



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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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted as amended on 27 June 2018¹

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 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
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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 Cells* 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 States. 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) The United States has acted inconsistently failed to notify the subsidies to the SCM Committee.

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 "administered 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 "administered 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

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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 III¹. 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 industry². 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 Agreement⁵. 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.

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 Agreement⁹. 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 installation² or purchases of domestically made renewable energy products, have driven the installation³ of domestically made renewable energy and storage equipment, or any purchasing decisions⁴ 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 product⁶, the "treatment no less favourable" emphasizes the equality of opportunities or conditions of competition, the discipline

* 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?

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.

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

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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.

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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 reference¹:

- 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 Adder⁷ 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 Adder¹¹ 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 measure²⁰; (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 party²²; (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 established²³; 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 Adder³⁰, 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 1³⁴) 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 party⁴⁸

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

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 Guidelines⁵⁸, 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 establishment⁷⁵, 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 Panel⁹², 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 Adder⁹⁶, 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.

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 modules¹⁰⁷ 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 mean¹¹⁰:

- 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, 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 parties¹¹⁹

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 required¹²², 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 terms¹²⁷:

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 follows¹²⁸:

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 process¹³⁰, 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 reference¹³³, 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 basis¹⁴⁵, 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 request¹⁴⁷, 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 recognizes¹⁵⁴, 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 process¹⁶², may enable that Member to clarify its

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.

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

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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 dispute³.

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 amend¹¹; (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" situation¹²; 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 measures¹⁸ – 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 suggestion¹⁹, 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 paragraphs 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 Report³³, 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 economy⁴⁰ 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 circumstances⁴⁵, 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 economy⁴⁸, 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 Report⁵⁵, 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' observation⁵⁶ that our decision to exercise judicial economy with respect to India's prohibited subsidy claims obviously does not operate to discharge the United States 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 discretion⁵⁹ 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 submission⁶⁵ 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 Handbook⁷⁰ (under Measure 2), which was amended and replaced by the 2017 SGIP Handbook following panel establishment⁷¹; 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

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.