India's request for consultations, and were not the subject of consultations between the parties.[4]

2.3. Given the similarity of arguments and legal issues involved in the preliminary issues concerning the LAMC Adder and the Massachusetts Manufacturer Adder, the Panel will address these jointly.[5] Likewise, the Panel will address the Solar Thermal and Solar PV rebates jointly, in light of the closely related arguments and legal issues involved in the relevant preliminary ruling requests.[6]

[1] United States' first written submission, paras. 40-74.
[2] United States' first written submission, para. 42.
[3] United States' first written submission, para. 40.
[4] United States' first written submission, para. 41.
[5] In fact, the parties have also presented their arguments jointly in their relevant submissions. See United States' first written submission, paras. 44-65; and India's response to the United States' request for a preliminary ruling, paras. 4-20.
[6] In fact, the parties have also presented their arguments jointly in their relevant submissions. See United States' first written submission, paras. 66-74; and India's response to the United States' request for a preliminary ruling, paras. 21-41.

3 THE LAMC ADDER AND THE MASSACHUSETTS MANUFACTURER ADDER

3.1 The adders in question

3.1. The LAMC Adder[7] consists of a payment granted under the Los Angeles SIP to eligible recipients, provided that a minimum of 50% of the components of the finished solar photovoltaic (PV) modules and/or the qualifying equipment are manufactured and/or assembled within the city of Los Angeles, California. The LAMC Adder was contained in the Net Energy Metering and Solar Photovoltaic Incentive Program Guidelines of 4 December 2015 (2015 SIP Guidelines) issued by the Los Angeles Department of Water and Power (LADWP).[8] The LADWP issued new SIP Guidelines effective as from 1 January 2017.[9] The parties concur that these 2017 SIP Guidelines do not contain the LAMC Adder.[10]

3.2. The Massachusetts Manufacturer Adder[11] was granted by the State of Massachusetts provided that a system uses eligible Massachusetts manufactured components. The adder was part of the two CSHWP programs administered by the Massachusetts Clean Energy Centre (MassCEC). Under these programs, rebates are offered to offset the cost of installing solar hot water systems. These rebates act as refunds and are not *per se* challenged by India. The processes of applying for rebates, the eligibility requirements and the rebate levels are regulated in two manuals issued on 25 February 2016, one for each program.[12] The methods for calculating the total amount of rebates under these manuals include certain adders, among them the Massachusetts Manufacturer Adder challenged by India.

3.3. MassCEC issued new program manuals on 5 October 2016, which expressly discontinued the Massachusetts Manufacturer Adder. These manuals included the following notice: "As of December 15, 2016, new applications will not be eligible to receive the Massachusetts manufactured rebate adder".[13] The most recent versions of both program manuals were issued on 1 May 2018. These state that an applicant shall provide the relevant photographs of eligible system components manufactured in Massachusetts only "if applicable, and if the application was submitted prior to December 15, 2016".[14]

3.2 Main arguments of the parties

3.2.1 General arguments

3.4. The United States requests the Panel to find that the LAMC Adder and the Massachusetts Manufacturer Adder fall outside the Panel's terms of reference because they were no longer in force when the Panel was established on 21 March 2017, and, accordingly, to reject India's request for findings on them.[15] The United States recalls that, according to the Appellate Body, the term "specific measures at issue" in Article 6.2 of the DSU suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that were in existence at the time of the panel's establishment. For the United states, measures not "in existence" for purposes of Article 6.2 include

[7] According to India, the measure is implemented through the California Public Utilities Code, Division 1, Part 1, Chapter 2.3, Article 6 (Sections 360 – 380.5); and the 2015 SIP Guidelines. (India's first written submission, para. 251).

[8] LADWP, Net Energy Metering and Solar Photovoltaic Incentive Program Guidelines, 4 December 2015 (Exhibit IND–26).

[9] LADWP, Solar Incentive Program Guidelines, 1 January 2017 (Exhibit US-5).

[10] India's first written submission, para. 252. United States' first written submission, para. 49.

[11] According to India, the measure is implemented through the Massachusetts Clean Energy Centre, Commercial-Scale Solar Hot Water Program Manual, February 25, 2016, and the Massachusetts Clean Energy Centre, Residential-Scale Solar Hot Water Program Manual, February 25, 2016. (India's first written submission, para. 1097).

[12] Massachusetts Clean Energy Center, Residential- and Small-Scale Solar Hot Water Program Manual, February 25, 2016 (Exhibit IND-73); and Massachusetts Clean Energy Center, Commercial-Scale Solar Hot Water Program Manual, February 25, 2016 (Exhibit IND-74).

[13] Massachusetts Clean Energy Center, Residential- and Small-Scale Solar Hot Water Program Manual, October 5, 2016, p.1 (Exhibit US–17); Massachusetts Clean Energy Center, Commercial-Scale Solar Hot Water Program Manual, October 5, 2016, p. 1 (Exhibit US-18).

[14] Massachusetts Clean Energy Center, Residential- and Small-Scale Solar Hot Water Program Manual, May1, 2018, p.5 (Exhibit US–15); Massachusetts Clean Energy Center, Commercial-Scale Solar Hot Water Program Manual, May1, 2018, p. 5 (Exhibit US-16).

[15] United States' first written submission, paras. 40, 58 and 65.

measures that were previously in effect but whose legislative basis expired before the panel was established.[16]

3.5. India requests the Panel to reject the United States' requests for preliminary rulings and find that the Panel has jurisdiction to issue findings with respect to the LAMC Adder and the Massachusetts Manufacturer Adder.[17] According to India, the Appellate Body has recognised that there are at least two exceptions to the general rule that measures included in a panel's terms of reference must be in existence at the time of its establishment, which may apply depending on facts and circumstances of each case.[18] India noted that in prior disputes, some panels have decided to rule on "expired measures" based on a risk of their being reintroduced at some later point in time.[19] India argues that the following principles emerge from prior panel and Appellate Body reports: (i) the fact that a measure has expired is not dispositive of the preliminary question of whether a panel can address claims in respect of such measure[20]; (ii) the key principle which must guide a panel in exercising its discretion with respect to an expired measure is that a complaining party must not be forced to face a "moving target"[21]; (iii) a panel may issue findings with respect to an expired measure without showing that such measure continued to produce effects impairing the benefits to the complaining party[22]; (iv) there could be more exceptions to the general rule that a panel's terms of reference are limited to measures that were "in existence" at the time the panel was established[23]; and (v) the ease with which an expired measure may be re-introduced is a factor which panels have taken into account while exercising discretion to rule on an expired measure.[24] India adds that the fact that a respondent asserts the WTO consistency of an expired measure indicates that it would face no difficulty in reintroducing it.[25]

3.6. The United States submits that the past cases mentioned by India are not on point because they dealt with measures that were in force when the respective panels were established and expired only subsequently, in the course of the panel proceedings.[26] The United States disagrees with India that the existence of a risk of reintroduction would justify inclusion of the measures in the panel's terms of reference. The United States considers that India's approach lacks evidentiary support, would give panels essentially unbounded authority to examine long-expired measures, and would open the way for legal challenges on a purely speculative basis even where there is no evidence that the Member is likely to reintroduce them.[27]

3.2.2 LAMC Adder

3.7. According to the United States, the LAMC Adder was part of the SIP, but was terminated in December 2016 by the Los Angeles Board of Water and Power Commissioners with the issuance of the 2017 Guidelines, which superseded the 2015 SIP Guidelines in their entirety from 1 January 2017. The United States notes that the 2017 SIP Guidelines, in accordance with which the LADWP administers the SIP, do not provide for or refer to the LMAC Adder. Further, the United States notes that on 6 December 2016, the Los Angeles Board of Water and Power Commissioners expressly

[16] United States' first written submission, para. 47.
[17] India's response to the United States' request for a preliminary ruling, para. 42.
[18] India's response to the United States' request for a preliminary ruling, para. 6 (referencing Appellate Body Report, *US – Certain EC Products*, para. 81).
[19] India's response to the United States' request for a preliminary ruling, paras. 7-9 (referencing Panel Report, *US – Poultry (China)*, paras. 7.51-7.56; Panel Report, *Chile – Price Band System*, paras. 7.112-7.115; and Panel Report, *India – Additional Import Duties*, para. 4.18).
[20] India's response to the United States' request for a preliminary ruling, para. 10(i) (referencing Appellate Body Report, *US – Upland Cotton*, para. 272).
[21] India's response to the United States' request for a preliminary ruling, para. 10(ii) (referencing Appellate Body Report, *Chile – Price Band System*, para. 144).
[22] India's response to the United States' request for a preliminary ruling, para. 10(iii) (referencing Appellate Body Report, *US – Certain EC Products*, para. 81; and Panel Report, *Chile – Price Band System*, paras. 7.112-7.115).
[23] India's response to the United States' request for a preliminary ruling, para. 10(iv) (referencing Appellate Body in *EC – Selected Customs Matters*, para. 81).
[24] India's response to the United States' request for a preliminary ruling, para. 10(v).
[25] India's response to the United States' request for a preliminary ruling, para. 10(v) (referencing Panel Report, *India – Additional Import Duties*, paras. 7.69-7.70).
[26] United States' comments on India's response to the United States' request for preliminary rulings, paras. 8-9.
[27] United States' comments on India's response to the United States' request for preliminary rulings, paras. 10-11.

terminated certain incentive adders that were previously available under the SIP, including the LAMC Adder.[28] A Board letter accompanying the proposed resolution states that "the Los Angeles Manufacturing Credit will be removed" as "[t]here have been no requests for this manufacturing credit for over three years".[29]

3.8. India acknowledges that the 2017 SIP Guidelines issued by LADWP do not contain any provision with respect to the LAMC Adder[30], but considers that the LAMC Adder has been removed only in view of the consultations between India and the United States.[31] In any event, it is not clear to India if the 2015 Guidelines have been superseded by the new guidelines, and even if superseded, India considers it likely that the LAMC Adder benefits under those guidelines continue to be provided.[32]

3.9. Alternatively, India notes that there is a risk that the LAMC Adder or similar measures may be reintroduced.[33] India argues that even if the LAMC Adder under the 2015 SIP Guidelines was abolished through the 2017 Guidelines, the legislative basis of the SIP (i.e. Senate Bill 1[34]) has not expired. According to India, as Senate Bill 1, which amends the Public Resources Code and the Public Utilities Code, gives legislative authority to issue program guidelines, the LAMC Adder can be easily re-introduced by amending the existing SIP guidelines. India notes that the fact that the LADWP periodically reviews, modifies, and amends its SIP guidelines is also evident from a California LADWP board letter submitted by the United States, which records the numerous reviews and modifications to the SIP guidelines since 2000.[35]

3.10. Further, India notes that the United States disputes the WTO-inconsistency of the LAMC Adder, and observes that prior panels facing a similar issue considered the possible repetition of a WTO-inconsistent measure or the possibility of reinstating the *status quo ante* as a key factor in deciding whether to issue findings on an expired measure. Consequently, India submits that, given the ease with which the LADWP could re-introduce the LAMC Adder and the fact that the United States asserts the LAMC Adder is WTO-consistent, the Panel must issue findings, if not a recommendation to the DSB, with respect to the LAMC Adder in order to secure a positive resolution to the dispute.[36]

3.11. According to the United States, India's assertion that the LADWP continues to provide benefits under the LMAC Adder are unsupported and, indeed, refuted by the facts. Likewise, the United States considers that India's assertions regarding the alleged risk that the LMAC Adder or similar measures may be re-introduced in the future to be without merit, and notes that India proffers no evidentiary support for them.[37]

3.2.3 Massachusetts Manufacturer Adder

3.12. The United States argues that the instruments providing for the Massachusetts Manufacturer Adder were superseded by new Program Manuals issued by the MassCEC on 5 October 2016. According to the United States, the legal instruments that allegedly provided for the adder were not in force as of 5 October 2016, and thus not in force on 21 March 2017 when the Panel was established.[38]

3.13. The United States notes that the Program Manuals issued on 5 October 2016 explicitly terminated the Massachusetts Manufacturer Adder, effective 15 December 2016. Specifically, the United States highlights that the first page of both new manuals contains the following announcement: "As of 15 December 2016, new Applications will not be eligible to receive the

[28] United States' first written submission, paras. 51-52.
[29] California LADWP, board letter accompanying proposed resolution No. 017111, Continuation of Solar Incentive Program and Guidelines Modifications, November 22, 2016 (Exhibit US-9).
[30] India's first written submission, para. 252.
[31] India's response to the United States' request for a preliminary ruling, para. 14.
[32] India's first written submission, para. 252.
[33] India's first written submission, para. 252.
[34] Senate Bill No. 1, Chapter 132, 21 August 2016 (Exhibit IND-25).
[35] Exhibit US-9.
[36] India's response to the United States' request for a preliminary ruling, paras. 12-16.
[37] United States' first written submission, paras. 53 and 55; and comments on India's response to the United States' request for preliminary rulings, paras. 10-11.
[38] United States' first written submission, para. 59.

Massachusetts Manufactured rebate adder".[39] According to the United States, India acknowledges that the adder was "discontinued" by the new Program Manuals issued on 5 October 2016.[40]

3.14. India acknowledges that the MassCEC has issued new program manuals, which discontinued the Massachusetts Manufacturer Adder. However, India considers it likely that benefits under the previously existing manuals continue to exist.[41]

3.15. Further, India submits that there is a risk that this adder or similar incentives may be reintroduced in the future. India argues that the legislative provisions from which the MassCEC derives its authority to implement the CSHWP continue to exist.[42] In fact, argues India, the MassCEC has amended, modified and revised the program manuals periodically.[43] Additionally, India submits that the United States does not believe that the Massachusetts Manufacturer Adder is inconsistent with its obligations under the relevant covered agreements.[44] India considers that, accordingly, the issue raised by the United States' preliminary ruling request is similar to those faced by the panels in *US – Poultry* and *India – Additional Import Duties*. In those disputes, the panels considered the possible repetition of a WTO-inconsistent measure or the possibility of reinstating the *status quo ante* as a key factor in assessing whether to make findings on an expired measure.[45] India submits that, given the ease with which the MassCEC could re-introduce the Massachusetts Manufacturer Adder and the fact that the United States asserts the Massachusetts Manufacturer Adder is WTO-consistent, we must issue findings, if not a recommendation to the DSB, with respect to the Massachusetts Manufacturer Adder in order to secure a positive resolution to the dispute.[46]

3.16. The United States argues that India has not substantiated its assertion that it is likely that the benefits of the adder under the old manuals continue to exist. According to the United States, the CSHWP does not entitle participants to the continued stream of "benefits" to which India alludes. Likewise, the United States submits that India's concern about the risk that the Massachusetts Manufacturing Adder or similar incentives may be re-introduced is mere speculation unsupported by evidence.[47]

3.3 Main arguments of a third party[48]

3.17. The European Union recalls the Appellate Body's statement that Article 6.2 of the DSU covers measures "in existence" at the time of panel establishment, and considers that neither of the two exceptions recognised by the Appellate Body to that general rule appear to be applicable to the LAMC Adder and the Massachusetts Manufacturer Adder.[49] The European Union adds that a mere allegation by India that it is "likely" that the two adders in question continue under the old and expired rules without any supporting evidence is insufficient; otherwise, any measure expired prior to panel establishment could be challenged on such a speculative basis. Regarding the alleged risk of re-introduction, the European Union notes that such a risk has been accepted by panels and the Appellate Body as a relevant consideration in situations involving the expiry of a measure *after* panel establishment but not in situations involving the expiry of a measure *prior to* panel establishment. According to the European Union, if such an exception were to be accepted, the Panel would have to assess whether India established such a risk of re-introduction based on positive evidence, not simply on statements of a theoretical and speculative nature.[50]

[39] United States' first written submission, paras. 60-61.
[40] United States' first written submission, para. 62.
[41] India's first written submission, para. 1098.
[42] India's first written submission, paras. 1080-1095.
[43] The latest versions entered into effect on 1 May 2018. See Exhibits US-16 and US-15.
[44] India's response to the United States' request for a preliminary ruling, para. 19.
[45] India's response to the United States' request for a preliminary ruling, para. 19.
[46] India's response to the United States' request for a preliminary ruling, paras. 19-20.
[47] United States' first written submission, paras. 53 and 55; and comments on India's response to the United States' request for preliminary rulings, para. 63.
[48] As mentioned, the third parties were invited to comment on the United States' preliminary ruling requests as part of their third party written submissions. Of the third parties that made a third party written submission, only the European Union addressed the preliminary issues relating to these two adders.
[49] European Union's third party written submission, paras. 6-8.
[50] European Union's third party written submission, para. 8.

3.4 Analysis by the Panel

3.4.1 The question before us

3.18. The United States requests us to find that the LAMC Adder and the Massachusetts Manufacturer Adder fall outside our terms of reference, and therefore to reject India's request for findings on them.[51] India, in turn, requests us to reject the United States' preliminary ruling request and to "issue findings, if not recommendation[s] to the DSB", with respect to both measures.[52]

3.19. The United States' preliminary ruling request and India's response to it make reference to three issues: a panel's jurisdiction; a panel's making of findings in respect of measures at issue; and a panel's making of recommendations to the DSB in respect of measures that it has found to be WTO-inconsistent. These three issues are clearly related. A panel can only make findings and issue recommendations on measures within its terms of reference. Importantly, however, these three issues are also distinct. A panel's jurisdiction with regard to specific measures, and the making of findings and issuing recommendations in respect of such measures, are distinct legal concepts regulated in different provisions of the DSU.[53] Accordingly, assessment of a panel's jurisdiction will be based on legal considerations different from those that may arise in the context of a panel's considering whether to make findings and recommendations on measures that are within its jurisdiction.

3.20. In light of the request of the United States, we turn first to consider whether the LAMC Adder and the Massachusetts Manufacturer Adder are within our terms of reference.

3.21. Under Article 7.1 of the DSU, panels have the following standard terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

> To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

3.22. Under these standard terms of reference, a panel is directed to examine the matter referred to the DSB by the complainant in its panel request. Article 6.2 of the DSU sets forth the requirements concerning requests for the establishment of a panel, with one such requirement being the identification of "the specific measures at issue".[54] As a matter of principle, the function of a panel request is "to establish and delimit the jurisdiction of the panel in a dispute, and it serves the due process objective of notifying the respondent and third parties of the nature of the dispute".[55]

3.23. The Panel in these proceedings was established with the following standard terms of reference:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by India in document WT/DS510/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[56]

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[51] United States' first written submission, paras. 40, 58 and 65.

[52] India's response to the United States' request for a preliminary ruling, paras. 16, 20 and 42.

[53] The terms of reference of a panel are regulated in Articles 6.2 and 7 of the DSU. Findings and recommendations are treated as two different concepts in the DSU, including in its Articles 11, 12.7 and 19.2. For the recommendations of the DSB, see article 21 of the DSU. Additionally, past reports have treated findings and recommendations as different concepts. See, for example, Appellate Body Reports, *US – Upland Cotton*, para. 272; *EU – Fatty Alcohols (Indonesia)*, paras. 5.200-5.201; *US – Certain EC Products*, para. 81; and Panel Report, *US – Poultry (China)*, para. 7.56.

[54] Article 6.2 DSU provides that: "[t]he request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."

[55] Appellate Body Report, *EC – Large Civil Aircraft*, para. 786.

[56] WT/DS510/3.

3.24. India's panel request expressly identifies both the LAMC Adder and the Massachusetts Manufacturer Adder as measures at issue.[57] Importantly, however, the LAMC Adder was "removed" with the issuance in December 2016 of the 2017 SIP Guidelines[58], which took effect on 1 January 2017, "replac[ing]" the 2015 SIP Guidelines.[59] Similarly, the new Program Manuals of the Massachusetts Manufacturer Adder, issued on 5 October 2016, stated that "[a]s of December 15, 2016 new Applications *will not be eligible* to receive the Massachusetts Manufactured rebate adder".[60] As mentioned above, this Panel was established on 21 March 2017. Accordingly, it appears, as the United States submits, that both adders were formally discontinued prior to the Panel's establishment. India does not contest this.[61] To the contrary, it acknowledges that the new SIP Guidelines "do not contain any provisions with respect to the LAMC Adder"[62], and observes that the new CSHWP Program Manuals "discontinued with the Massachusetts Manufacturer Adder".[63]

3.25. We note, in this connection, India's argument in a different context that the legal instruments that authorize the LADWP and the MassCEC to implement, respectively, the SIP and the CSHWP are themselves still in force.[64] We will address this point below when we come to analyse India's submissions concerning the alleged risk that the LAMC Adder and the Massachusetts Manufacturer Adder may be reintroduced. At this point, we simply note that these legal instruments do not expressly refer to the adders challenged by India. We also note that India has not argued that the continuing existence of these instruments means that the adders themselves continue to exist. Accordingly, while we will consider the legal significance of the continued existence of these authorizing instruments later in our analysis, we note that their ongoing existence does not affect our agreement with the parties that the two adders were discontinued prior to the establishment of the Panel.

3.26. Based on the above, we conclude that the LAMC Adder and the Massachusetts Manufacturer Adder expired before the establishment of this Panel.

3.27. Whether, as a general matter, panels may review the WTO consistency of expired measures is an issue that has been analysed by prior panels and the Appellate Body. In its recent report in *EC – PET (Pakistan)*, the Appellate Body stated that "[t]he fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure"[65], and recalled that, pursuant to Article 3.3 of the DSU, a Member may initiate WTO dispute settlement

[57] The LAMC Adder is referred to as follows: "3. Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Los Angeles Department of Water and Power's ("LADWP") Solar Incentive Program in the State of California: The measures at issue are the incentives provided in the form of the Los Angeles Manufacturing Credit ("LAMC") for qualifying and approved photovoltaic ("PV") equipment manufactured in Los Angeles (individually and/or collectively referred to as "the PV Equipment") that has confirmed LADWP Solar Incentive Program reservation. The Net Energy Metering and Solar Photovoltaic Incentive Program Guidelines, 2015 provide that the goal of the LAMC is to promote local economic development through manufacturing and job creation within the City of Los Angeles".

In turn, the Massachusetts Manufacturer Adder is referred to as follows: "11. Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Massachusetts Clean Energy Centre's Commonwealth Solar Hot Water Program, ("CSHWP") in the State of Massachusetts: The program is administered by the Massachusetts Clean Energy Centre which provides certain rebates to reduce the upfront cost of installing a solar hot water system. The measures at issue are rebates available for both residential-scale and commercial-scale projects if the installed system has eligible Massachusetts manufactured components (individually and/or collectively referred to as "the Installed System and Massachusetts Components") To qualify, the applicant is required to provide evidence that the solar hot water system uses components from one of the qualified companies that manufactures in Massachusetts".

India's request for the establishment of a panel (WT/DS510/2), pp. 3 and 10.

[58] Exhibit US-5.

[59] Minutes of the Regular Meeting of the Board of Water and Power Commissioners of the City of Los Angeles, California, December 6, 2016 (Exhibit US-7).

[60] See Exhibits US-17 and US-18, p. 1 (emphasis original).

[61] India's response to the United States' request for a preliminary ruling, paras. 10-20.

[62] India's first written submission, para. 252.

[63] India's first written submission, para. 1098.

[64] These legal instruments would be Senate Bill 1 (Exhibit IND–25) in the case of the SIP (India's response to the United States' request for a preliminary ruling, para. 12.), and the General Laws of the Commonwealth of Massachusetts, Massachusetts Clean Energy Technology Center, Chapter 23 J, Title II (Exhibit IND-71) in the case of the CSHWP (India's response to the United States' request for a preliminary ruling, para. 18).

[65] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.27 (referring to Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179).

proceedings whenever it considers that any benefits accruing to it are being impaired by measures taken by another Member.[66] It has, however, clarified that "the deference accorded by a panel to a Member's exercise of its judgement in bringing a dispute is not entirely boundless".[67]

3.28. Importantly, the Appellate Body has also explained that there is a key temporal distinction to be made when dealing with expired measures, depending on whether such measures expired before or after the establishment of the panel. Indeed, in its above-referenced *EC – PET (Pakistan)* report, the Appellate Body acknowledged the observation of the panel in the same case that whereas no panel has declined to hear the entirety of a dispute due to the expiry of the challenged measure *after* panel establishment, some past panels have declined to make findings with respect to measures that expired *before* panel establishment.[68] Further, it admonished one of the parties in the appeal for "overlook[ing] this temporal distinction".[69] Similarly, the panel in *US – Upland Cotton* expressly noted the importance of this temporal distinction when referring to measures that expired prior to the request for establishment of a panel, noting that it was "a different situation from that confronting some previous panels, where measures expired during their proceedings".[70]

3.29. This distinction is of the essence in the present dispute, because we are dealing with measures that expired *before* panel establishment. Consequently, the question before us is whether we have jurisdiction to address measures that were included in a panel request but that expired before panel establishment. Specifically, the question before us is whether the LAMC Adder and the Massachusetts Manufacturer Adder, which were duly referenced in India's panel request, are within our terms of reference given that both measures expired *prior* to the establishment of the Panel in this case.

3.4.2 The general rule regarding measures included in a panel's terms of reference

3.30. We begin by noting that panels must deal with issues related to their jurisdiction.[71] The Appellate Body has affirmed that "panels have the authority to determine whether they have jurisdiction in a given case and to determine the scope and limits of that jurisdiction, as defined by their terms of reference".[72]

3.31. A panel's terms of reference are generally defined by the panel request that results in its establishment. There may, however, be instances where measures are outside a panel's terms of reference even though they are identified in the panel request in accordance with Article 6.2 of the DSU.

3.32. In *EC – Chicken Cuts*, the Appellate Body identified one such instance when it stated that "[a]s a general rule, the measures included in a panel's terms of reference must be measures in existence at the time of the panel's establishment".[73] We understand this to mean that, as a general rule, measures that expire prior to the panel's establishment automatically, and by virtue of their expiry, fall outside a panel's terms of reference. Although, as noted, in *EC – PET (Pakistan)* the Appellate Body stated that "[t]he fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure"[74], that statement was made in

[66] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.42.
[67] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.43.
[68] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.38 (referring to the Panel Report, para 7.13, in turn referring to Panel Reports, Dominican Republic – Import and Sale of Cigarettes, para 7.343, Indonesia – Autos, para 14.9; China – Electronic Payment Services, para 7.227; EC – Approval and Marketing of Biotech Products, paras. 7.1307-7.1308; *US – Gasoline*, para. 6.19; and Argentina – Textiles and Apparel, paras 6.4 and 6.12-6.13).
[69] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.38.
[70] Panel Report, *US – Upland Cotton*, para. 7.107.
[71] The Appellate Body has noted that "panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues… The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings. For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed". (Appellate Body Report, *Mexico — Corn Syrup (Article 21.5 — US)*, para. 36, referring to appellate Body Report, *United States – 1916 Act*, supra, footnote 32, para. 54).
[72] Appellate Body Report, *EU – PET (Pakistan)*, para 5.16 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45 and fn 90 thereto).
[73] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[74] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.27 (referring to Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179).

the context of analysing measures that had expired *after* the establishment of the panel in that case. Moreover, as also noted, the Appellate Body in the same case appeared to reaffirm the validity and importance of the distinction between measures that expire *prior* to the establishment of a panel, on the one hand, and measures that expire *subsequent* to the establishment of a panel, on the other hand. We therefore consider that, while a panel may have significant flexibility to decide whether and how to make findings on measures that expire *subsequent to* its establishment[75], the general rule that measures within a panel's terms of reference must exist at the time of the panel's establishment continues to hold. Indeed, as we understand it, the Appellate Body's statements in *EC – PET (Pakistan)* did *not* concern the panel's terms of reference, but rather a panel's discretion to make findings on measures within its terms of reference. That report therefore appears to confirm that the question whether measures existed at the time of a panel's establishment is crucial for determining whether those measures are outside the panel's terms of reference, in which case a panel cannot make findings on them, or within the panel's terms of reference, in which case a panel has discretion about whether to make findings or not.

3.33. As noted, neither the LAMC Adder nor the Massachusetts Manufacturer Adder were in existence at the time of this Panel's establishment. Therefore, the general rule would indicate that they fall outside our terms of reference, even though they were identified in India's panel request.

3.4.3 Exceptions to the general rule recognised by the Appellate Body

3.34. India argues that there are exceptions to the above-mentioned general rule, and requests us to rule on the expired adders because (i) "it is likely that the [relevant] adder benefits" "continue to be provided" or "continue to exist"; and (ii) there is a risk that the same or similar measures will be reintroduced.[76]

3.35. We note that the Appellate Body has expressly qualified the general rule that the measures included in a panel's terms of reference must be in existence at the time of the panel's establishment by recognizing the existence of two exceptions. First, a panel has the authority to examine a legal instrument enacted after its establishment if the instrument amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure.[77] Second, "panels are allowed to examine 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".[78]

3.36. The first exception, which concerns measures amended after a panel's establishment, is clearly not applicable in the present case. India has not identified any relevant subsequent amendments of the measures or argued that such amendments should be included within the Panel's terms of reference. Regarding the LAMC Adder, we have not been provided with any amendment to the SIP Guidelines issued after Panel's establishment. As for the Massachusetts Manufacturer Adder, the 2018 CSHWP Program Manuals were indeed issued after the Panel's establishment, but by that time the adder had already been discontinued through the 2016 program manuals. Therefore, we see no relevant amendment within the meaning of the first exception identified by the Appellate Body.

3.37. The second exception concerns measures whose "legislative basis" expired prior to the establishment of a panel but that nevertheless continue to affect the operation of one or more of the covered agreements.[79] We note that India has not clearly argued that this exception would justify our finding that the LAMC and Massachusetts Manufacturer Adders are within our terms of reference. As we discuss in more detail below, India has argued that benefits "continue to be provided"[80] or

[75] "[I] t is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue. The fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure". (Appellate Body Report, *EU – PET (Pakistan)*, para. 5.51).

[76] India's first written submission, paras. 252 and 1098.

[77] Appellate Body Report, *EC – Chicken Cuts*, para. 156 (referencing Appellate Body Report, *Chile – Price Band System*, para. 139. See also Appellate Body Report, *EC – Selected Customs Matters,* para. 184).

[78] See Appellate Body Report, *EC – Selected Customs Matters,* para. 184 (referencing Appellate Body Report, *US – Upland Cotton*, para. 263).

[79] Ibid.

[80] India's first written submission, para. 252.

"continue to exist"[81] even though the measures have expired. It has not, however, clearly explained the relationship between this argument and the second exception recognized by the Appellate Body.

3.38. At any rate, India has not provided any evidence suggesting that the effects of the adders are continuing to impair the benefits accruing to India under a covered agreement even though the adders themselves no longer exist. In fact, regarding the LAMC Adder, the United States has submitted a letter that accompanied the resolution to adopt the 2017 SIP Guidelines stating that "[t]here have been no requests for this manufacturing credit for over three years".[82] This suggests that the Adder has not had any effects at all for a number of years prior to its removal from the SIP Guidelines before the establishment of this Panel. Regarding the Massachusetts Manufacturer Adder, as the United States points out, the new Program Manuals state that applicants will not be eligible for such adder as of December 15, 2016.[83] Accordingly, and in the absence of specific evidence from India to the contrary, we do not see how either of these measures could have been impairing the benefits accruing to India under a covered agreement at the time this Panel was established. We recall in this regard the basic rule on burden on proof identified by the Appellate Body, that the party which asserts a fact, whether the complainant or the respondent, is responsible for providing proof thereof.[84]

3.4.4 Additional arguments by India

3.39. India argues that, because the Appellate Body has stated that the general rule is qualified by "at least"[85] the two exceptions discussed above, it follows that there may be other exceptions depending upon the facts and circumstances of each case.[86] In this context, India suggests that the LAMC and Massachusetts Manufacturer Adders should be considered to fall within our terms of reference in this case because "it is likely" that benefits provided under the measures continue to be provided or continue to exist. Additionally, India argues that we should rule on these two measures because otherwise there is a risk that either or both could be reintroduced.[87]

3.40. We recognize that the Appellate Body has referred to the existence of "at least" two exceptions.[88] However, the Appellate Body has not specified in which other circumstances it would be appropriate for a panel to find that measures expired prior to the panel's establishment are nevertheless within its terms of reference.

3.41. To limit our findings to what is necessary to resolve the preliminary issue before us, we will analyse whether India has established the factual premises on which it grounds its arguments in this regard. Only if we find that India has established that benefits provided under the measures continue to exist, or that there is a risk of the measures being reintroduced, will we consider whether those circumstances would justify our departing from the general rule that measures within a panel's terms of reference must be in existence at the time of the panel's establishment.

3.4.4.1 Whether benefits continue to be provided or to exist

3.42. Regarding the possibility that benefits under the measures continue "to be provided" or "to exist", we do not consider that the evidence on the record supports this argument. As we have already explained, India has not submitted any evidence indicating that the effects of the adders were continuing to impair benefits accruing to India under a covered agreement at the time of the establishment of this Panel. Likewise, India has not submitted any evidence showing the existence

[81] India's first written submission, para. 1098.
[82] Exhibit US–9.
[83] United States' first written submission, paras. 60-61.
[84] According to the Appellate Body it is "difficult, indeed to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof". (Appellate Body Report, *US – Wool Shirts and Blouses*, p.14). See also in a similar vein, Appellate Body Reports, *Japan – Apples*, para. 157; and Panel Report, *US – Section 301 Trade Act*, para. 7.15.
[85] Appellate Body Report, *EC – Selected Customs Matters*, para. 184.
[86] India's response to the United States' request for a preliminary ruling, para. 6.
[87] India's first written submission, paras. 252 and 1098.
[88] The Appellate Body expressly stated that "[t]his general rule, however, is qualified by at least two exceptions". (Appellate Body Report, *EC – Selected Customs Matters*, para. 184).

of ongoing benefits caused by, or otherwise attributable to, the measures despite their discontinuance. In particular, India has not submitted any factual evidence that payments continue to be made under the adders despite their withdrawal. We agree in this regard with the United States and the European Union that a mere allegation that benefits under a measure continue to be provided or to exist, without any factual arguments or evidence to support such a claim, is insufficient to establish that benefits continue to be provided or exist under a measure that has formally been withdrawn. As noted, it is the party that alleges a specific fact – in this case, India – that has the burden to prove it.

3.43. As India has not substantiated the factual basis of this argument, we do not need to consider whether the ongoing provision of benefits under the measures would, as a legal matter, justify a finding that the measures are within our terms of reference even though they expired prior to the establishment of this Panel.

3.4.4.2 Whether there is a risk of reintroduction

3.44. India submits that the frequency with which the SIP Guidelines and the CSHWP Program Manuals, through which the adders at question were originally maintained, have been amended in the past indicates that there is a risk of these adders being reintroduced.[89] We do not agree. In our view, the mere fact that a measure has been amended in the past does not, without more, give rise to a risk that that measure will be reintroduced following its discontinuance. We do not consider that there is any necessary causal relationship between the frequency of past changes to a set of instruments and the possibility of a specific, discontinued aspect being reintroduced in the future. India has not provided any evidence that there is such a causal relationship in this case as regards the adders in question.

3.45. India further argues that, in considering whether there is a risk of the measures being reintroduced, the Panel should bear in mind the principle that a complaining party should not be forced to challenge a "moving target". We agree that, in principle, a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a "moving target". Indeed, we consider this to be well-established in past reports of the Appellate Body.[90] However, we do not consider that we are somehow confronted with a "moving target scenario"[91] in the present circumstances. We cannot find any support in either India's arguments or the evidence on the record for the proposition that the two adders at issue were withdrawn in order to shield them from scrutiny by the Panel[92], or that they may be (re)introduced once the risk of panel scrutiny has passed. In this connection, we recall the Appellate Body's statement that WTO adjudicators "must assume that Members of the WTO will abide by their treaty obligations in good faith".[93] Without any evidence to the contrary, we cannot assume that the United States is waiting to re-introduce these measures, and thus force India into a "moving target" scenario.

3.46. India also argues that the existence of a risk of reintroduction is supported by the fact that the legal instruments "which authorize the [LADWP and MassCEC] to implement the [SIP and the CSHWP, respectively] continue to exist".[94] However, the instruments in question merely grant general powers to the relevant agencies. They authorize the implementation of the relevant programs (i.e. the SIP and the CSHWP), as India notes; however, they do not refer to, let alone

[89] India's response to the United States' request for preliminary rulings, paras. 13 and 19.

[90] Appellate Body Report, *EU – PET (Pakistan)*, para 5.39 (referring to Appellate Body Report, *Chile – Price Band System*, para. 144).

[91] Panel Report, *US – Poultry (China)*, para. 7.55.

[92] Appellate Body Report, *Chile – Price Band System*, para. 144.

[93] Appellate Body Report, *EC – Sardines*, para. 278 (referring to Appellate Body Reports, *US – Shrimp*, supra, footnote 50, para. 158; and *Chile –Taxes on Alcoholic Beverages*, para. 74). See also Panel Reports, *Argentina – Textiles and Apparel*, para. 6.14; and *Thailand – Cigarettes (Philippines)*, footnote 1543. The Appellate Body also added that "always in dispute settlement, every Member of the WTO must assume the good faith of every other Member". (Appellate Body Report, *EC – Sardines*, para. 278).

[94] As noted, India argues that the LADWP derives the authority to implement the SIP from Senate Bill 1 (Exhibit IND–25), which amended the Public Utilities Code and the Public Resources Code of the State of California (India's response to the United States' request for a preliminary ruling, para. 12.), and that the MassCEC derives the authority to implement the CSHWP from the General Laws of the Commonwealth of Massachusetts, Massachusetts Clean Energy Technology Center, Chapter 23 J, Title II (Exhibit IND-71) (India's response to the United States' request for a preliminary ruling, para. 18).

mandate, the specific adders challenged by India. The instruments are therefore general grants of authority that could be exercised in any number of ways. In our view, the mere fact that instruments from which an authority derives general regulatory powers continue to be in force cannot be considered sufficient to substantiate a risk that such authority will adopt any specific measures not mandated or referenced in those underlying instruments. Otherwise, almost any legal instrument by means of which general powers are granted to an authority of a Member could, without more, be relied upon to claim a risk of a WTO-inconsistent measure being (re)introduced.

3.47. Finally, India further supports its argument that the measures risk being reintroduced by noting that the United States argues that the adders in question are not inconsistent with its obligations under the relevant covered agreements.[95] In our view, however, this alone is not sufficient to establish the existence of a risk that the measures will be reintroduced. The mere fact that a Member considers a possible measure to be WTO-consistent does not, without more, indicate that that Member will actually introduce such measure. In the circumstances of the present case, the very fact that the measures were discontinued rather suggests the contrary: the fact that the relevant authorities chose to withdraw the adders at issue seems, at least without evidence to the contrary, to suggest that they indeed no longer considered them to be worth maintaining. We note in this regard that the Los Angeles Board of Water and Power Commissioners expressly terminated the LAMC Adder[96], and according to a board letter accompanying the proposed resolution "the Los Angeles Manufacturing Credit will be removed" as "[t]here have been no requests for this manufacturing credit for over three years".[97] In turn, the 2016 MassCEC program manuals included the following notice: "As of December 15, 2016, new applications will not be eligible to receive the Massachusetts manufactured rebate adder".[98] If anything, this evidence seems to contradict India's argument about the risk of reintroduction of the adders in question.

3.48. For the above reasons, we do not consider that India has substantiated its allegations that there is a risk of the LAMC Adder and the Massachusetts Manufacturer Adder being reintroduced.[99] As noted, it is India, the party that alleges the risk of reintroduction, that has the burden to prove it. We therefore do not need to consider whether such circumstances, if established, would justify a finding that the measures are within our terms of reference even though they expired prior to the establishment of this Panel.

3.4.5 Conclusion on the LAMC Adder and the Massachusetts Manufacturer Adder

3.49. In light of the above and the evidence before us, we therefore conclude that the LAMC Adder and the Massachusetts Manufacturer Adder do not fall within our terms of reference, and, therefore, we uphold the United States' preliminary ruling requests concerning these two measures. Accordingly, we will not make any findings or issue any recommendations regarding these two measures.

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[95] India's response to the United States' request for preliminary rulings, paras. 15 and 18.
[96] United States' first written submission, paras. 51-52.
[97] Exhibit US-9.
[98] Exhibits US–17 and US-18.
[99] We note that, as legal basis for its argument, India relies on three past panel reports that decided to make findings on expired measures based on the risk that they may be reintroduced following the panel proceedings (*US – Poultry (China)*, *Chile – Price Band System*, and *India – Additional Import Duties*). However, we consider that these reports have limited relevance for the issue before us. As the United States noted, the measures on which the panels made findings in all those three disputes were actually in force at the time of panel establishment and expired only subsequently during the panel proceedings (see Panel Reports, *US – Poultry*, paras. 1.3 and 7.51, *Chile – Price Band Systems*, paras. 1.3, and 7.195, and *India – Additional Import Duties*, para. 4.18). In the present dispute, as mentioned above, the measures in question were terminated before the establishment of this Panel.

Likewise, India also mentions that the Appellate Body, in *US – Certain EC Products*, did not find any error with the panel's substantive findings on a measure that had lapsed prior to the establishment of the panel and where no analysis was done as to whether the lapsed measure continued to produce effects that were impairing the benefits of the complaining party. However, we consider that the situation in that dispute was also different to the one under analysis. In *US – Certain EC Products*, part of the disagreement between the parties was precisely whether the measure was no longer in existence (see Appellate Report, *US – Certain EC Products*, paras. 11 and 20). Here, on the contrary, India does not contest that the LAMC Adder and the Massachusetts Manufacturer Adder are no longer in existence.

4 THE SOLAR THERMAL REBATE AND THE SOLAR PV REBATE

4.1. The United States asks the Panel to find that two of the three programs comprising the tenth challenged measure, which India refers to as the "Minnesota Solar Incentive Program" (MSIP)[100], were not subject to consultations between the parties, and therefore fall outside the Panel's terms of reference.[101] The two programs at issue are the Solar Thermal rebate and the Solar photovoltaic (PV) rebate.[102] The United States does not argue that India failed to identify these programs in its panel request, as required by Article 6.2 of the DSU. Rather, the United States' argument is that these programs were not identified in India's consultations request, and that India's inclusion of them in its panel request and first written submission is therefore impermissible.

4.1 The programs in question

4.2. The Solar Thermal rebate provides rebates upon the installation of solar thermal systems that are "Made in Minnesota".[103] A solar thermal system is "Made in Minnesota" if the components of the system are manufactured in Minnesota and the solar thermal system is certified by the Solar Rating and Certification Corporation.[104] The rebate is available for solar thermal systems that are installed on residential or commercial premises, and which are used for, *inter alia*, hot water or space or pool heating purposes.[105]

4.3. The Solar PV rebate provides rebates to owners of "qualified properties"[106] who install solar PV modules[107] manufactured in Minnesota.[108] Only solar PV modules "manufactured in Minnesota" are eligible to receive the rebate.[109] For the purposes of this program, "manufactured" is defined to mean[110]:

a. the material production of solar PV modules, including the tabbing, stringing, and lamination processes; or

b. the production of interconnections of low-voltage photoactive elements that produce the final useful photovoltaic output by a manufacturer operating in Minnesota.

4.4. The third program raised by India under the umbrella of the MSIP is the Solar Energy Production Incentive (SEPI) program. The United States has not argued that this program falls outside our jurisdiction. We therefore simply note that it, the like the Solar PV rebate, concerns financial incentives to owners of grid-connected solar PV modules that are manufactured in Minnesota and that have a total nameplate capacity (i.e. intended maximum capacity) of less than 40 kilowatts.[111]

4.2 Main arguments of the parties

4.5. In support of its request for a preliminary ruling, the United States notes that India's consultations request refers to a program "administered pursuant to the criterion established under the Made in Minnesota Solar Energy Production Incentive law (Minnesota Statute section 216C.414,

[100] See India's first written submission, paras. 939-988. The third program under this heading is the Solar Energy Production Incentive (SEPI).
[101] United States' first written submission, paras. 66-74.
[102] The United States does not contest that the third program, the Solar Energy Production Incentive (SEPI) program, was identified in India's consultations request.
[103] According to India, the relevant legal instrument defines a solar thermal system as "a flat plate or evacuated tube … with a fixed orientation that collects the sun's radiant energy and transfers it to a storage medium for distribution as energy to heat or cool air or water". (India's first written submission, para. 964).
[104] India's first written submission, para. 965).
[105] India's first written submission, para. 966).
[106] "Qualified properties" are residences, multifamily residences, businesses, or publicly owned buildings in the assigned service area of the utilities subject to the program. (2016 Minnesota Statutes, Chapter 216C. Energy Planning and Conservation (Exhibit IND-66), Section 116C.7791, Subdivision 1(d)).
[107] Solar PV modules are defined for the purposes of this program as "the smallest, nondivisible, self-contained physical structure housing interconnected photovoltaic cells and providing a single direct current of electrical output". (2016 Minnesota Statutes, Chapter 216C. Energy Planning and Conservation (Exhibit IND-66), Section 116C.7791, Subdivision 1(e)).
[108] Ibid. Section 116C.7791, Subdivision 2.
[109] Ibid. Section 116C.7791, Subdivision 3(1).
[110] Ibid. Section 116C.7791, Subdivision 1(b).
[111] 2016 Minnesota Statutes, Section 216C.415, Subdivisions 1 (Exhibit IND-66).

subd. 2 (2013))". In the United States' view, this language identifies only the Solar Energy Production Incentive (SEPI) program, which is established and administered "pursuant to the criterion" laid down in the cited legislative instrument, and thus excludes from the scope of the dispute programs, such as the Solar Thermal rebate and the Solar PV rebate programs, that are administered pursuant to different criteria and under different legislative instruments (i.e. different sections of the Minnesota Statutes).[112]

4.6. India asks the Panel to reject the United States' request for a preliminary ruling, and to find that both the Solar Thermal rebate and the Solar PV rebate are within the Panel's terms of reference.[113] India submits that its consultations request is broad enough to encompass both rebate programs, and does in fact make reference to those programs.[114] In the alternative, India argues that even if the two programs were not identified in the consultations request, that document was nevertheless sufficient to indicate the nature of the measure and the gist of what was at issue.[115] In particular, India argues that the "general framework of the request for consultations" contains language indicating "that India may raise additional factual and legal claims in the interim period between the request for consultations and the request for establishment of panel".[116] Consequently, in India's view, the inclusion of the Solar Thermal and Solar PV rebates in its panel request neither expanded the scope nor changed the essence of the dispute, and was therefore permissible pursuant to Appellate Body jurisprudence.[117] India also notes that it did raise questions concerning both the Solar Thermal and the Solar PV rebates during the consultations process.[118]

4.3 Main arguments of the third parties[119]

4.7. In its third party submission, the European Union notes that one of the purposes of consultations is to enable the parties to achieve a better understanding of, and additional information about, each other's positions, and that therefore a complainant's claim may be expected to be shaped by the consultations process. The European Union recalls the Appellate Body's statements that the identification of a measure in a panel request need not be identical to what was set out in the consultations request, provided that the complainant does not expand the scope or change the essence of the dispute.[120] In the European Union's view, the modifications made by India in its panel request do not appear, at least "at first sight", to expand the scope or change the essence of the dispute.[121]

4.8. Japan, in its third party submission, also emphasizes the Appellate Body's statement that a "precise and exact identity" between a consultations request and a panel request is not required[122], provided that any measures identified in the panel request that were not identified in the consultations request do not "expand the scope" or "change the essence of the dispute".[123] According to Japan, these principles must guide the Panel's analysis of whether the Solar Thermal and the Solar PV rebates are within its terms of reference.

[112] United States' first written submission, paras. 71-73.
[113] India's response to the United States' request for a preliminary ruling, paras. 21-41.
[114] India's response to the United States' request for a preliminary ruling, paras. 28-35.
[115] India's response to the United States' request for a preliminary ruling, para. 36.
[116] India's response to the United States' request for a preliminary ruling, para. 35.
[117] India's response to the United States' request for a preliminary ruling, para. 36.
[118] India's response to the United States' request for a preliminary ruling, paras. 29 and 36.
[119] As mentioned, the third parties were invited to comment on the United States' preliminary ruling requests as part of their third party written submissions. Of the third parties that made a third party written submission, only the European Union and Japan addressed the preliminary issues relating to these two programs.
[120] European Union's third party written submission, para. 10.
[121] European Union's third party written submission, para. 11.
[122] Japan's third party written submission, para. 19.
[123] Japan's third party written submission, para. 20.

4.4 Analysis by the Panel

4.4.1 The question before us

4.9. As noted, the United States does not argue that the Solar Thermal and the Solar PV rebates were not identified in India's panel request in conformity with Article 6.2 of the DSU. Those programs are, in fact, clearly and specifically identified at paragraph 10 of India's panel request in the following terms:

> 10. Incentives granted and/or maintained contingent upon the use of domestic over imported goods under Made in Minnesota Solar Incentive Program ("MSIP") in the State of Minnesota: The measures at issue are the: (i) incentives (which are in the nature of performance-based financial incentive expressed as a per kilowatt-hour amount) offered if the solar photovoltaic modules qualify as "Made in Minnesota"; (ii) rebates offered to owners of a qualified property for installing solar photovoltaic modules manufactured in Minnesota; and (iii) rebates offered for the installation of "Made in Minnesota" solar thermal systems. The equipment mentioned at (i), (ii), and (iii) above is individually and/or collectively referred to as "the Minnesota Equipment".
>
> The measures under the MSIP are implemented through instruments that include, but are not limited to, the following, operating separately or collectively, as well as any amendments, modifications, replacements, successor, and extensions thereto, and any implementing measure or any other related measures thereto:
>
> (a) Minnesota Statute (2016), including, in particular, MINN. STAT. 216C.411 through 216C.416, and MINN. STAT. 116C.7791.[124]

4.10. The United States' argument is rather that the two programs were not identified in India's consultations request. In particular, the United States notes that India's consultations request refers only to the "Made in Minnesota Solar Incentive Program ("MSIP") administered pursuant to the criterion established under the Made in Minnesota Solar Energy Production Incentive law (Minnesota Statute § 216C.414, subd. 2 (2013))".[125] According to the United States, this language excludes any and all programs that are "administered pursuant to different criteri[a]"[126], including the Solar Thermal and Solar PV rebates.

4.11. The question before us, therefore, is whether the Solar Thermal and Solar PV rebates are within our terms of reference, or whether, as the United States argues, they fall outside our terms of reference because they were not identified in India's consultations request.

4.4.2 Legal framework

4.12. Article 4.4 of the DSU sets out the requirements for consultations requests in the following terms[127]:

> All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, *including identification of the measures at issue and an indication of the legal basis for the complaint.*

4.13. Article 6.2 of the DSU sets out the requirements for panel requests as follows[128]:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than

[124] WT/DS510/2, p. 9 (footnote omitted).
[125] United States' first written submission, para. 70.
[126] United States' first written submission, para. 71.
[127] Article 4.4 of the DSU (emphasis added).
[128] Article 6.2 of the DSU.

standard terms of reference, the written request shall include the proposed text of special terms of reference.

4.14. The Appellate Body has held that "Articles 4 and 6 of the DSU … set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[129] Consultations are a vital step in the dispute settlement process[130], and a consultations request plays an "important role in defining the scope of the dispute".[131] It "informs the respondent, and the WTO Membership, of the nature and object of the challenge raised by the complainant, and enables the respondent to prepare for the consultations".[132] Accordingly, even though it is the panel request that defines a panel's terms of reference[133], the inclusion in a panel request of measures not identified in a consultations request may raise concerns about whether a complaining party has been "fully forthcoming"[134] during the consultations, as well as whether the dispute settlement "process" provided for in Articles 4 and 6 of the DSU has been properly followed in respect of those measures.[135]

4.15. At the same time, consultations are "but the first step in the WTO dispute settlement process".[136] The Appellate Body has made clear that there need not be "a precise and exact identity" between the measures that were the subject of consultations and the specific measures identified in the panel request.[137] For one thing, the use of the word "specific" in Article 6.2 of the DSU indicates that greater specificity is required in a panel request than in a consultations request.[138] Accordingly, measures may be identified in a consultations request to "some degree that is less than specific".[139] Moreover, as the Appellate Body has repeatedly acknowledged, a panel request can be "expected to be shaped by, and thereby constitute a natural evolution of, the consultations process".[140] Thus, the Appellate Body has cautioned panels against imposing "too rigid a standard of identity" between a consultations request and a panel request.[141] According to the Appellate Body, "the requirement under Article 4.4 to identify the measure at issue cannot be too onerous at this initial step in the proceedings"[142], because "this would substitute the request for consultations for the panel request".[143]

4.16. In light of these considerations, the Appellate Body has held that, provided that a complainant does not "expand the scope" or "change the essence" of the dispute in its panel request as compared to its consultations request, it is the panel request that determines the panel's terms of reference.[144] Whether the inclusion of a measure in a panel request has expanded the scope or changed the essence of a dispute must be assessed on a case-by-case basis[145], and "involves scrutinizing the extent to which the identified measure at issue … ha[s] evolved or changed from the consultations request to the panel request".[146] When analysing whether the inclusion of a measure in a panel request has expanded the scope or changed the essence of a dispute, it may be appropriate for a panel to ask what the responding party could "reasonably have understood through" the consultations request[147], and in particular whether the language used in the consultations request

[129] Appellate Body Report, *Brazil – Aircraft*, para. 131.
[130] Appellate Body Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293; and *US – Upland Cotton*, para. 284.
[131] Appellate Body Report, *Argentina – Import Measures,* para. 5.12.
[132] Appellate Body Report, *Argentina – Import Measures*, para. 5.12.
[133] Appellate Body Report, *Argentina – Import Measures*, para. 5.11.
[134] Appellate Body Report, *India – Patents (US)*, para. 94.
[135] Appellate Body Report, *Brazil – Aircraft*, para. 131; and Panel Report, *EU – Footwear (China)*, para. 7.55.
[136] Appellate Body Report, *US –Upland Cotton*, para. 293; and Panel Report, *Russia – Tariff Treatment*, para. 4.9.
[137] Appellate Body Reports, *Argentina – Import Measures*, para. 5.13; and *Brazil – Aircraft*, para. 132;
[138] Appellate Body Report, *Argentina – Import Measures*, para. 5.9.
[139] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 288.
[140] Appellate Body Reports, *Argentina – Import Measures*, para. 5.10; and *Mexico – Anti-dumping Measures on Rice*, para. 138.
[141] Appellate Body Report, *US – Upland Cotton*, para. 293.
[142] Appellate Body Report, *Argentina – Import Measures*, para. 5.12.
[143] Appellate Body Report, *US – Upland Cotton*, para. 293.
[144] Appellate Body Report, *Argentina – Import Measures*, para. 5.13.
[145] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.
[146] Appellate Body Report, *Argentina – Import Measures*, para. 5.13.
[147] Panel Report, *US – Orange Juice (Brazil)*, para. 7.25.

was "sufficient to alert" the responding party that the additional measures identified in the panel request were part of the initial complaint.[148]

4.4.3 Whether the Solar Thermal and Solar PV rebates are identified in India's consultations request

4.17. Turning to the case before us, we note, as an initial matter, that in determining the scope of a request for consultations, what matters is the written consultations request, and not what was or may have been discussed in the consultations.[149] We agree with the United States that it is not relevant to our inquiry that during the course of the consultations India may have posed questions to the United States regarding the two programs at issue.[150] Rather, what we need to assess is whether the two programs fall within the scope of India's *written* consultations request, as contained in the relevant document submitted by India to the DSB.[151]

4.18. Turning, then, to the relevant documents, we note that there are clear differences between the relevant sections of India's consultations and panel requests. Most importantly for present purposes, India's panel request specifically identifies three programs and their underlying legal bases: the SEPI (established by Section 216C.411-216C.415 of the Minnesota Statutes), the Solar Thermal rebate (established by section 216C.416 of the Minnesota Statutes), and the Solar PV rebate (established by section 116C.7791 of the Minnesota Statutes). However, as the United States has observed, the consultations request only explicitly identifies the SEPI by name, and only refers specifically to section 216C.414 of the Minnesota Statutes.

4.19. As we have explained, the United States' view is that because it refers to programs "administered pursuant to the criteria" in section 216C.414 of the Minnesota Statutes (pursuant to which the SEPI program is administered), India's consultations request must be read as excluding from the scope of the dispute any and all programs other than the SEPI program. Noting that the Solar Thermal and Solar PV rebates are contained in sections of the Minnesota Statutes not specifically referenced in the consultations request and administered according to criteria different from those by which the SEPI program is administered, the United States contends that the two programs fall outside our terms of reference.[152]

4.20. We see some force in the United States' argument. The specific identification in the consultations request of section 216C.414 of the Minnesota Statutes could be interpreted as comprehensively delimiting the scope of India's concerns, and implying that India's complaint does not extend to programs established and administered under other sections of the Minnesota Statutes. Indeed, given India's decision to specifically identify section 216C.414 in its consultations request, a reader could well consider that, had India intended to include other sections of the Minnesota Statutes within the scope of its complaint, it would have specifically identified those as well.

4.21. Having said that, we also consider that the reference to section 216C.414 must not be read in isolation from the rest of the consultations request in which it appears.[153] Importantly, and as the United States itself recognizes[154], the reference to "programs administered according to the criteri[a] established under section 216C.414" is followed by two paragraphs that expand and elaborate upon it, and which, in our view, provide vital context to a proper appreciation of the import of the reference to section 216C.414. These paragraphs provide as follows:

> MSIP offers incentives to consumers who install PV and solar thermal systems using solar modules and collectors that are certified to be "manufactured in Minnesota". The program is only available to customers of one of the Minnesota's three participating investor-owned utilities (Minnesota Power, Otter Tail Power Company, Xcel Energy).

[148] Panel Report, *Russia – Tariff Treatment*, para. 4.15.
[149] Appellate Body Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 291 and 294; *US – Upland Cotton,* para. 287; and Panel Report, *United States – Orange Juice (Brazil)*, para. 7.17.
[150] United States' comments on India's response to the United States' request for a preliminary ruling, para. 19.
[151] India's consultations request, WT/DS510/1.
[152] United States' first written submission, paras. 72 and 73.
[153] Appellate Body Report, *Argentina – Import Measures*, para. 5.14. See also, e.g. Panel Report, *Russia – Railway Equipment*, para. 7.124.
[154] United States' first written submission, para. 69.

> The rebate is equal to 25 percent of the system-installed cost up to a maximum of $2,500 for residential, $5,000 for multi-family and $25,000 for commercial systems.
>
> There are three incentive levels depending on the ownership and system size. In addition, amounts vary by the module manufacturer. The three levels are For-Profit Commercial, Non-Profit/Public/Tax Exempt, and Residential. Incentives for Made in Minnesota solar PV are performance-based, established by a system's energy production, and paid over 10 years.[155]

4.22. We will examine the import of this text in the context of the each of the specific programs in question.

4.4.3.1 Solar Thermal rebate

4.23. We turn first to the Solar Thermal rebate. As the United States observes, the SEPI program administered under section 216C.414 of the Minnesota Statutes and specifically identified in the consultations request does *not* concern solar thermal systems, but only solar PV modules. We note, however, that the two paragraphs from India's consultations request quoted above refer to "incentives" available to "consumers who install PV and *solar thermal systems*".[156] The paragraphs then describe the way in which the incentives subject to the complaint are paid out. The description, however, appears, at least in part, to be of the way in which incentives under the Solar Thermal rebate, and not the SEPI program, are paid out. In particular, the first of the two paragraphs quoted above reflects almost exactly the method of payment under the Solar Thermal rebate program.[157]

4.24. We accept that it is somewhat unclear why the specific reference in India's consultations request to section 216C.414 is followed by text that refers, *inter alia*, to solar thermal incentives, which, as noted, are not dealt with in that section. Ultimately, however, the question we need to answer is whether the more specific and accurate identification of the Solar Thermal rebate in the panel request expanded the scope or changed the essence of the dispute from the consultations request, or whether it represents a reasonable evolution from the consultations request.[158]

4.25. As noted, in answering this question it may be appropriate to consider what the respondent could reasonably have understood from the language actually used in the consultations request.[159] In our view, the references to solar thermal incentives in the consultations request, although associated with the incorrect legislative instrument, would have "alerted" the United States to the fact that this program was part of the object of India's complaint. Indeed, there would have been no reason for India to include references to solar thermal incentives in the text of its consultations request, and those references would not have had any meaningful purpose, unless India had intended to bring the Solar Thermal rebate within the scope of this dispute. To find otherwise would be to effectively read these references out of India's consultations request. Such an approach would not, in our view, be consistent with the principle of interpreting consultations requests holistically. The paragraphs, then, indicate that India was challenging the Solar Thermal rebate as well as the SEPI, even though it appears to have insufficiently distinguished the two programs from one another.

4.26. We do not consider it implausible that a complaining Member, at the time of submitting a consultations request, might be under some confusion about the precise identity of, and relationship between, specific legal provisions and the programs they established. In this connection, we recall the Appellate Body's guidance that one of the purposes of consultations is precisely to enable the disputing parties to "exchange information" and clarify the scope of the dispute, including the measures at issue, prior to initiating panel proceedings.[160] It has also recognized that "a complaining party may learn of additional information during consultations".[161] Thus, consultations, which are "but the first step" in the dispute settlement process[162], may enable that Member to clarify its

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[155] India's consultations request, WT/DS/510/1.
[156] Emphasis added.
[157] India's consultations request, WT/DS510/1, p. 4. See India's first written submission, paras. 968-969 and Section 216C.416, subdivision 3, of the Minnesota Statutes (Exhibit IND-110).
[158] Appellate Body Report, *Argentina – Import Measures*, para. 5.13.
[159] Panel Report, *Russia – Tariff Treatment*, para. 4.15.
[160] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.
[161] Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*, para. 138.
[162] Appellate Body Report, *US –Upland Cotton*, para. 293.

understanding and gain a sharper appreciation of the identity and operation of, and the relationship between, the measures about which it is complaining.

4.27. We also recall the Appellate Body's statement that, because Article 4.4 requires Members to identify the "measures" at issue, whereas Article 6.2 requires identification of the "*specific* measures at issue"[163], complainants are not required to identify the "specific" measures at issue in their consultations request; identification of the measures at issue "to some degree that is less than specific" will suffice at this early stage of dispute settlement proceedings.[164]

4.28. In light of the above, we are of the view that the specific identification in India's panel request of the Solar Thermal rebate and the legal instrument underpinning it (i.e. section 216C.416 of the Minnesota Statutes) neither expanded the scope nor changed the essence of the dispute. The program was already within the scope of the dispute by virtue of both the references in the consultations request to incentives for solar thermal systems and the description in that document of the way in which the incentives are paid out. While these did not specifically identify the Solar Thermal rebate, they were sufficient to establish the scope of the dispute as containing that program, and to alert the United States to the fact that India intended to challenge the Solar Thermal rebate. Accordingly, the increased specificity of in the panel request represents a reasonable "evolution" from a more general to a more detailed and accurate description of this program.

4.4.3.2 Solar PV rebate

4.29. We now turn to the Solar PV rebate. The two paragraphs from India's consultations request reproduced above refer to incentives for "solar PV … modules". As we have explained, the SEPI program, which is administered pursuant to section 216C.414 of the Minnesota Statutes and which is explicitly identified in the consultations request, itself concerns Solar PV modules. It might therefore be reasonable to read the reference to Solar PV modules in India's consultations request as referring to the SEPI program itself, rather than to another, unidentified incentive program concerning Solar PV modules.

4.30. At the same time, we note that the SEPI program and the Solar PV rebate are very close in their scope and effect. Like the SEPI program, the Solar PV rebate offers incentives to consumers who install Solar PV modules that are manufactured in Minnesota. This similarity and potential overlap seems to be recognized in the instrument establishing the SEPI program itself, which provides that consumers who receive the SEPI are ineligible to receive the Solar PV rebate in addition. This suggests to us that the two programs are basically intended to work together, as two complementary alternatives operating in the same field.[165] As we see it, then, the Solar PV rebate is closely "connected" to the SEPI program.[166]

4.31. We recall the Appellate Body's confirmation that a "complaining party may learn of additional information during consultations – for example, a better understanding of the operation of a challenged measure".[167] On occasion, a Member may learn through the consultations process that the alleged nullification or impairment about which it is concerned is caused or contributed to by measures about which it was not previously aware, or about whose relationship with measures identified in the consultations request it did not fully or accurately understand. In such circumstances it may be that the identification of such additional measures in the panel request will not expand the scope or change the essence of the dispute, but rather represent an "evolution" and further definition and delimitation of it. Of course, whether that is so can only be determined on a case-by-case basis.[168]

4.32. In the present case, the Solar PV rebate is similar in type and substance to the SEPI, and is closely connected to it. In our view, it can be said to fall within the subject-matter of the dispute as delimited in India's consultations request, and in particular within the scope of the phrase "incentives to consumers who install PV … systems", even if it was not specifically identified in that document

[163] Emphasis added.
[164] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 288.
[165] India's first written submission, para. 977 (citing section 216C.415, subdivision 6 (Exhibit IND-66)).
[166] Panel Report, *China – Broiler Products*, para. 7.224.
[167] Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*, para. 138.
[168] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.

as a program separate from, although operating alongside, the SEPI program. Therefore, in our view, its inclusion in India's panel request did not expand the scope of the dispute.

4.33. We further note that India's claims in respect of the Solar PV rebate are identical to its claims about the SEPI. This further suggests to us that India's identification of the former in its panel request has not changed the "essence" of the dispute but simply identified an additional, closely related program that is alleged to be contributing to the claimed WTO violations about which India signalled its concern in the consultations request.

4.34. Accordingly, we consider that the inclusion of the Solar PV rebate in India's panel request did not expand the scope or change the essence of the dispute. Rather, such inclusion represents a reasonable evolution from the consultations request, identifying and defining the specific programs at issue in more detail as required by Article 6.2 of the DSU.

4.4.4 The "general framework" of India's consultations request

4.35. As noted, in addition to its specific arguments concerning the part of the consultations request dealing with the Solar Thermal and Solar PV rebates, India also submits that the "general framework" of its consultations request contains language indicating "that India may raise additional factual and legal claims in the interim period between the request for consultations and the request for establishment of panel"[169], and that therefore the inclusion of the Solar Thermal and Solar PV rebates in its panel request neither expanded the scope nor changed the essence of the dispute.[170]

4.36. We have some doubt about whether general language in a consultations request indicating that a Member may include additional measures in its panel request will always or necessarily preclude a panel from finding that inclusion of additional measures in the panel request has expanded the scope or changed the essence of the dispute. Ultimately, the significance and import of such general language will need to be assessed on a case-by-case basis, taking into account all the relevant circumstances.[171] In this case, we need not explore this issue further. We have already concluded, on the basis of the specific part of the consultations request concerning the Solar Thermal and Solar PV rebates, that the inclusion of those programs in India's panel request neither expanded the scope or changed the essence of the dispute, and thus represented a reasonable evolution from the consultations request.

4.4.5 Conclusion on the Solar Thermal and Solar PV rebates

4.37. For the above reasons, we conclude that the inclusion of the Solar Thermal and Solar PV rebates in India's panel request neither expands the scope nor changes the essence of the dispute, and accordingly represents a reasonable evolution from India's consultations request. We therefore conclude that both programs are within our terms of reference, and we reject the United States' preliminary ruling requests concerning these two programs.

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[169] India's response to the United States' request for a preliminary ruling, para. 35.
[170] India's response to the United States' request for a preliminary ruling, para. 36.
[171] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.

ANNEX E
INTERIM REVIEW

ANNEX E-1
INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion and disposition of the arguments made at the interim review stage. The Panel has modified certain aspects of its Interim Report in the light of the parties' comments where the Panel considered it appropriate, as explained below. In addition, the Panel has made a number of changes of an editorial nature to improve the clarity and accuracy of the Report, or to correct typographical and other non-substantive errors, including but not limited to those identified by the parties.

1.2. As a result of these changes, in particular the deletion from the Final Report of paragraph 7.366 and footnote 747 thereto of the Interim Report, the numbering of subsequent footnotes and paragraphs in the Interim Report has been reduced by one in the Final Report. Otherwise, the paragraph and footnote numbering in the Interim and Final Reports is identical.

2 INDIA'S REQUEST CONCERNING PARAGRAPH 7.7 AND FOOTNOTE 187

2.1. India argues that, at paragraph 7.7 of the Interim Report, the Panel incorrectly states that India's arguments concerning a panel's jurisdiction over measures amended after panel establishment cite only one panel report. In India's view, this is "not correct", because "in response to [Panel] question No. 102, India has cited numerous panel and Appellate Body reports, on each point, with respect to treatment of measures that have been amended or terminated after the establishment of a panel".[1] India thus requests that the Panel "review and suitably amend" the paragraph in question.[2]

2.2. The United States did not comment on this request.

2.3. In Panel question No. 102, we asked India to clarify the nature of the findings and recommendations it was seeking on measures that were amended or terminated following panel establishment, and to explain the legal basis for such findings and recommendations. India explained the legal basis on which panels may make findings and recommendations on measures amended following panel establishment in subparagraph 1(ii) of its response, as follows:

> Amendments or revisions to the original measures challenged by a complainant in its panel request are also within the terms of reference of a panel if: (a) the terms of reference are broad enough to include amendments/ revisions; (ii) the new measure does not "change the essence" of the original measures included in the panel request; and (c) the inclusion of amendments within the panel's terms of reference is necessary to secure a positive solution to the dispute[3].

[3] Panel Report, *EC – IT Products*, para. 7.139.

2.4. That paragraph is supported by reference to the panel report in a single dispute, namely *EC - IT Products.*

2.5. It is true that, more generally in its response to question No. 102 (which, as noted, was broadly phrased and concerned more than just the circumstances in which panels have jurisdiction over amended measures) India also referred to other panel and Appellate Body reports. Such references were made, however, in the context of arguments concerning different aspects of India's requests for findings and recommendations, and not on the specific issue of the circumstances in which amendments to a measure made after panel establishment will fall within a panel's terms of reference.[3]

[1] India's request for review of the Interim Report, para. 4.
[2] India's request for review of the Interim Report, para. 4.
[3] Thus, with reference to the reports mentioned by India in its request for review, India referenced the Appellate Body's report in *EC – Chicken Cuts* to support its argument that "[a] challenged measure that is in existence at the time of the establishment of a panel is properly within the terms of the reference of the panel" (India's response to Panel question No. 102, para. 1(i)). India referred to the Appellate Body Report in *Chile –*

2.6. Paragraph 7.7 of our Interim Report, however, deals with precisely the question of the circumstances in which panels have jurisdiction over amendments to measures made after panel establishment.[4] The first sentence of the paragraph makes this clear, in the following terms: "Neither party has engaged in detail with past cases that have dealt with *the issue of a panel's jurisdiction over measures amended after panel establishment*".[5] Following this sentence, the Panel makes the statement to which India objects. However, as our summary of India's response to Panel question No. 102 makes clear, that statement accurately reflects that, on the specific issue discussed in paragraph 7.7, India did indeed refer only to a single panel report. The fact that India referred to other reports in support of different arguments concerning the legal basis for its requests for findings and recommendations is not relevant to the paragraph in question. Neither does the statement to which India objects suggest that India did not reference other panel or Appellate Body reports in connection with other legal arguments.

2.7. We therefore do not think that the statement to which India objects is incorrect. Nevertheless, in an effort to address India's concern, we have added the word "specific" in the relevant sentence, to make even clearer that our statement relates only to India's argument concerning the circumstances in which amendments to a measure made after panel establishment will fall within a panel's terms of reference, and not to other of India's arguments relating to other legal issues arising in relation to the Panel's treatment of amended and terminated measures. We have also amended the relevant footnote to clarify that we are referring to the relevant portion of India's response, i.e. paragraph 1(ii), and not to paragraph 1 of India's response in general.

3 INDIA'S REQUEST CONCERNING PARAGRAPHS 7.28-7.29

3.1. India requests that the Panel review its finding, in paragraphs 7.28 and 7.29 of the Interim Report, that the "made in Washington" bonus is not an amendment to the Washington State additional incentive, but rather a distinct measure falling outside the Panel's terms of reference.[6] India "considers that the reasoning adopted by the Panel … is not correct".[7] In particular, India argues that the test applied by the Panel in this connection is different from the test applied in respect of other amended measures. In India's view, the reasons given by the Panel as to why the "made in Washington" bonus was a distinct measure "cannot be the guiding factors to decide whether a measure is included within the terms of reference".[8] Rather, in India's view, the Panel should have applied the three-pronged test it applied to determine whether other amended measures were within the terms of reference.[9] India also notes that the "made in Washington" bonus is similar to the Washington State additional incentive in a number of ways, including in its "design and structure", and argues that it is therefore a "mere extension[] of the original".[10]

3.2. Additionally, India argues: (i) that the fact that the "made in Washington" bonus entered into force at a different time than the Washington State additional incentive is "given", and all amendments enter into force after the measure that they amend[11]; (ii) that the Panel's reasoning may frustrate the purposes of dispute settlement to the extent it suggests that a Member could "easily amend the measure to adopt a similar measure" and thus create a "moving target" situation[12]; and (iii) that the Panel's reasoning in this connection is contrary to its analysis with

Price Band System in support of its submission that "[w]here the amendments/revisions to the original measure have been found to be within the terms of reference, a panel has jurisdiction to issue findings and recommendations on the as amended measure" (India's response to Panel question No. 102, para. 1(v)). Finally, India referred to the panel report in *China – Raw Materials* to support its arguments about when a panel may make recommendations on a terminated measure or a measure that is "revised or implemented through" a series of measures (India's response to Panel question No. 102, paras. 1(iv) and 1(vi)).

[4] We note, in this connection, that the issue of when such amendments fall within a panel's terms of reference, and the issue of what findings and recommendations a panel may make on such measures if and when they are found to fall within its terms of reference, are distinct – a point we made clearly in our Interim Report. See Interim Report, paras. 7.4 and 7.17.

[5] Interim Report, para. 7.7 (emphasis added).

[6] India's request for review of the Interim Report, para. 5.

[7] India's request for review of the Interim Report, para. 6.

[8] India's request for review of the Interim Report, para. 8.

[9] India's request for review of the Interim Report, para. 8.

[10] India's request for review of the Interim Report, para. 8.

[11] India's request for review of the Interim Report, para. 10.

[12] India's request for review of the Interim Report, para. 10.

respect to the SGIP Handbooks, where the Panel decided to examine both the 2016 and the 2017 SGIP Handbooks despite differences between the two instruments in scope and coverage.[13]

3.3. The United States requests us to reject India's request. According to the United States, "India has provided no rationale why this finding [i.e. in the impugned paragraphs] should be altered".[14] The United States provides three reasons why we should reject India's request. First, the United States argues that the "made in Washington" bonus is not within the Panel's terms of reference because it was enacted after the date the Panel was established.[15] Second, the United States submits that India's assertion that the Panel was required to apply "a certain 'three-pronged test'" in its assessment of whether the "made in Washington" bonus fell within its terms of reference is misplaced, because the reports on which India relies in this regard were not based on the text of the DSU, and India has not identified any text in the DSU that would support the use of such a test.[16] Finally, the United States argues that India's concern that the "made in Washington" bonus will remain "perpetually exempt from DSB findings unless the Panel renders findings on the measure" is "unfounded", because "[t]he Member subject to a recommendation is not somehow exempt from the compliance provisions of the DSU simply because the Member replaces or amends the measure subject to DSB recommendations".[17]

3.4. In our view, India's request seems to misunderstand important aspects of our reasoning. Importantly, India suggests that we applied a different test in the impugned paragraphs than we did in respect of other amended measures, and that this was an error. In fact, the "three-pronged test" referred to by India – and which we applied in respect of other amended measures[18] – is a test to determine whether an amendment made after panel establishment falls within a panel's terms of reference. As the impugned paragraphs indicate, however, we did not agree with India that the "made in Washington" program actually was an amendment. There was therefore no reason for us to apply the three-pronged test to determine whether it fell within our terms of reference. In other words, the three-pronged test may be useful where a post-establishment amendment to a measure has been identified, and the question is whether that amendment is within a panel's terms of reference. However, where, as here, a claimed amendment is in fact found to be a separate and distinct measure, application of the three-pronged test would not be appropriate.

3.5. We have explained already in our Interim Report why we considered the "made in Washington" bonus to be a separate measure, and not a "mere extension" of the Washington State additional incentive. We do not need to rehearse those reasons in detail here. Nevertheless, we make the following observations to further explain why we consider that India's interim review arguments in this connection do not speak to the distinction we draw in our report between amendments to a measure on the one hand and separate and distinct measures on the other hand.

3.6. First, contrary to India's suggestion[19], we do not consider that the fact that two measures have similarities, in terms of their design and structure, in itself necessarily means that they are the same measure for purposes of WTO dispute settlement. Conversely, in our view, the fact that two instruments have different product coverage does not exclude the possibility that one instrument is an amendment to the other. As we see it, the relationship between two instruments can only be determined on a case-by-case basis, by taking all relevant facts and circumstances into account.[20] Our conclusions in the paragraphs challenged by India are a result of such a holistic analysis.

[13] India's request for review of the Interim Report, para. 11.
[14] United States' comments on India's request for review of the Interim Report, para. 2.
[15] United States' comments on India's request for review of the Interim Report, paras. 3 - 4.
[16] United States' comments on India's request for review of the Interim Report, para. 6.
[17] United States' comments on India's request for review of the Interim Report, para. 7.
[18] We explained why we considered it appropriate to rely on this test in paragragraphs 7.8 – 7.16 of our Interim Report.
[19] India's request for review the Interim Report, para. 8.
[20] In this connection, we note the Appellate Body's guidance, in the context of Article 21.5 of the DSU, that determining the relationship between two instruments must be assessed on a case-by-case basis, involving "an examination of the timing, nature, and effects of the various measures", as well as an analysis of the existence of "close links" between the two instruments and the relevant factual and legal background. Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77. Although we are not faced in this case with a question about the relationship between instruments under Article 21.5 of the DSU, we consider that the Appellate Body's approach is analogous to the issue addressed in the paragraphs impugned by India.

3.7. Second, we disagree with India that our reasoning in the impugned paragraphs would enable responding Members to create a "moving target situation". The phrase "moving target" generally refers to a situation where a responding Member continuously modifies or repeals and re-enacts a challenged measure, perhaps in order to avoid panel or Appellate Body scrutiny. In this case, however, the question was whether a new bonus was an amendment to an incentive identified in India's panel request (which remained in force concurrently with the new bonus), or whether it was a separate measure. That is clearly a different question, and one that, in our view, does not implicate the issue of moving targets.

3.8. For these reasons, we decline India's request to review our findings in paragraphs 7.28 and 7.29 of our Interim Report.

4 INDIA'S REQUEST CONCERNING PARAGRAPHS 7.72 AND 7.77

4.1. India requests that the Panel "review its observations" in paragraphs 7.72, 7.76, and 7.77 of its Interim Report.[21] India indicates that it "does not agree with the Panel's reasoning and conclusion" in those paragraphs.[22] According to India, in paragraph 7.72 of the Interim Report, the Panel states that "Article 10, Section 28(a) of the Senate [Bill] No. 1456 does not address the issue of timing of any final payment, in particular in respect of applications approved prior to the effective date of [the] repeal legislation". India submits that "[o]n this basis, the Panel concludes that India has not demonstrated a *prima facie* case that the Minnesota solar thermal rebate has ongoing effects".[23] It argues, however, that it *did* show how the Senate File addresses the timing of final payments. Moreover, in India's view, "[u]nless the United States dislodges this understanding with evidence, India has indeed *prima facie* demonstrated the ongoing effects of the Minnesota solar thermal rebate". Because the Panel was not convinced by the evidence submitted by the United States on this point, "the United States has failed to dislodge the *prima facie* demonstration by India".[24]

4.2. The United States did not comment on this request.

4.3. In our view, India's request stems from a misreading of our reasoning in the relevant paragraphs. Paragraphs 7.71 and 7.72 of the Interim Report address Senate Bill No. 1456, which India submitted as evidence that the Minnesota solar thermal rebate has ongoing effects. We closely examined the provisions of that instrument relied on by India, but found that, contrary to India's submission, they did not "clearly answer the question whether rebate payments may continue following the repeal of the Minnesota solar thermal rebate, in particular with respect to previously approved recipients".[25]

4.4. Following our review of Senate Bill No. 1456, we proceeded to assess whether the 2017 Guide for Applicants submitted by the United States threw additional light on India's claim that the Minnesota solar thermal rebate has ongoing effects. We concluded that it did not.[26]

4.5. Finally, we recalled that, as India requested us to make findings and recommendations on the Minnesota thermal rebate, it was India's burden to show *prima facie* that that measure had ongoing effects despite its formal repeal. We concluded that, in light of the limited argumentation and evidence before us, it had failed to do so.[27]

4.6. As this summary indicates, and as the relevant paragraphs of our Interim Report make clear, we found that the text of Senate Bill No. 1456 submitted by India was insufficient to establish a *prima facie* case that the measure at issue had ongoing effects. The fact that the 2017 Guide for Applicants submitted by the United States did not shed further light on this issue does not change this. The fact that the United States' arguments were not, in our view, convincing, does not mean that we were required to accept India's submissions on this issue, or to find that India has made a *prima facie* case. As the party claiming that the measure had ongoing effects, it was India's burden,

[21] India's request for review of the Interim Report, para. 16.
[22] India's request for review of the Interim Report, para. 14.
[23] India's request for review of the Interim Report, para. 13.
[24] India's request for review of the Interim Report, para. 14.
[25] Interim Report, para. 7.72.
[26] Interim Report, paras. 7.73 - 7.75.
[27] Interim Report, para. 7.76.

and not the United States', to make a *prima facie* case in this regard, and we concluded, based on the limited evidence and arguments before us, that India had failed to do so.

4.7. India is therefore incorrect to suggest that, because we did not accept the United States' submission on this point, "the United States … failed to dislodge the *prima facie* demonstration by India". We found that India had *not* made a *prima facie* case in this regard in the first instance; there was therefore no *prima facie* that the United States was required to dislodge.

4.8. For these reasons, we decline India's request to review our findings in paragraphs 7.72 and 7.77 of our Interim Report.

5 INDIA'S REQUEST CONCERNING PARAGRAPH 7.265

5.1. India has drawn to our attention a typo in the title of a panel report referenced in paragraph 7.265 of the Interim Report, and requested that we correct this.

5.2. The United States did not comment on this request.

5.3. We have made the correction requested by India.

6 INDIA'S REQUEST CONCERNING PARAGRAPHS 7.271-7.272

6.1. India requests that the Panel review its conclusions, in paragraphs 7.271 and 7.272 of the Interim Report, that India did not establish a *prima facie* case that the Montana tax incentive (Measure 8) modified the conditions of competition in respect of the final product (i.e. ethanol) as well as the wood and wood-based products used to distil ethanol.[28] India notes that the Panel accepted that domestic and imported ethanol were "like products" within the meaning of Article III:4 of the GATT 1994, and also recalls that the Panel accepted earlier in its report that a finding of less favourable treatment need not be based on actual market effects. India argues that, having so found, "there is no reason [for the Panel] to apply a different test or principle for assessing less favourable treatment with respect to the final product".[29] Moreover, India submits that it "is not required to show any additional evidence of flow through of incentives to the final product".[30] India states that, for these reasons, it "does not agree with the Panel's observations" on this issue in paragraphs 7.271 and 7.272.[31]

6.2. The United States did not comment on this request.

6.3. India's request for review suggests that the Panel applied a different test in assessing whether imported ethanol is accorded treatment less favourable than ethanol produced from Montana-origin ingredients. In particular, India suggests that we required it to show "evidence of flow through of incentives to the final product". Neither of these two assertions accurately describes our findings.

6.4. In paragraph 7.270 of the Interim Report, we accept India's argument that the measure at issue accords treatment less favourable to imported wood and wood-based products used to distil ethanol than to the like Montana-origin products. Then, in paragraph 7.271, we find that India had not shown that the measure additionally accords treatment less favourable to imported than to locally-produced ethanol. As paragraph 7.271 makes clear, this finding is based on the fact that, in contrast with its sufficiently detailed argumentation explaining how the measure accorded treatment less favourable to imported than to local wood and wood-based products, India's argumentation on ethanol failed to explain *how* the measure accorded less favourable treatment to imported than to domestic *ethanol,* and in particular why a measure that modifies the conditions of competition in respect of wood and wood-based products would necessarily modify the conditions of competition in respect of a distinct product (i.e. ethanol) made from those wood and wood-based products. As the paragraph notes, India "simply asserted" that the measure would have such effect. We explained

[28] India's request for review of the Interim Report, paras. 18 and 19.
[29] India's request for review of the Interim Report, para. 19.
[30] India's request for review of the Interim Report, para. 19.
[31] India's request for review of the Interim Report, para. 19.

that in our view, mere assertion "without more detailed explanation" was not sufficient to establish a *prima facie* case of less favourable treatment.[32]

6.5. It is true that, in paragraph 7.271, we observed that "[s]uch flow-through must, however, at least be argued by the complaining party". This was not, however, a suggestion that India was required to show the existence of actual flow-through. Rather, the point, which is emphasized again later in the paragraph, is that India, as the complainant, was required at least to explain how, because Measure 8 accorded treatment less favourable to imported than to domestic ingredients, it also, by virtue of its design and structure, accorded treatment less favourable to the imported than to the domestic final product (ethanol). India did not do so. While our report does not discount the *possibility* that a measure affecting the conditions of competition of ingredients of a product may also affect the conditions of competition of the final product, we concluded that India, by merely asserting the existence of such an effect, had not adduced sufficiently detailed arguments to establish a *prima facie* case. That finding stems from our application of the ordinary rules concerning burden of proof, as well as our duty under Article 11 of the DSU to make an objective assessment of the matter. It does not stem, as India suggests, from the application of a legal test that is different to the test applied earlier in the analysis in respect of wood and wood-based products (and indeed throughout our assessment of less favourable treatment).

6.6. Our conclusion is therefore not based on our applying a different legal test, nor did we require India to submit evidence of actual flow-through. Rather, we applied the same test we applied throughout our analysis as regards less favourable treatment, but found in this specific instance that India failed to satisfy its burden of proof by submitting sufficient argumentation to make a *prima facie* case that Measure 8 accords less favourable treatment to imported than to domestic ethanol.

6.7. Finally, we observe that, in our view, India's submission that we had already found domestic and imported ethanol to be like is, while true, not germane. As we explain in the Interim Report[33], a violation of Article III:4 exists where three elements are satisfied. One of these elements is that the products in question are like. Another is that the measure accords treatment less favourable to imported than to like domestic products. These elements are of course interrelated, but each needs to be satisfied separately, on its own terms with sufficient argumentation. Thus, the mere fact that products are like does not in itself automatically lead to the conclusion that a given measure accords treatment less favourable. That is a separate element involving different considerations, and it must be sufficiently established. To the extent that India's request for review suggests that our finding that domestic and imported ethanol are like products itself furnished a basis for finding that the measure accords treatment less favourable to imported than to domestic products, we disagree. India as the complainant bore the burden of making a *prima facie* case in respect of all the elements of Article III:4. In our view, however, as indicated in the impugned paragraph, India did not do so with respect to its claim that Measure 8 accorded treatment less favourable to imported than to domestic ethanol.

6.8. For these reasons, we decline India's request to review our findings in paragraphs 7.271 and 7.272 of our Interim Report.

7 INDIA'S REQUEST CONCERNING PARAGRAPHS 7.361-7.369

7.1. India "disagrees with the Panel's analysis" in paragraphs 7.361-7.369 of the Interim Report, and calls into question the specific reasons set out in those paragraphs for exercising judicial economy on India's claims under Articles 3.1(b) and 3.2 of the SCM Agreement.[34]

7.2. The United States responds that India's request for review of the Panel's exercise of judicial economy with respect to India's prohibited subsidy claims lacks any merit.[35]

7.3. More specifically, India argues that the Panel was not obligated to rule on India's claims under the SCM Agreement only if India's other claims under other agreements raise issues of subsidies, as the Panel seems to suggest in paragraph 7.362 and 7.363 of the Interim Report. According to India, the fact that the claims in the *EC – Export Subsidies on Sugar* dispute pertained to Articles 3.3 and

[32] Interim Report, para. 7.271.
[33] Interim Report, para. 7.85.
[34] India's request for review of the Interim Report, paras. 20-22.
[35] United States' comments on India's request for review of the Interim Report, para. 8.

8 of the Agreement on Agriculture and Article 3 of the SCM Agreement (all dealing with subsidies) is inconsequential. The only criterion relevant for exercising judicial economy is whether a finding and recommendation with respect to one claim, and abstention from issuing findings and recommendations with respect to certain other claims, would "fully resolve" the dispute.[36]

7.4. India adds that the Panel's observation in paragraph 7.365 that "India's claims under Article III:4 of the GATT 1994 and Articles 2.1 and 2.2 of the TRIMS Agreement do not relate to subsidies" is "incorrect".[37]

7.5. According to India, while it specifically requested the Panel to issue findings and recommendations on each of its claims, "the Panel never posed any question to India as to why should it not apply judicial economy with respect claims under the SCM Agreement if it were to find the measures to be inconsistent with the provisions of Article III:4 of the GATT 1994." Therefore, for the Panel to state that India, at no point, referred to Article 4.7 or the special remedies therein is "unreasonable". India adds that the provisions of Article 4.7 of the SCM Agreement are mandatory in nature. Once a panel has found that a challenged measure is a prohibited subsidy, it shall make an additional recommendation as described in Article 4.7 of the SCM Agreement.[38]

7.6. The United States responds that India does not cite any provision of the DSU, nor does such a provision exist, that would support India's contention that the Panel was required to make findings on each and every claim in India's request for panel establishment.[39] Referring to Articles 3.7 and 11 of the DSU, the United States argues that the text of the DSU supports the discretion of a panel to exercise judicial economy[40] and nothing in the text of these provisions indicates that a panel is required to examine or make findings on each and every claim made by a complaining party.[41]

7.7. The United States adds that India's suggestion that the Panel was "under an obligation" to render findings on India's prohibited subsidy claims due to the "special remedies" available under Article 4.7 of the SCM Agreement is unfounded. According to the United States, Article 4.7 simply provides for a certain recommendation in the event the Panel has found the existence of a prohibited subsidy. The United States contends that, contrary to India's position, nothing in Article 4.7 requires a panel to make a finding on every prohibited subsidy claim set out in a request for panel establishment, thus Article 4.7 does not preclude a panel from exercising judicial economy.[42] The United States adds that, indeed, in prior disputes, the Appellate Body has upheld a panel's decision to decline to make findings on prohibited subsidy claims for reasons of judicial economy.[43]

7.8. We begin by recalling our statement, in paragraph 7.345 of the Interim Report, that, according to the Appellate Body, "[j]udicial economy refers to the discretion of a panel to address only those claims that must be addressed 'in order to resolve the matter in issue in the dispute'", and "th[is] discretion of a panel … is consistent with the aim of the WTO dispute settlement mechanism, as articulated in Article 3.7 of the DSU, to 'secure a positive solution to a dispute'".[44] We therefore agree with India that the effective resolution of the dispute is the key consideration for a panel's assessment whether to exercise judicial economy.

7.9. That said, we do not agree with India that we were somehow supposed to address a question to India seeking specific reasons for not exercising judicial economy. In our view, even in the absence of a specific question, India could be reasonably expected to have understood that the Panel might decide to exercise judicial economy on some of India's claims. This is so not only because of panels'

[36] India's request for review of the Interim Report, para. 23.
[37] India's request for review of the Interim Report, para. 24.
[38] India's request for review of the Interim Report, para. 25
[39] United States' comments on India's request for review of the Interim Report, para. 8.
[40] United States' comments on India's request for review of the Interim Report, para. 9.
[41] United States' comments on India's request for review of the Interim Report, para. 10.
[42] United States' comments on India's request for review of the Interim Report, para. 11.
[43] United States' comments on India's request for review of the Interim Report, para. 12.
[44] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.20 (footnotes omitted, referring to Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 19; *India – Patents (US)*, para. 87; *Brazil – Retreaded Tyres*, para. 257; *Canada – Wheat Exports and Grain Imports*, para. 133; *US - Lead and Bismuth II*, paras. 71 and 73; *Argentina – Footwear (EC)*, para. 145; *Australia – Salmon*, para. 223; and *Japan – Agricultural Products II*, para. 111).

discretion to exercise judicial economy in certain circumstances[45], but also in light of the numerous disputes in which panels actually chose to exercise judicial economy on claims similar to those raised by India before us.[46] We also note that, in the specific context of these proceedings, India has explicitly requested us to address all of its claims.[47] In our view, such a request presupposes and implies India's recognition that the Panel might not make findings on all of its claims, including by possibly exercising judicial economy. Also, India has had ample opportunity to provide any and all arguments for its specific requests, including any possible exercise of judicial economy. Indeed, the United States explicitly requested us to exercise judicial economy[48], and the parties exchanged arguments on this matter in the course of the dispute.[49]

7.10. Turning to India's requests in the context of the *EC – Export Subsidies on Sugar*, we note that our analysis in paragraphs 7.362-7.364 summarizes our reading of the Appellate Body report in that dispute. In particular, as introduced by paragraph 7.316, paragraphs 7.362-7.364 identify the reasons why we consider that the Appellate Body's analysis in *EC – Export Subsidies on Sugar* is not directly applicable to the present dispute, including the difference in the provisions at issue in *EC – Export Subsidies on Sugar* and the present dispute, and the fact that – unlike in *EC – Export Subsidies on Sugar* – we have not made any finding that a prohibited subsidy is involved.

7.11. Despite India's arguments, we stand by the relevance of those distinctions. We continue to consider that the Appellate Body's analysis in *EC – Export Subsidies on Sugar* should not be read as articulating a general principle excluding the exercise of judicial economy on claims under the SCM Agreement.[50]

7.12. Turning to Article 4.7 of the SCM Agreement, we agree with India this provision uses mandatory language, and that "once a panel has found that a challenged measure is a prohibited subsidy", it shall make an additional recommendation as described in Article 4.7 of the SCM Agreement. The latter is precisely our point in paragraphs 7.363-7.365 of the Interim Report. As explained in paragraph 7.365 of the Interim Report, our finding that the measures at issue violate Article III:4 of the GATT 1994 neither entails nor implies that the measures at issue are or are not subsidies. We see this as a key difference from *EC – Export Subsidies on Sugar*, which involved a finding of prohibited subsidy. To avoid any misunderstanding in this regard, and as requested by India, we have adjusted the penultimate sentence of paragraph 7.365 to avoid suggesting that India's claims under Article III:4 of the GATT 1994 and Articles 2.1 and 2.2 of the TRIMs Agreement "do not relate to subsidies" and to state instead that these provisions do not relate to subsidies.

7.13. As regards paragraph 7.366 of the Interim Report, India also argues that it did not need to refer specifically to Article 4.7 of the SCM Agreement in order to obtain a ruling on its claims under that Agreement. India adds that its request for consultations and request for establishment of a panel refers to Article 4 and Article 4.4 of the SCM Agreement respectively. India argues that, given that it had referred to Article 4 of the SCM Agreement in its request for the establishment of a panel, it was obviously referring to the special rules and additional procedures on dispute settlement under the SCM Agreement.[51]

7.14. In response, we recall that paragraph 7.366 of the Interim Report merely notes, as a matter of fact, that at no point before the interim review did India make any specific reference to Article 4.7 of the SCM Agreement or argue the relevance of the "special remedies" under that provision – not

[45] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.20 (footnotes omitted, referring to Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 19; *India – Patents (US)*, para. 87; *Brazil – Retreaded Tyres*, para. 257; *Canada – Wheat Exports and Grain Imports*, para. 133; *US - Lead and Bismuth II*, paras. 71 and 73; *Argentina – Footwear (EC)*, para. 145; *Australia – Salmon*, para. 223; and *Japan – Agricultural Products II*, para. 111).

[46] Interim Report, paras. 7.349-7.352 and 7.356-7.359.

[47] India's first written submission, paras. 1175-1178. See also India's oral comment in first substantive meeting, part of the official record (minute 15:19 of the meeting on 10 October 2018), and second written submission, para. 99 and footnote 76.

[48] United States' opening statement at the second meeting of the Panel, para. 5.

[49] India's first written submission, paras. 1175-1178. See also India's remarks at the first meeting of the Panel, part of the official record (minute 15:19 of the meeting on 10 October 2018), and second written submission, para. 99 and footnote 76; and United States' opening statement at the second meeting of the Panel, paras. 5 and 8.

[50] Interim Report, para. 7.364.

[51] India's request for review of the Interim Report, para. 25.

even in the context of its request that we address all its claims. That said, we agree with India that ultimately this omission is not determinative of the applicability of Article 4.7 of the SCM Agreement. Accordingly, we have deleted paragraph 7.366, noting that this does not alter our conclusion that, in our reading, the Appellate Body's report in *EC – Export Subsidies on Sugar* does not articulate a general principle that a panel may never exercise judicial economy on claims under the SCM Agreement.[52] More generally, we continue to disagree with any proposition that, absent a finding that a measure at issue involves prohibited subsidies, Article 4.7 would exclude the exercise of judicial economy altogether with regard to claims under the SCM Agreement. As we have explained, the central question is whether it is necessary to deal with all of a complainant's claims in order to secure a positive solution to the dispute.

7.15. India also argues that judicial economy with regard to its claims under the SCM Agreement "absolves the United States from its obligations to notify the challenged measures (which offer prohibited subsidies) to the Committee on Subsidies and Countervailing Measures under Article 25 of the SCM Agreement".[53]

7.16. The United States responds that this argument by India "is baseless", as the Panel's decision to exercise judicial economy with respect to India's prohibited subsidy claims does not operate to discharge the United States of any notification obligations with respect to the challenged measures.[54]

7.17. In response to India's argument, we reiterate that we have made no findings that the measures at issue are prohibited subsidies as we did not consider that necessary for resolving the dispute before us. As we have stated in paragraph 7.372 of the Interim Report[55], given that in our view it is not necessary to determine whether the measures at issue are prohibited subsidies in order to resolve this dispute, it follows *a fortiori* that it is also not necessary for us to assess whether those measures, if they were prohibited subsidies, would have needed to be notified as such under Article 25 of the SCM Agreement. We also agree with the United States' observation[56] that our decision to exercise judicial economy with respect to India's prohibited subsidy claims obviously does not operate to discharge the United State of any notification obligations with respect to the challenged measures.

7.18. India also argues that, unlike in the present dispute, the complainants in *China – Auto Parts* had themselves offered to the panel to exercise judicial economy in its discretion. Unlike India, we do not consider this factual difference to be determinative. As the Appellate Body stated, "nothing in [Article 11 of the DSU] or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party"[57], and "a panel has the *discretion* to determine the claims it must address in order to resolve the dispute between the parties".[58] It is a corollary of such discretion[59] that a complainant's suggestions as to whether a panel should or should not exercise judicial economy, while pertinent, do not deprive a panel of authority to exercise judicial economy where it finds it appropriate to do so.

8 INDIA'S REQUEST CONCERNING PARAGRAPHS 8.7(C) AND 8.7(F)-(H)

8.1. India argues that certain subparagraphs of paragraph 8.7 of the Interim Report, which contains the Panel's recommendations, fail to identify certain instruments forming part of the some of the measures at issue.[60] India indicates that, if we accept some or all of its requests concerning the specific subparagraphs, we may also need to review certain other parts of the Interim Report to make any necessary consequential changes.[61]

8.2. The United States did not comment on this request.

[52] Interim Report, para. 7.362.
[53] India's request for review of the Interim Report, para. 27.
[54] United States' comments on India's request for review of the Interim Report, para. 13.
[55] Final Report, para. 7.371.
[56] United States' comments on India's request for review of the Interim Report, para. 13.
[57] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 339 (emphasis original).
[58] Appellate Body Report, *India – Patents (US)*, para. 87 (emphasis added).
[59] See footnote 44 above.
[60] India's request for review of the Interim Report, paras. 34-38.
[61] India's request for review of the Interim Report, para. 39.

8.3. With respect to subparagraph 8.7(c) of the Interim Report, India requests that we add a reference to the *Administrative Rules of Montana* 18.15.701 – 18.15.703 and 18.15.710 – 18.15-712.[62]

8.4. We have made this change to subparagraph 8.7(c), and have also made related amendments in paragraphs 2.23 and 7.150 to clarify that these regulations provide further details on the administration and implementation of Measure 4. We have made a corresponding change in subparagraph 8.4(c) to ensure consistency between our findings and recommendations.

8.5. With respect to subparagraph 8.7(f) of the Interim Report, India requests that we add a reference to the *Request for Qualification for Eligible Contractors and Third Party PV System Owners*.[63]

8.6. The omission identified by India was accidental. We have therefore made this change to subparagraph 8.7(f), added a reference to this instrument at paragraph 7.150, and made a corresponding change in subparagraph 8.4(f) to ensure consistency between our findings and recommendations.

8.7. With respect to subparagraph 8.7(g) of the Interim Report, India requests that we add a reference to the Renewable Energy Plans adopted by the MPSC-regulated electric providers including the Rate Book of Service adopted by Consumer Energy Company and approved by the Michigan Public Service Commission.[64]

8.8. We note that the only such plan submitted to the Panel was the "Rate Book for Electric Service" adopted by the Consumer Energy Company. As we understand it, however, this instrument is not part of Measure 8. Rather, it was adopted by the Consumer Energy Company in compliance with that Measure. This understanding is confirmed by India's first written submission[65] and its response to a question from the Panel about the relevance of the Rate Book, in which India indicated that the Rate Book was submitted as "an example of how electric providers and electric utilities, as the case may be, can implement provisions of PA 342 or PA 295".[66] We therefore understand that the Rate Book is not itself part of Measure 8, but was rather submitted by India as evidence of the operation of that Measure. Accordingly, we reject India's request to add a reference to this instrument in our recommendations, and we have removed the misplaced reference to the Rate Book from footnote 396.

8.9. Finally, with respect to paragraph 8.7(h), India requests that we add a reference to the *Rules and Procedures to Implement the Renewable Energy Portfolio Standard*.[67]

8.10. The omission identified by India was accidental, and we have therefore made this change to subparagraph 8.7(h). We have also made a corresponding change in subparagraph 8.4(h) to ensure consistency between our findings and recommendations.

9 UNITED STATES' REQUEST CONCERNING PARAGRAPH 8.7

9.1. The United States argues that the measures identified at paragraph 8.4 of the Interim Report, (i.e. the measures found to be inconsistent with Article III:4 of the GATT 1994) and the measures to which the recommendations in paragraph 8.7 applies "must be the same". Accordingly, the United States request that we delete the list of measures in subparagraphs (a)-(j) of paragraph 8.7 of the Interim Report, and instead merely refer to "the measures identified in paragraph 8.4(a)-(j)".[68]

9.2. Invoking Article 19.1 of the DSU, the United States also requests that we delete the recommendation that the United States bring "itself" into compliance, and instead recommend that

[62] India's request for review of the Interim Report, para. 35.
[63] India's request for review of the Interim Report, para. 36.
[64] India's request for review of the Interim Report, para. 37.
[65] India's first written submission, para. 745.
[66] India's response to Panel question No. 39.
[67] India's request for review of the Interim Report, para. 38.
[68] United States' request for review of the Interim Report, para. 3.

the United States bring into compliance the measures that have been found to be inconsistent with Article III:4 of the GATT 1994.[69]

9.3. India did not comment on this request.

9.4. As regards the *chapeau* of paragraph 8.7 of the Interim Report, in light of the language of Article 19.1 of the DSU, we have adjusted it in the Final Report to focus our recommendations on the measures at issue as opposed to recommending that the United States bring "itself" into compliance.

9.5. As regards the subparagraphs of Article 8.7 of the Interim Report, we note that there are two differences from paragraph 8.4 of the Interim Report, concerning subparagraphs (b) and (j). In paragraph 8.4, these subparagraphs include unconditional conclusions of inconsistency with Article III:4 of the GATT 1994 concerning:

- the 2016 SGIP Handbook[70] (under Measure 2), which was amended and replaced by the 2017 SGIP Handbook following panel establishment[71]; and
- Sections 216C.411 – 415 of the 2016 Minnesota Statutes (under Measure 10)[72], which were repealed following panel establishment.[73]

9.6. Conversely, in paragraph 8.7 of the Interim Report, the corresponding subparagraphs (b) and (j) contain more nuanced recommendations in regard to these instruments conditioned essentially on their continued operation.

9.7. Under Article 19.1 of the DSU, "[w]here a panel … concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."[74] Although this may be read as "suggest[ing] that it is not within a panel's … discretion to make a recommendation in the event that a finding of inconsistency has been made", "the Appellate Body has found that the expiry of the measure may affect what recommendations a panel may make."[75] As the Appellate Body notes:

> In this vein, some panels have found it not appropriate to make a recommendation to the DSB after they had found that the measure was no longer in force. Other panels have made a recommendation in such circumstance, albeit limited in scope. In *US – Certain EC Products*, the Appellate Body found an inconsistency between the finding of the panel that the relevant measure was no longer in existence and the subsequent recommendation of the panel that the DSB request the United States bring that measure into conformity with its WTO obligations.[76]

9.8. As explained in paragraph 7.59 of the Interim Report, depending on the circumstances, it may or may not be appropriate for a panel that has made findings on a measure repealed after panel establishment to make recommendations in respect of that measure. In particular, a panel's decision whether to make recommendations in respect of such a repealed measure must depend on a careful examination of the nature of the subsisting "matter", and whether there are concrete actions or steps that a respondent could take, beyond repeal, to ensure that the repealed measure is no longer impairing benefits accruing to a Member under the covered agreements.[77]

9.9. Accordingly, we see no reason to eliminate the distinction between our unconditional conclusion of inconsistency in subparagraph 8.4(j) and our conditional recommendations in

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[69] United States' request for review of the Interim Report, para. 2.
[70] Interim Report, subparagraph 8.4(b).
[71] Interim Report, paragraphs 2.15 and 7.30.
[72] Interim Report, subparagraph 8.4(j).
[73] Interim Report, paragraphs 2.56 and 7.61.
[74] Footnotes omitted.
[75] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.199-5.200 (footnotes omitted).
[76] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.200 (footnotes omitted).
[77] Paragraph 7.59. See more generally the distinction we made in our preliminary ruling concerning the following three related issues: (i) a panel's jurisdiction; (ii) a panel's making of findings in respect of measures at issue; and (iii) a panel's making of recommendations to the DSB in respect of measures that it has found to be WTO-inconsistent. Annex E-1, para. 3.19.

subparagraph 8.7(j) of the Interim Report as regards the repealed Minnesota solar energy production incentive (SEPI) program under Measure 10.

9.10. We consider that a similar logic applies in regard to Measure 2. Given that we decided to assess the WTO-conformity of both the 2016 and 2017 versions of the SGIP Handbook, we see legitimacy in making unconditional findings of inconsistency with regard to both versions of the SGIP Handbook but only conditional recommendations in regard to the 2016 SGIP Handbook, which was replaced by the 2017 SGIP Handbook. We believe that this is in accordance with the ultimate consideration of securing a positive solution to the dispute.[78] As explained by the Appellate Body, "[w]hile a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations that arise after the adoption of a panel and/or Appellate Body report by the DSB".[79]

[78] As explained in paragraph 7.17, the question of which version or versions of an amended measure a panel addresses, and the precise recommendations that it makes, will depend first and foremost on the complainant's specific request and on what is necessary to secure a positive solution to the dispute.

[79] Appellate Body Reports, *China – Raw Materials*, para. 260.