UNITED STATES – CERTAIN MEASURES RELATING TO THE RENEWABLE ENERGY SECTOR

(DS510)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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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.

2. Rather, this dispute must be seen as a tactical response by India to a separate, ongoing dispute – involving a major federal-level Indian program that the DSB has found to favor India's domestic solar cell and modules industry over foreign competitors. That dispute, *India – Solar Cells*, was filed by the United States in 2013, and remains unresolved. The reasonable period of time for India's compliance expired in December 2017. Currently, both an arbitration under Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and a compliance proceeding under Article 21.5 of the DSU, are pending.

3. For a Member to bring a dispute involving no discernable trade interest, but rather as a response to its own failure to comply in a separate dispute, is a questionable use of the WTO dispute settlement system. Nonetheless, India's claims have been submitted to the Panel, and the United States must respond. As explained in this submission, India has failed to make a prima facie case that the state and local measures at issue are inconsistent with U.S. obligations under the WTO Agreement.

II. Factual Background & Measures at Issue

4. In this section, the United States will set out the pertinent facts with respect to each of the measures challenged by India.[1] At the outset, however, the United States would like to make a few thematic points to put India's challenge in the proper context. 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")

5. The pertinent facts regarding Washington's Renewable Energy System Cost Recovery Incentive Payment Program ("RECIP") are as follows. Under RECIP, Washington State utility "customers"[2] 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

[1] While the United States does not accept many of India's characterizations regarding the measures at issue, the United States does not address all of India's misstatements or omissions in this submission. The fact that the United States does not address a particular aspect of India's submission should not be construed as an indication that the United States agrees with India.

[2] *See*, Washington Administrative Code ("WAC") 458-20-273. Part III (204) (Exhibit IND – 3).

(*i.e.*, kilowatt-hours[3]) produced by the customer's renewable energy system over the previous fiscal year.[4]

6. Customers that were participating in RECIP as of September 30, 2017 are entitled to receive RECIP "incentive payments" through June 30, 2020.[5]

7. Participation in RECIP is voluntary on the part of utility companies. Utility companies that participate in RECIP may apply for tax credits "in an amount equal to" the aggregate of incentive payments the utility has paid out in a given fiscal year.[6] Customers served by utility companies that choose not to participate in RECIP are not entitled to receive incentive payments, even if they have installed a renewable energy system that would otherwise qualify.[7]

8. The Washington State Legislature created RECIP in 2005 and appointed the Washington Department of Revenue (DOR) as the principle administrative authority.[8] In this capacity, DOR was responsible for issuing tax credits[9] to participating utility companies and certifying that customers' renewable energy systems qualify for incentive payments.[10] In July 2017, the Washington State Legislature transferred most administrative responsibilities for RECIP to the Washington State University energy extension program ("WSU Energy Program"), effective October 1, 2017.[11]

B. CALIFORNIA – Self-Generation Incentive Program ("SGIP")

9. The pertinent facts regarding California's Self-Generation Incentive Program ("SGIP") are as follows. SGIP provides certain incentive payments[12] to California utility "customers" that install qualifying renewable energy generation or storage systems on their property.[13]

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[3] *See generally*, Revised Code of Washington ("RCW") 82.16.210 (Exhibit IND – 1). For example, in 2019 the base incentive is USD $0.14 per kilowatt-hour (KWh) for "residential-scale" renewable energy systems and USD $0.04 for commercial-scale systems.

[4] *See*, RCW82.16.130 3(a); *see also* Washington Administrative Code ("WAC") 458-20-273 (Exhibit IND – 3)

[5] *See*, Substitute Senate Bill 5939, Section 3(11) (Exhibit IND – 5).

[6] RCW 82.16.130 (1)(a) (Exhibit IND – 2).

[7] *See*, WAC 458-30-273, Part II (201).

[8] *See*, Substitute Senate Bill 5101 (Exhibit IND – 1).

[9] *See*, WAC 458-30-273, Part 111(709).

[10] *See*, RCW 82.16.210 2(d).

[11] Substitute Senate Bill 5939 (July 7, 2017), Section 3(9) (Exhibit IND – 4).

[12] The amount of incentive payment due to a customer is determined by a number of factors, including the technology type of the generation or storage equipment[12] and the "size" (or capacity) of a customer's installed system. *See*, CPUC Decision 16-06-055, Table 9: "SGIP Project Size Caps and Rebate Levels" (Exhibit US – 1).

[13] *See*, 2017 SGIP Handbook Section 4.1.1("*Any retail* electric or gas distribution class of *customer* (industrial, agricultural, commercial or residential) of PG&E [Pacific Gas & Electric], SCE [Southern California Edison], SoCalGas [Southern California Edison], or SDG&E [San Diego Gas & Electric] is eligible to be the Host Customer and receive incentives from the SGIP.") (emphasis added) (Exhibit IND-15),

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").[14]

10. The California State Legislature has authorized CPUC to collect SGIP funds through December 31, 2019.[15] CPUC is required to return to utility companies any SGIP program funding that remains after January 1, 2021. [16]

11. The CPUC created SGIP in 2001,[17] pursuant to authority granted by the California State Legislature.[18] The CPUC administers SGIP in accordance with *SGIP Handbooks* that the CPCU issues on a periodic basis. The *SGIP Handbooks* set out the eligibility requirements and application process for SGIP incentives. CPUC issued the most recent *SGIP Handbook* on December 18, 2017.[19]

C. LOS ANGELES – Solar Incentive Program ("SIP")

12. The pertinent facts regarding the Los Angeles Solar Incentive Program ("SIP") are as follows. Under SIP, the Los Angeles Department of Water and Power ("LADWP")[20] provides "one-time" upfront "incentive payments" to residential, commercial, and non-profit customers that install grid-connected solar rooftop systems on their property.[21] LADWP administers the SIP in accordance with guidelines approved by the Los Angeles Board of Water and Power

[14] *See*, *CPUC* Decision 17-04-017 (Exhibit IND –23)

[15] *See*, Senate Bill 861(12) ("This bill would extend the authority of the Public Utilities Commission to authorize the electrical corporations to continue making the annual collection through December 31, 2019. The bill would extend the administration of the program to January 1, 2021.") (Exhibit US – 2)

[16] Senate Bill 861(2) ("The commission shall require the administration of the program for distributed energy resources originally established pursuant to Chapter 329 of the Statutes of 2000 until January 1, 2021. On January 1, 2021, the commission shall provide repayment of all unallocated funds collected pursuant to this section to reduce ratepayer costs.") (Exhibit US – 2).

[17] *See*, CPUC Decision 01-03-073 (Exhibit IND – 11).

[18] *See*, Assembly Bill, 970 (Exhibit IND – 12).

[19] *See*, 2017 SGIP Handbook (Exhibit IND – 15).

[20] The Los Angeles Department of Water and Power ("LADWP") is the municipal water and power utility for the city of Los Angeles. *See*, LADWP website, *Who We Are*, available at: https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-whoweare (Exhibit US – 3) ; *see also*, Los Angeles city website, *Departments and Bureaus* (Water and Power, Department of), available at: https://www.lacity.org/your-government/departments-commissions/departments-bureaus#water-power. (Exhibit US – 4)

[21]*See*, LADWP, *Solar Incentive Program Guidelines* ("*2017 SIP Guidelines*") (January 1, 2017), Section 1.0 ("Introduction to SIP"), p. 3 (The amount of incentive due to a customer is calculated by multiplying the applicable "incentive rate" by a system's power generation "capacity" and "expected output."); *see also 2017 SIP Guidelines, Section 2.6 ("How are incentive payments calculated?), pp. 6-8* (The current base inventive rates are $0.25, $0.30, and $0.95/watt for residential, commercial, and non-profit/government customers, respectively."); *see also, 2017 SIP Guidelines*, Section 2.5 ("Funding Categories and Funding Triggers"; Table 1: Incentive Levels), p. 6. (Exhibit US – 5).

Commissioners ("the Board.").[22] The Board approved the most recent – and currently effective – Solar Incentive Guidelines ("2017 Guidelines") on December 6, 2016, with effective date January 1, 2017.[23]

13. On December 6, 2017, the Board terminated certain "incentive adders"[24] that were previously available under the SIP, including the Los Angeles Manufacturing Credit (LAMC).[25] No further SIP incentive payments will be available after December 31, 2018 and the SIP will effectively end as of that date.[26]

14. As the United States will explain in Section III below, the measure that India refers to as the "LAMC Adder"[27] is not within the Panel's terms of reference because it was no longer in legal effect when the Panel was established on March 21, 2017.

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[22] The Board is the formal oversight and regulatory body of LADWP. In this capacity, the Board is responsible for, *inter alia*, setting the overall policy direction of LADWP and promulgating rules that govern the Department's activities. The Board is comprised of five Commissions appointed by the Mayor of Los Angeles and confirmed by the Los Angeles City Council. *See*, Office of the City Clerk of Los Angeles, *General Information on City Commissions*, "Water and Power Commissioners, Board of." (October 12, 2016) p. 52., available at: http://clerk.lacity.org/sites/g/files/wph606/f/City%20Commissions%20General%20Information.pdf. ("The Board of Water and Power Commissioners: 1) controls, regulates and manages the Department; 2) makes and enforces all necessary and desirable rules and regulations regarding the exercise of powers conferred upon the Department by the Charter; 3) controls, orders appropriates and expends all monies from the Water Revenue Fund and the Power Revenue Fund…") (Exhibit US – 6).

[23] The resolution states in relevant part that the *2017 Guidelines* "shall become effective as January 1, 2017 and "*replace* the existing Net Energy Metering (NEM) and Solar Incentive Program Guidelines." (emphasis added) *See*, Minutes of Regular Meeting of the Board of Water and Power Commissioners of the City of Los Angeles, Item No. 15 (Authorizes Continuation of Solar Incentive Program and Guidelines Modifications), Resolution No. 017 111 (December 6, 2016) ("Board Resolution of December 6, 2016"), p. 16, available at http://ladwp.granicus.com/MinutesViewer.php?view_id=2&clip_id=908&doc_id=953ef3b8-3416-11e7-b9a7-00219ba2f017 (Exhibit US – 7).

[24] *See*, Board of Water and Power Commissioners, LADWP, AGENDA, *Items for Approval* No. 15, Resolution authorizing Continuation of Solar Incentive Program and Guidelines Modifications. ADOPTED RES 017 111, December 6, 2016, available at: https://www.ladwp.com/cs/idcplg?IdcService=GET_FILE&dDocName=OPLADWPCCB551807&RevisionSelectionMethod=LatestReleased (Exhibit US – 8).

[25] *See*, LADWP, Board Letter accompanying proposed Resolution No. 017 111, *Continuation of Solar Incentive Program and Guidelines Modifications* (November 26, 2016) ("Board Letter of November 26, 2016") (Exhibit US – 9), p. 6:

> Removal of Incentive Adders
>
> The incentive adder for Building Integrated PV has not been requested for at least two years and will be removed from the proposed Guidelines in efforts to further streamline the program processes. Similarly, *the Los Angeles Manufacturing Credit will be removed. There have been no requests for this manufacturing credit for over three years*. (emphasis added).

[26] *See, 2017 SIP Guidelines*, p. 4 (Exhibit US – 5).

[27] India's First Written Submission, para. 250.

D. MONTANA – Tax Incentive for Ethanol Production

15. The pertinent facts regarding Montana's Tax Incentive for Ethanol Production ("MTIEP") are as follows.[28] 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[29] for the first six years of their production.[30] The Montana Department of Transportation ("DOT") administers the payment of incentives under MTEIP in accordance with Section 15-70-522 of the Montana Code Annotated ("MCA").[31]

16. Records show that DOT has disbursed no tax incentives under MTIEP since 1995.[32]

E. MONTANA – Tax Credit for Biodiesel Blending and Storage

17. The pertinent facts regarding Montana's Tax Credit for Biodiesel Blending and Storage ("Biodiesel Tax Credit") are as follows. The Biodiesel Tax Credit is a tax credit available to individuals and business that "store or blend biodiesel with petroleum for sale."[33] 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.[34] Eligible taxpayers can collect a tax credit of up to 15 percent of their "costs of investments in depreciable property [i.e., the equipment] used to stor[e] or blend[] biodiesel."[35] The Montana Department of Transportation Revenue ("DOR") administers the Biodiesel Tax Credit in accordance with Section 15-32-703 of the MCA.[36]

18. Records show that no taxpayer has claimed this credit since 2011. [37]

F. MONTANA – Tax Refund for Biodiesel ("Biodiesel Refund")

19. The pertinent facts regarding Montana's Tax Refund for Biodiesel ("Biodiesel Refund") are as follows. The Montana Refund for Biodiesel ("Biodiesel Refund") is a $0.01 - $0.02 per gallon tax refund available to certain gasoline "distributors" and "retail motor vehicle outlets" in

[28] *See*, Montana Code Annotated ("MCA") 15-70-522 (Exhibit IND – 34).

[29] MCA, 15-70-522, Section 2.

[30] MCA, 15-70-522, Section 2.

[31] *See*, MCA, 15-70-503, Section 1 (Exhibit IND – 32).

[32] *See*, Montana Department of Transportation Records file (Exhibit US – 10).

[33] *See*, MCA, 15-32-703 (Exhibit US – 11).

[34] MCA, 15-32-703(3)(c).

[35] *See*, MCA, 15-32-703.

[36] MCA, 15-32-703.

[37] Montana Department of Revenue Memorandum on Biodiesel Blending and Storage Tax Credit (April 19, 2016) (Exhibit US – 12), available at: https://leg.mt.gov/content/Committees/Interim/2015-2016/Revenue-and-Transportation/Meetings/Sept-2016/DOR-biodiesel-blending-storage-tax-credit.pdf

Montana.[38] The Montana Department of Transportation ("DOT") administers the Biodiesel Refund in accordance with Section 15-70-433 of the MCA.[39]

20. Records show that no Montana taxpayer has ever applied for or received the Biodiesel Refund.[40]

G. CONNECTICUT – Residential Solar Investment Program ("RSIP")

21. The pertinent facts regarding Connecticut's Residential Solar Investment Program ("RSIP") are as follows. RSIP provides incentives to Connecticut homeowners that install solar power systems on their residential property.[41] The amount of incentive payment due to a homeowner depends on the "size" of the installed solar power system and certain technical "design factors." Homeowners can receive the entirety of their incentive payment on an up-front "expected performance" basis or an actual "performance" basis over a period of six years.[42] Current inventive levels range from $0.35 to $0.45 per watt generated. Program eligibility is limited to homeowners that occupy the residential property where the solar power system is installed.

22. The Connecticut General Assembly created RSIP in 2012 and [43] appointed the Connecticut Green Bank ("CGB") as primary administrating authority.[44] In this capacity, the CGB sets applicable incentive rates, pays out incentives, and establishes relevant technical and eligibility guidelines for the program.[45] The Connecticut Public Utilities Regulatory Authority ("PURA") is authorized to provide additional incentives to homeowners that participate in RSIP.[46]

23. For ease of reference, the United States will refer to the "measure at issue" as the "Connecticut Component Incentive" (or "CCI") throughout.

H. MICHIGAN – Renewable Energy Standards Program ("Michigan RESP")

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[38] MCA, 15-40-433(1) (Exhibit IND – 37).

[39] *See generally* MCA, 15-40-433.

[40] *See*, Montana Department of Transportation, Report on Dyed Fuel Enforcement Submitted to the Revenue and Transportation Interim Committee (2016), p. 4 ("The department has never had any person apply for this incentive."), available at: https://leg.mt.gov/content/Committees/Interim/2015-2016/Revenue-and-Transportation/Meetings/March-2016/dyed-fuel-biodiesel-reports-mdt.pdf (Exhibit US – 13).

[41] *See*, General Statutes of Connecticut, Sec. 16-245ff (3).

[42] *See*, General Statutes of Connecticut, Sec. 16-245ff (4)(c).

[43] *See*, General Statutes of Connecticut, Sec. 16-245ff (Residential solar investment program).

[44] *See*, General Statutes of Connecticut, Sec. 16-245ff (4)(b).

[45] *See*, General Statutes of Connecticut, Sec. 16-245ff (4)(b).

[46] *See*, General Statutes of Connecticut, Sec. 16-245ff (4)(i).

24. The pertinent facts regarding Michigan's Renewable Energy Standards Program ("RESP") are as follows. 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.[47]

25. Electricity providers demonstrate compliance with this "renewable portfolio standard" ("RPS") by purchasing or producing Renewable Energy Credits ("RECs") from a qualifying "renewable energy system" or facility.[48] Electricity providers earn one REC toward meeting the RPS for each megawatt-hour (MWh) of renewable energy they source from a qualifying "renewable energy system" (*i.e.,* solar, hydro, or wind power).[49] The Michigan Public Services Commission ("MPSC")[50] is responsible for administering the RPS and assessing electricity providers' compliance therewith.[51]

I. <u>DELAWARE – Renewable Energy Standards Program ("Delaware RESP")</u>

26. The pertinent facts regarding Delaware's Renewable Energy Standard Program ("RPS") are as follows. Under the RPS "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[52]). Under the current statute, retail electric suppliers must source at least 25% of their electricity sales from renewable sources by 2025.[53]

27. Electricity suppliers demonstrate yearly compliance with the RPS by purchasing "renewable energy credits" (RECs) from renewable energy power generators ("generation units").[54] Electricity suppliers earn one REC toward compliance with the RPS for each megawatt-hour (MWh) of renewable energy sourced from a qualifying renewable "energy

[47] *See, The Clean, Renewable and Efficient Energy Act, Public Act No. 295 of 2008* ("PA 295"), Section 27 (Exhibit IND – 43); *see also* PA 342 of 2016, Section 28 (Exhibit IND – 45).

[48] *See,* PA 295, Section 11(i): (i) "'Renewable energy system' means a facility, electricity generation system, or set of electricity generation systems that use 1 or more renewable energy resources to generate electricity or steam."

[49] *See,* PA 295, Section 11(g): "'Renewable energy resource' means a resource that naturally replenishes over a human, not a geological, time frame and that is ultimately derived from solar power, water power, or wind power."

[50] *See,* Michigan Public Services Commission, About the MPSC (Exhibit IND – 92).

[51] *See,* PA 342, Section 3(f) (Exhibit IND – 45).

[52] 26 Del. C. § 352 (6) (Exhibit IND – 54).

[53] *See,* 26 Del. C. § 354.

[54] 26 Del. C. § 351 (18).

resource."[55] The Delaware Public Services Commission ("DPSC") is chiefly responsible for administering the RPS and assessing retail electricity suppliers' compliance therewith.[56]

J. MINNESOTA – Minnesota Solar Incentive Program ("MSIP")

28. India's first written submission refers to a program called the "Solar Incentive Program" ("MSIP"). The United States understands India to use that nomenclature as an umbrella term for three "distinct"[57] programs: (1) the Made in Minnesota Solar Energy Production Incentives program; (2) Rebates for installation of Solar Thermal Systems; and (3) Rebate for Solar PV Modules.[58] The pertinent facts regarding these programs are as follows.

1. Made in Minnesota Solar Energy Production Incentives ("Solar PV Incentive")

29. The Made in Minnesota Solar Energy Production Incentive program ("Solar PV Incentive Program") was a "performance-based"[59] incentive available to residential and commercial property owners in Minnesota that installed "grid connected solar photovoltaic modules" on their property.[60] The Minnesota Legislature enacted the Solar PV Incentive Program in 2013 and appointed the Minnesota Department of Commerce ("MDOC") as the principal administrative authority.[61]

30. The Minnesota Legislature repealed the Solar PV Incentive Program on May 22, 2017.[62] The repeal legislation provides that no further incentive payments are available to property owners "whose application was approved by [MDOC] after May 2, 2017."[63]

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[55] 26 Del. C.§ 352 (25).

[56] 26 Del. C. § 359(a).

[57] *See*, India's First Written Submission, para. 986 ("There are three distinct measures at issue…").

[58] *See,* India's First Written Submission, para. 985 ("For ease of reference, all three types of incentive/rebates (i.e. SEPI, rebate for Solar Thermal Systems under Section 216C.416 and the rebate for the solar PV modules under Section 116C.7791) are collectively referred to as 'incentives and/ or rebates under the MSIP' or '**MSIP incentives**', unless specified otherwise.")

[59] *See*, *Minnesota Statutes* ("MINN.STAT") 216.414.subdiv.1 (2016). (Exhibit – IND 66)

[60] *See*, MINN.STAT.216.415.subdiv.1 (2016) (Exhibit – IND 66).

[61] *See*, MINN.STAT.216.414.subdiv.2 (2016) (Exhibit – IND 66).

[62] *See,* Senate Bill 1456 (Exhibit IND – 100); *see also,* Minnesota Department of Commerce, *Made in Minnesota Solar Incentive Program* website, announcing repeal of program ("The Made in Minnesota Solar Incentive Program was repealed during the 2017 legislative session, meaning no further applications will be accepted for the program.") (Exhibit IND – 100).

[63] *See,* Senate Bill 1456, Section 22 ("No incentive payments may be made under this section to an owner whose application was approved by the commissioner after May 1, 2017.") (Exhibit IND – 100).

2. Rebates for Installation of Solar Thermal Systems ("Solar Thermal Rebates")

31. 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."[64] The "maximum rebate" available was "25 percent of the installed cost" of the solar thermal system, with varying absolute monetary limits for residential, multi-dwelling, and commercial property owners, respectively.[65]

32. The Minnesota Legislature repealed the Solar Thermal Rebates program on May 22, 2017.[66] The repeal legislation provides that "No rebate may be paid…to an owner of a solar thermal system whose application was approved by the commissioner of commerce after the effective date of this act."[67]

33. As the United States will explain at section III.B.1 below, the Solar Thermal Rebates program is not within the Panel's terms of reference because it was not the subject of consultations between India and the United States.

3. Rebate for Solar PV Modules ("Solar PV Rebate")

34. The Solar PV Rebate was an incentive program that provided rebates to Minnesota property owners that installed "solar photovoltaic modules" on their property.[68] Property owners were eligible to begin receiving rebates on July 1, 2010.[69] The rebate program was funded by Minnesota utility companies, as mandated by the legislation that created the program. Utility companies were required to provide funding for the rebate program through 2015.[70]

35. As the United States will explain at section III.B.2 below, the Rebates for Solar PV Modules is not within the Panel's terms of reference because it was not the subject of consultations between India and the United States

K. MASSACHUSETTS – Commonwealth Solar Hot Water Program ("SHWP")

36. The pertinent facts regarding the Commonwealth Solar Hot Water Program ("SHWP") are as follows. Under the SHWP, the Massachusetts Clean Energy Technology Center

[64] *See*, MINN.STAT.216.416.subv.1-3 (Exhibit IND – 66).

[65] MINN.STAT.216.416.subv.3 (Exhibit IND – 66).

[66] *See*, Senate Bill 1456, Section 28 (Exhibit IND – 100).

[67] *See*, Senate Bill 1456 (a): "No rebate may be paid under Minnesota Statutes 2016, section 216C.416, to an owner of a solar thermal system whose application was approved by the commissioner of commerce after the effective date of this act." (Exhibit IND – 100).

[68] MINN. STAT.116C.7791.subdiv.3 (Exhibit US – 14).

[69] MINN. STAT.116C.7791.subdiv.4.

[70] *See*, MINN. STAT.116C.7791.subdiv.5(b).

("MassCEC")[71] provides "rebates" to offset the cost of installing "solar hot water systems (SHWs) at residential, commercial, industrial, institutional, and public facilities."[72]

37. Several factors determine the "Base Rebate" due to a "system owner," including a system's (i) technical rating; (ii) expected annual energy production; and (iii) installation site. Systems installed on the property of non-profit entities qualify for higher base level rebates than systems housed at residential or commercial locations.[73] Additional rebate "adders" are available for systems installed at sites designated as "affordable housing"[74] and to system owners with an annual income under certain thresholds (*i.e.*, the "income-based rebate adder").[75]

38. MassCEC administers the SWHP in accordance with a periodically issued "Program Manual." MassCEC issues separate manuals for residential/small- and commercial-scale systems, respectively. It issued the most recent – and currently effective – Program Manuals on May 1, 2018.[76]

39. As the United States will explain in Section III below, the measure that India refers to as the "Massachusetts Manufacture Adder"[77] is not within the Panel's terms of reference because it was no longer in legal effect when the Panel was established on March 21, 2017.

III. Requests for Preliminary Rulings

[71] The Center is a "quasi-public" state agency that administers the SHWP pursuant to authority granted to it by the Massachusetts Legislature in 2009. *See*, Massachusetts General Laws, Chapter 23J, Section 2(a) (Exhibit IND –71).

[72] MassCEC, *Residential- and Small-Scale Solar Hot Water* Program *Manual* (May 1, 2018) ("*2018 Small-Scale Manual*"), p 1 (Exhibit US – 16), p. 1; *see also*, MassCEC, *Commercial-Scale Solar Hot Water Program Manual* (Mar 1, 2018) ("*2018 Commercial-Scale Manual*"), p 1 (Exhibit US –16).

[73] For example, systems installed at residential and commercial sites are eligible for a "rebate factor" of $0.21/kBTU, whereas systems sited on the property of a non-profit entity qualify for a "rebate factor" of $0.43/kBTU. *See, e.g., 2018 Small-Scale Manual*, Table 4 (Exhibit US – 15).

[74] *See, 2018 Small-Scale Manual*, Section 2.5.

[75] *See, 2018 Small-Scale Manual*, Section 2.6.

[76] *See, 2018 Small-Scale Manual, 2018 Commercial-Scale Manual*.

[77] India's First Written Submission, para. 1096. ("The measures at issue compromise of the additional incentives (i.e., Massachusetts Manufacturer Adder) under the CSHWP which are granted/offer on the condition that a system uses eligible Massachusetts manufactured components.")

40. As the United States will explain below, the LAMC Adder[78] (formally provided for under the Los Angeles SIP[79]) and the Massachusetts Manufacturer Adder[80] (formally provided for under the SHWP[81]) were no longer in legal force when the Panel was established on March 21, 2017. Accordingly, the United States requests that the Panel find that these measures fall outside the Panel's terms of reference, and, accordingly, reject India's request for legal findings on them.

41. In addition, two of the measures identified in India's request for panel establishment – the (i) Solar Thermal Rebates; and (ii) Solar PV Rebates under the Minnesota Solar Incentive Program (MSIP) – were not included in India's request for consultations, and were not the subject of consultations between India and the United States. Specifically, the following "measures at issue" were not included in India's request for consultations of September 9, 2016 and not consulted on by the parties:

(i) Solar PV Rebate (*Minnesota Statute MINN. STAT. 116C.7791*)[82]

(ii) Solar Thermal Rebate (*Minnesota Statute 216C.416*)[83]

42. Accordingly, the United States requests that the Panel find that these measures fall outside of the Panel's terms of reference and reject India's request for legal findings on them.

43. In order to conserve the resources of the parties and the Panel, the United States requests that the Panel make preliminary rulings on these jurisdictional issues with respect to the (1) LAMC Adder; (2) Massachusetts Manufacture Adder; (3) Solar PV Rebate; and (4) Solar Thermal Rebate.

A. The "LAMC Adder" and "Massachusetts Manufacturing Adder" fall outside of the Panel's terms of reference

[78] India's First Written Submission, paragraph 250 (The measures at issue comprise of the LAMC Adder maintained and/or granted under the LADWP SIP to the recipients on the condition that a minimum of 50% of the components of the finished solar photovoltaic modules and/or the qualifying equipment are manufactured and/or assembled within the city of Los Angeles, California.")

[79] As defined in section II.3, the "SIP", refers to the Los Angeles Solar Incentive Program.

[80] *See*, India's First Written Submission, paragraph 119 (describing the "measures at issue" with respect to the SHWP as "the additional incentives (i.e., Massachusetts Manufacturer Adder) under the CSHWP which are granted/offer on the condition that a system uses eligible Massachusetts manufactured components."

[81] As defined in section II.K, the "SHWP" refers to the Commonwealth Solar Hot Water Program (Massachusetts).

[82] *See,* India's First Written Submission, paras. 972 (*i.e.,* "Rebate for Solar PV Modules") and 968.

[83] *See,* India's First Written Submission, paras. 962 (*i.e.,* "Rebates for installation of Solar Thermal Systems") 968.

44. 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 in March 21, 2017.[84]

1. **<u>Measures not in legal effect – and therefore not "in existence" – at the time a panel is established are Not Within a Panel's terms of reference.</u>**

45. Article 7.1 and Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") govern a panel's terms of reference. Article 7.1 provides:

> Panels shall have the following 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)."

The "document" referred to in Article 7.1 is the request for panel establishment. Article 6.2 describes the contents of the panel request:

> 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.[85]

46. As the Appellate Body has properly found, Article 6.2 covers the measures "in existence" when the panel was established. Specifically, in *EC – Chicken Cuts*, the Appellate Body observed that:

> The term "specific measures at issue" in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be *measures that are in existence at the time of the establishment of the panel*.[86]

47. In summary, measures *not* "in existence" for purposes of Article 6.2 include measures that were previously in legal effect, but "whose legislative basis [] expired" before the panel was established.[87]

[84] Further, neither measure was in legal effect when India submitted its request for the establishment of a panel on January 17, 2017.

[85] DSU, Article 6.2. (emphasis added)

[86] *EC – Chicken Cuts (AB)*, para. 115. (emphasis added)

[87] *EC – Selected Customs Matters*, para. 184 (referencing *US – Upland Cotton*, para. 263.).

2. 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

48. As explained above in Section II.C above, LADWP presently administers the Solar Incentive Program ("SIP") in accordance with the *2017 SIP Guidelines* (Exhibit US – 5). 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."[88] The effective date is clearly marked on the cover of the *2017 Guidelines* ("Effective: January 1, 2017").

49. As is clear from a review of that document, the *2017 SIP Guidelines* do not provide for or refer to the LMAC Adder. Indeed, India acknowledges that the *2017 SIP Guidelines* took effect on January 1, 2017 and "do not contain any provision with respect to the LMAC Adder."[89] In other words, India essentially concedes that the LMAC Adder was not in effect on the date of panel establishment. India's concession on this score demonstrates that India has failed to meet its burden[90] to establish that the LMAC Adder was a measure "in existence" when the Panel was established on March 28, 2017. Accordingly, the Panel should find that the LMAC Adder falls outside of its terms of reference.

50. While India concedes that the LMAC Adder does not appear in the *2017 Guidelines*, it suggests that LADWP may continue to implement the LMAC Adder through the *2015 Guidelines* and "urges" the Panel to rule on India's substantive legal claims. Specifically, India asserts the following at paragraph 252 of its first written submission.

> [I]t is not clear if the *Net Metering and Solar Photovoltaic Incentive Program Guidelines* [NEM and SIP Guidelines] dated 4 December 2015 have been superseded by the *2017 Guidelines.* Further, even if the 2015 SIP Guidelines have been superseded, it is likely that the LAMC Adder benefits under those provisions continue to be provided. Alternatively, there is a risk that the LMAC Adder or similar measures are re-introduced. .

Each of India's assertions on this score is without merit.

51. First, notwithstanding India's suggestion to the contrary, it is clear that the *2015 SIP Guidelines* "have been superseded" by the *2017 Guidelines*. Specifically, the Board's resolution of December 6, 2016 provides that

> BE IT FURTHER RESOLVED that the new SIP Guidelines shall become effective January 1, 2017 and *replace the existing NEM and SIP Guidelines*. (emphasis added)[91]

[88] Board Resolution of December 6, 2016, p. 16 (Exhibit US – 7).

[89] India's First Written Submission, para. 252.

[91] Board Resolution of December 6, 2016, p. 16. (Exhibit US – 7).

The Board's explicit statement that the *2017 SIP Guidelines* "shall…replace" the *2015 Guidelines* leaves no doubt that the *2017 SIP Guidelines* superseded the *2015 SIP Guidelines* in their entirety.

52. Second, 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 *Solar Incentive Program.*

> Similarly, the Los Angeles Manufacturing Credit *will be removed*. There have been no requests for this manufacturing credit for over three years. (emphasis added).[92]

Thus, even if India were able to establish that certain elements of the *2015 SIP Guidelines* remained in effect at the time the Panel was established, the Board's resolution makes clear that the LMAC Adder was not one of those elements and did not survive past January 1, 2017.

53. Third, India proffers no evidentiary support for the assertion that "it is likely that LMAC Adders benefits under [the *2015 SIP Guidelines*] continue to be provided."[93] At any rate, the *SIP Guidelines* explicitly state that LADWP provides incentives on a "one-time" basis in the form of "lump sum upfront" payments.[94] In other words, the *SIP Guidelines*, by its terms, does not entitle qualifying customers to the continued stream of payments to which India alludes.

54. Moreover, the Board's resolution of December 6, 2016 reports that "[T]here have been no requests for [the LMAC Adder] for over three years." Therefore, to the extent LADWP issued *any* payments with respect to the LMAC Adder, the most recent of such payments would have occurred in December 2013, *at the latest*. India has cited no evidence demonstrating that LADWP issued any such payment after that date, much less established that such payments continue to flow now.

55. Fourth, 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. At any rate, there does not appear to be any real impetus for LADWP to re-introduce the LAMC Adder given that, as noted, "there have been no requests" for the LAMC Adder since 2013.[95]

56. In sum, India has failed to meets 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. In fact, it is clear that the Board had already terminated the LAMC Adder when India filed its

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[92] Board Letter of November 26, 2016 (Exhibit US – 9).

[93] India's First Written Submission, para. 252.

[94] *See*, *2015 SIP Guidelines*, Section 4.7 ("The incentive payment will be calculated using the Estimated Performance Based Buydown (EPBB) incentive formula (rounded to the nearest dollar), which allows for a lump sum upfront incentive payment. EPBB bases the incentive payment on the system's expected performance.") (Exhibit – IND 26).

[95] Board Letter of November 26, 2016 (Exhibit US – 9).

request for the establishment of a panel on January 17, 2017. Specifically, the Board "removed" the LMAC Adder by resolution on December 6, 2016; the *2017 SIP Guidelines* – which India acknowledges do not provide for the LMAC Adder – took effect on January 1, 2017. India's assertion that LADWP continues to provide benefits under the LMAC Adder are unsupported and refuted by facts entered by the United States. Nor has India substantiated its concern that the LAMC Adder could be re-introduced. Therefore, for the foregoing reasons, the Panel should find that the LAMC Adder falls outside of its terms of reference, and accordingly, reject India's request that the Panel examine and render findings with respect to the LMAC Adder.

57. Moreover, India has provided no reason for the Panel to depart from the "general rule" that precludes a panel from examining measures that are not "in existence" at the time the panel was established. As explained above, the Appellate Body has identified two exceptions to the "general rule" that a panel's terms of reference are limited to measures that were "in existence" at the time the panel was established. First, a panel may examine an instrument that entered into force *after* the panel was established, provided that such instrument merely amends "but does not change the essence of" a measure that *was* in effect when the panel was established and identified in the panel request.[96] Second, a panel may examine measures that expired *before* the date of panel establishment, if the complaining Member alleges that such measures continued to produce "effects" that were "impairing [] benefits accruing to the [] Member under a covered agreement at the time of the establishment of the panel."[97]

58. Accordingly, the LMAC 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.

3. 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

59. The Massachusetts Manufacturer Adder ("the Adder") was not a measure "in existence" when the Panel was established on March 21, 2017. India alleges that the instruments that provide for the Massachusetts Manufacturer Adder ("the Adder") are the *Feb. 2016 Small-Scale Manual*[98] and *Feb. 2016 Commercial-Scale Manual*.[99] MassCEC issued both of these manuals on February 12, 2016.[100] On October 5, 2016, however, MassCEC issued new Program

[96] *EC – Selected Customs Matters*, para. 184 (referencing *US – Upland Cotton*, para. 263.).

[97] *EC – Selected Customs Matters*, para. 184 (referencing *US – Upland Cotton*, para. 263.).

[98] Exhibit IND-73.

[99] Exhibit IND-74.

[100] *See* India's First Written Submission, paras. 1096-1097.

Manuals[101] that superseded[102] the manuals issued on February 12, 2016. In other words, 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. This *alone* demonstrates that the Adder falls outside of the Panel's terms of reference.

60. In addition, the Program Manuals issued on October 5, 2016 explicitly terminated the Adder, effective December 15, 2016. Specifically, the first page of the *Residential- and Small-Scale Solar Hot Water Program Manual* ("*Oct. 2016 Small-Scale Manual*") is affixed with the following announcement:

> NOTICE
>
> - As of December 15, 2016, new Applications will not be eligible to receive the Massachusetts Manufactured rebate adder. (emphasis original)

61. The language terminating the Adder is replicated at page one of the *Commercial-Scale Solar Hot Water Program Manual* ("*Oct. 2016 Commercial-Scale Manual").* Therefore, the text of the *Oct. 2016 Manuals* (*i.e.*, Exhibits US – 17 and US – 18) confirm that the Adder was no longer in legal effect as of December 15, 2016. Accordingly, the Adder was not a measure "in existence" when the Panel was established on March 21, 2017.

62. In fact, India acknowledges that the Adder was "discontinued" by the SHW Program Manuals issued on October 6, 2016.[103] India nonetheless suggests that certain benefits continue to flow from the Adder and surmises that "there is risk" that the Adder or similar measures will be "re-introduced."[104] India "therefore…urges" the Panel to examine and make findings with respect to the "discontinued" Adder. Specifically, India states that

> India understands that the MassCEC issued a new program manual for residential scale and commercial-scale on 5 October 2016 and on 2 November 2016, respectively. The new manuals discontinued with the Massachusetts Manufacturer

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[101] *See*, MassCEC, *Residential- and Small-Scale Solar Hot Water Program Manual* (October 6, 2016), p.1 (Exhibit US – 17); MassCEC, *Commercial-Scale Solar Hot Water Program Manual* (October 6, 2016), p. 1 (Exhibit US – 18).

[102] MassCEC makes clear that the latest-in-time Program Manual supersedes previously issued Manuals. *See, e.g., Feb. 2016 Small-Scale Manual*, Section 5.5 (Changes/Amendments to the Program Manual), which provides that

> The requirements listed herein are subject to change without notice to potential Applicant Parties. This Program Manual has been distributed electronically using MassCEC's website. It is the responsibility of Applicant Parties to check MassCEC's website for any addenda or modifications to the Program Manual to which they intend to respond. *MassCEC, the Commonwealth of Massachusetts, and its subdivisions accept no liability and will provide no accommodation to an Applicant who submits an Application based on an out-of date Program Manual and/or related document*. (emphasis added)

[103] India's First Written Submission, para. 1098.

[104] India's First Written Submission, para. 1098.

> Adder. However, it is likely that the Massachusetts Manufacturer Adder benefits under the old manual continue to exist. Further, there is risk that the Massachusetts Manufacturer Adder or similar incentives are re-introduced. [105]

India's assertions on this score are without merit.

63. First, India does not even attempt to substantiate the assertion that "it is likely that [Adder] benefits under the old manual continue to exist." Second, at any rate, the SHWP provides incentives in the form of up-front "rebates" based on the "expected performance" of a solar hot water system.[106] In other words, the SHWP does not entitle participants to the continued stream of "benefits" to which India alludes. Third, India's concern that "there is a risk that the Massachusetts Manufacturing Adder or similar incentives [will be] introduced" is mere speculation that India has not even attempted to substantiate with evidentiary support.

64. In sum, India has failed to meets its burden to establish that the Massachusetts Manufacturing Adder was a measure "in existence" when the Panel in this dispute was established on March 21, 2017. In fact, it is clear that the MassCEC had already terminated the Adder when India filed its request for the establishment of a panel on January 17, 2017. Specifically, the MassCEC explicitly stipulated that the Adder was no longer available as of December 15, 2016. India's assertion that benefits related to the Adder "continue to exist" is wholly unsupported and refuted by facts entered by the United States. Nor has India bothered to substantiate its concern that the Adder could be re-introduced. Therefore, for the foregoing reasons, the Panel should find that the Massachusetts Manufacturing Adder falls outside of its terms of reference and reject India's request that the Panel examine and make findings with respect to that measure.

65. 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

66. 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". The United States has described these measures at sections II.J.2 & 3 respectively. 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.

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[105] India's First Written Submission, para. 1098.

[106] *See e.g.,* MassCEC *Residential-Scale Solar Hot Water Program Manual* (February 25, 2106) Section. 3.3 (Rebate Calculation) (Exhibit IND – 73).

67. Articles 4 and 6 of the DSU read in tandem make clear that only those measures that were the subject of consultations between the parties to a dispute are properly within a panel's terms of reference. As stated by the Appellate Body in *Brazil – Aircraft*

> In our view, 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.[107]

68. Therefore, measures that a complaining party did not identify in its request for consultations are not within a panel's terms of reference.[108]

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

69. India did not identify the Solar Thermal Rebates in its request for consultations. As noted in section II.J above, India characterizes the Solar Thermal Rebate as a component of the Minnesota Solar Incentive Program ("MSIP") in its first written submission. In its request for consultations, however, India described the MSIP and its implementing legal instruments in the following manner.

> **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)).** 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). 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.

70. Specifically, 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

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[107] *Brazil Aircraft (AB)*, para. 131; *see also*

[108] *See, US – Certain EC Products (AB)*, para. 70 ("The European Communities' request for consultations of 4 March 1999 did not, of course, refer to the action taken by the United States on 19 April 1999, because that action had not yet been taken at the time. At the oral hearing in this appeal, in response to questioning by the Division, the *European Communities acknowledged that the 19 April action, as such, was not formally the subject of the consultations held on 21 April 1999. We, therefore, consider that the 19 April action is also, for that reason, not a measure at issue in this dispute and does not fall within the Panel's terms of reference*."); *see also, US – Upland Cotton*, paras. 286-287 (holding that the scope of consultations is to be determined based the written request for consultations.)

Solar PV Incentive (*see,* section II.J.1), under which Minnesota provides incentives to property owners that install "*solar photovoltaic modules*"[109] not "solar thermal systems."

71. Therefore, the scope of India's request for consultations was limited to the "Minnesota Solar Energy Production Incentive" – that is, the measures "administrated pursuant to the criterion established under Minnesota Statute § 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.

72. In this regard, the United States notes that criteria for the Solar Thermal Rebate appear in a different section of Minnesota's statutory code (216C.416 ***subd. 3***) and differ from the criteria pertaining to the Solar PV Incentives.[110] 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

73. As explained at section III.C.1 above, the scope of India's request for consultations was limited to the Solar PV Incentive – that is, the measures "administrated pursuant to the criterion established under Minnesota Statute § 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. In this regard, the United States notes that the legal provisions that provide for the Solar PV Rebate appear in a different section of the Minnesota statutory code – *i.e.,* Minnesota Statute § 116C.7791 – and differ from the incentive criteria that pertain to the Solar PV Incentive.[111]

74. 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

75. 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)

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[109] *See*, MINN.STAT.216C.414.subv.1-5 (2013) (Exhibit IND – 66).

[110] In particular, the incentives that were provided under § 216C.414 *subd. 2* ("Solar Energy Production Incentives") were "performance-based" (i.e., paid out based on the amount of energy produced by a solar PV system. In contrast, the incentives were available under 216C.416 *subd. 3* ("Solar Thermal Rebates"), were paid out in the form of upfront "rebates" keyed to the "installed cost" of a solar thermal system.

[111] MINN. STAT.116C.7791.subdiv.3 (Exhibit US – 13).

"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.

76. GATT 1994 Article III:4 provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

77. As the Appellate Body found in *Korea – Various Measures on Beef*, three elements are required to establish a breach of a Member's national treatment obligations:

> [i] that the imported and domestic products at issue are "like products"; [ii] that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and [iii] that the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[112]

78. With respect to the third element, a measure accords "less favourable" treatment to imported products within the meaning of Article III:4 if the measure "*modifies the conditions of competition* in the relevant market to the detriment of imported products."[113]

79. India's arguments focus on what India characterizes as the "incentivizing" effects of the measures at issue.[114] Although that term might be a useful shorthand in certain circumstances, it does not replace the actual language or necessary elements set out in Article III:4 of the GATT 1994.

80. To recall, there are three separate elements for establishing a breach of Article III:4. Two of those elements – (i) "affecting" the "sale" , "purchase", "use", etc. of products; and (ii) "less favorable treatment" – are at issue in this dispute. India cannot make out its prima facie case without meeting its burden with respect to both of these elements. That is, if India does not establish that a measure affects the "use" (or "purchase", "sale", etc.) of products within the meaning of Article III:4, the measure cannot be found in breach of Article III:4. Furthermore, if

[112] *See Korea – Various Measures on Beef (AB),* para. 133.

[113] *US – FSC (Article 21.5 – EC)(AB),* para 215. (emphasis added); *see also Korea – Various Measures on Beef,* para. 137 ("A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure *modifies the conditions of competition in the relevant market to the detriment of imported products*.") (emphasis added); *Thailand – Cigarettes (Philippines) (AB),* para. 130 ("[T]he examination of whether imported products are treated less favourably "cannot rest on simple assertion", close scrutiny of the measure at issue will normally require further identification or elaboration of its *implications for the conditions of competition* in order properly to support a finding of less favourable treatment under Article III:4 of the GATT 1994.") (emphasis added).

[114] *See,* India's First Written Submission, paras. 51, 172, 274, 418, 464, 563, 1011, 1119.

a measure does not "affect" the "use" (or "purchase", "sale", etc.) of a product, it is difficult to see how the measure could "modify the conditions of competition" with respect to that product on the market, and thus would not meet the third element of "less favorable treatment". In short, a measure that does not "affect" the "use" (or "purchase", "sale", etc.) of a product within the meaning of Article III:4 does not breach Article III:4.

81. As the Appellate Body has found, the determination of whether a measure accords "less favourable" treatment to imported products within the meaning of Article III:4 cannot rest on a mere assertion, but must also assess the measure's "implications in the marketplace." Specifically, in *US – FSC (Article 21.5 – EC)*, the Appellate Body observed 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 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*.[115]

82. Moreover, as stated by the Appellate Body in *Thailand – Cigarettes (Philippines)*

> "[T]he examination of whether imported products are treated less favourably "cannot rest on simple assertion", close scrutiny of the measure at issue will normally require further identification or elaboration of its *implications for the conditions of competition* in order properly to support a finding of less favourable treatment under Article III:4 of the GATT 1994."[116]

83. Relatedly, in *Korea – Various Measures on Beef*, the Appellate Body noted that

> A formal difference in treatment between imported and like domestic products is thus neither necessary, *nor sufficient*, to show a violation of Article III:4. Whether or not imported products are treated "less favourably" than like domestic products should be assessed instead by examining *whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products*.

84. India, however, has not demonstrated that the measures at issue operate to "modify the conditions of competition to the detriment of imported products" or – for that matter – "affect" the use" of imported renewable energy products in the several involved U.S. jurisdictions. Therefore, as explained further below, India has failed to establish that the measures at issue are inconsistent with Article III:4 of the GATT 1994.

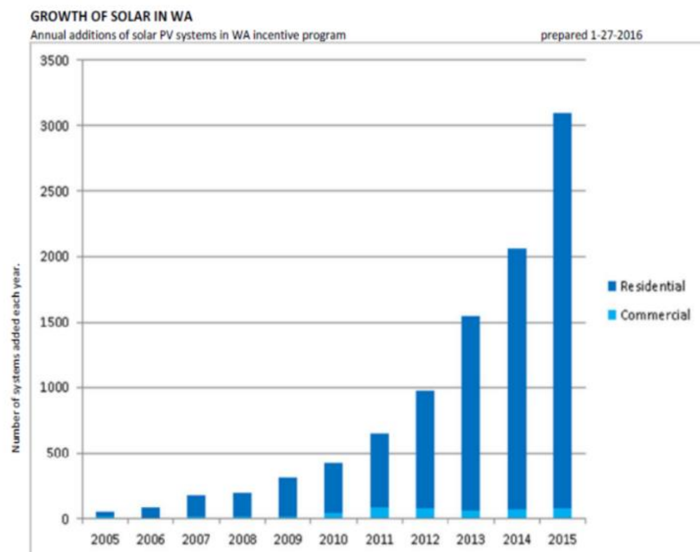
A. India has failed to establish that the "cost recovery incentives" provided under Washington's Renewable Energy Cost Recovery Program (RECIP) are inconsistent with Article III:4 of the GATT 1994

[115] *US – FSC (Article 21.5 – EC) (AB)*, para. 215.

[116] *Thailand – Cigarettes (Philippines) (AB)*, para. 130.

85. 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.[117] 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."

86. India suggests that the "cost incentive payments" provided under RECIP have induced the wide-scale adoption of Washington-made renewable energy products in Washington.[118] In particular, India refers to exponential growth in the number of solar PV systems installed in Washington state between 2005 – when RECIP began – and 2015 (*See,* India's First Written Submission, Figure 2 – inserted below).



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87. None of the information relied on by India, however, indicates what percentage of installed systems – if any – contain components manufactured *in* Washington. In other words, while the base-level "cost recovery incentives" may have incentivized the installation of solar PV systems *writ large,* the information that India presents does not suggest that the "measures at issue" have incentivized or "affected" the "use" of Washington-made solar PV systems or components *in particular*. Moreover, while India refers to data indicating that Washington has funded approximately $17 million in "cost recovery incentive payments" through 2015,[119]

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[117] *See*, India's First Written Submission, para. 24.

[118] *See*, India's First Written Submission, para. 24 ([T]he measures at issue also confer a benefit on Washington-based manufacturers of these specified components. This is also evident from the growth of the solar photo-voltaic systems in Washington during the period from 2005 to 2015…").

[119] *See*, India's First Written Submission, para. 25 ("Further, as of 23 September 2015, Washington state budget had forgone USD 17,023,303 in public utility tax receipts. This amount has been spent on investment cost recovery

nothing in the information India cites identifies what proportion of incentive payments – if any – were associated with the use of Washington-made renewable energy equipment or components.

88. Therefore, India has failed to demonstrate that the RECIP "measures at issue" operate to incentivize the installation of Washington-made renewable energy products. Because *incentivization*[120] is the vector by which India claims that measures at issue "affect" the "use" of products within the meaning of Article III:4, India has necessarily failed to establish that the measures "affect" the "use" of products with the meaning of that provision. Consequently, India has failed to demonstrate that the measures at issue "modify the conditions of competition" between imported and domestic products in Washington. As explained above, a measure that does not "affect" the "use" (or "purchase", "sale", etc.) of a product *necessarily* does not breach Article III:4 of the GATT 1994.

89. For the foregoing reasons, the Panel should find that India has failed to establish that the "measures at issue" with respect to the Washington's Renewable Energy Cost Recovery Incentive Program (RECIP) are inconsistent with Article III:4 of the GATT 1994.

B. India has failed to establish that the California Manufacture Adder[121] ("SGIP Adder") provided for under California's Self-Generation Incentive Program (SGIP) is inconsistent with Article III:4 of the GATT 1994

90. India has provided no evidence that substantiates its assertion that the SGIP Adder operates to "induce[]" buyers to "purchase specified products of California-origin."[122] 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." Even though SGIP has been in existence since 2001, India does not bother to proffer any data concerning how many individuals – if any – have availed themselves of the SGIP Adder. Indeed, based on the information cited by India (or lack thereof), it is unclear whether the availability of the SGIP has had any "implication [for] the marketplace"[123] in California.

91. Even if India were able to show that availability of SGIP incentives have driven the installation of renewable energy and storage equipment in California *writ large*, this would not establish that the "SGIP Adder" (*i.e.*, the "measure at issue") has induced buyers to "use" California-made products *in particular*. At any rate, as noted, India does not even attempt to

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incentive payments for electricity generated through certified renewable systems, the bulk of which are residential rooftop solar systems.")

[120] *See*, India's First Written Submission, paras. 51, 172, 274, 418, 464, 563, 1011, 1119.

[121] *See*, India's First Written Submission, para. 147("The measures at issue are the additional [SGIP] incentives, i.e. California Manufacturer Adder provided to the applicants pursuant to the Handbooks under the SGIP by the State of California (through the Program Administrators) for generating electricity contingent upon the use of the eligible equipment manufactured in California.")

[122] India's First Written Submission, para. 176.

[123] *See*, *US – FSC (Article 21.5 – EC) (AB)*, para. 215.

demonstrate that the SGIP Adder has incentivized the "use" of renewable energy generation or storage products manufactured in California.

92. Once again, because *incentivization* is the vector by which India claims that the SGIP Adder has "affect[ed]" the "use" of products within the meaning of Article III:4, India has necessarily failed to establish that the SGIP Adder "affect[s]" the "use" of products with the meaning of that provision. Consequently, India has failed to demonstrate that the SGIP Adder accords "less favorable" treatment to imported products within the meaning of Article III:4 of the GATT 1994.

93. For the foregoing reasons, the Panel should find that India has failed to establish that the "measures at issue" with respect to the SGIP are inconsistent with Article III:4 of the GATT 1994.

C. India has failed to establish that the LAMC Adder provided for under Los Angeles' Solar Incentive Program (SIP) is inconsistent with Article III:4 of the GATT 1994

94. As noted in Part III above, 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 (*See*, section III.A.2 above).

95. In addition, contrary to India's assertions, 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 Los Angeles Board of Water and Power ("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[124] 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).[125]

96. 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."[126] Because incentivization is the vector by which India claims

[124] LADWP Board AGENDA, Item no. 15 (December 6, 2016) (noting adoption of Resolution 017 111) (Exhibit US –7).

[125] LADWP Board Letter with Proposed Resolution 017 111 (November 26, 2016) (Exhibit US – 9), p. 6:

> Removal of Incentive Adders
>
> The incentive adder for Building integrated PV has not been requested for at least two year and will be removed from the proposed Guidelines in efforts to further streamline the program processes. *Similarly, the Los Angeles Manufacturing Credit will be removed. There have been no requests for this manufacturing credit for over three years*. (emphasis added).

see also LADWP Board AGENDA, Item no. 15 (December 6, 2016) (noting adoption of Resolution 017 111). (Exhibit US – 7).

[126] India's First Written Submission, para. 274.

the that LAMC Adder has "affect[ed]" the "use" of products within the meaning of Article III:4, India has necessarily failed to establish that the LAMC Adder "affect[s]" the "use" of products with the meaning of that provision. Consequently, India has also failed to demonstrate that the LAMC Adder accords "less favorable" treatment to imported products within the meaning of Article III:4 of the GATT 1994. As explained above, a measure that does not affect" the "use" (or "purchase", "sale", etc.) of a product *necessarily* does not "modify the conditions of competition to the detriment of imported products" and, by definition, does not accord "less favorable" treatment to imported products within the meaning of Article III:4 of the GATT 1994.

97. At any rate, affirmative evidence demonstrates that the LAMC Adder has not "modified the conditions of competition to the detriment of imported products." Specifically, the United States notes that Los Angeles has made significant achievements with respect to the installation of solar PV systems. For example, in 2016 LADWP was ranked the 4th "most solar interconnected" utility in the United States.[127] In 2017, Los Angeles was recognized for having the "most installed solar power" of any city in the United States, *after a 44% increase in solar installation during 2016*.[128] Crucially, the LAMC Adder was in legal effect through the end of 2016—that is, during the same period when Los Angeles was reportedly experiencing significant growth in solar PV system installation. Nonetheless, as noted above, not a single person sought to claim the LAMC Adder during 2016 or the two years prior. This demonstrates that the LAMC Adder has not operated to "modify the conditions of competition" in favor of solar PV components manufactured in Los Angeles. Accordingly, the LAMC Adder has not accorded "less favorable" treatment to "imported products" within the meaning of Article III:4.

98. For the foregoing reasons, the Panel should find that India has failed to establish that the "measures at issue" with respect to Los Angeles' SIP are inconsistent with Article III:4 of the GATT 1994.

D. India has failed to establish that the Montana Tax Incentive for Ethanol Production ("MTIEP") is inconsistent with Article III:4 of the GATT 1994

99. As discussed in Part II above, the Montana Department of Transportation records indicate no entity has availed of MTIEP since 1995 (*see,* section II.D). 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"[129] of products of Montana-origin. Because incentivization is the vector by which India claims that MTIEP has "affect[ed]" the "use" of products within the meaning of Article III:4, India has necessarily failed to establish that the MTEIP "affect[s]" the "use" of products with the meaning of that provision. Consequently, India has also failed to

[127] *See,* LADWP Net Metering (NEM) and Solar Incentive Program (SIP) DASHBOARD (July 30, 2018) ("Milestones/Achievements) (Exhibit US – 19).

[128] *See,* LADWP Net Metering (NEM) and Solar Incentive Program (SIP) DASHBOARD (July 30, 2018) ("Milestones/Achievements) (Exhibit US – 19).

[129] *See,* India's First Written Submission, para. 369 ("In effect, the measures alter the conditions of competition in the market in favour of the domestic products and final product derived from such domestic products to the obvious detriment of the imported products or final product derived from *use* of such imported product."). (emphasis added)

demonstrate the MTEIP accords "less favorable" treatment to imported products within the meaning of Article III:4 of the GATT 1994.

100. For the foregoing reasons, the Panel should find that India has failed to establish that the "measures at issue" with respect to MTEIP are inconsistent with Article III:4 of the GATT 1994.

E. India has failed to establish that the Montana Tax Credit for Biodiesel Blending and Storage (Biodiesel Tax Credit) is inconsistent with Article III:4 of the GATT 1994

101. As noted above, Montana Department of Revenue records indicate that no taxpayer has sought to claim the Biodiesel Tax Credit since 2011 (*See* section, II.E). 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. Accordingly, because incentivization is the vector by which India claims that Biodiesel Tax Credit has "affect[ed]" the "use" of products within the meaning of Article III:4, India has necessarily failed to establish that the Biodiesel Tax Credit "affect[s]" the "use" of products within the meaning of that provision. By the same token, India has also failed to demonstrate the Biodiesel Tax Credit accords "less favorable" treatment to imported products within the meaning of Article III:4 of the GATT 1994.

102. For the foregoing reasons, the Panel should find that India has failed to establish that the "measures at issue" with respect to Biodiesel Tax Credit are inconsistent with of Article III:4 of the GATT 1994.

F. India has failed to establish that the Montana Refund for Biodiesel ("Biodiesel Refund") is inconsistent with Article III:4 of the GATT 1994

103. As noted above, Montana Department of Transportation records indicate that no taxpayer has ever applied for (much less received) the Biodiesel Refund (*See*, section, II.E). This clearly rebuts India's assertion that the Biodiesel Refund has created a preference (*i.e.*, "incentivized") "for biodiesel manufactured from Montana products."[130] Once again, because incentivization is the vector by which India claims that the Biodiesel Refund has "affect[ed]" the "use" of products within the meaning of Article III:4, India has necessarily failed to establish that it "affect[s]" the "use" of products with the meaning of that provision. Consequently, India has also failed to demonstrate the Biodiesel Refund accords "less favorable" treatment to imported products within the meaning of Article III:4 of the GATT 1994.

104. For the foregoing reasons, the Panel should find that India has failed to establish that the "measures at issue" with respect to the Biodiesel Refund are inconsistent with Article III:4 of the GATT 1994.

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[130] India's First Written Submission, para. 569 ("The availability of a tax refund for biodiesel manufactured from Montana products would imply that distributors/importers/retailers would prefer to use biodiesel produced using Montana produced ingredients.")

G. India has failed to establish that the Connecticut Component Incentive ("CCI")[131] provided for under Connecticut's Residential Solar Investment Program ("RSIP") is inconsistent with Article III:4 of the GATT 1994

105. India has provided no evidence to substantiate its suggestion that the Connecticut Component Incentive ("CCI")" has played a "decisive" role in inducing consumers to "purchase" or "use" renewable energy components manufactured in Connecticut.[132] India seems to suggest that the CCI has played such a decisive role based on figures India touts at paragraph 651 of its first written submission. Specifically, India cites a 2015 Connecticut Green Bank report (*i.e.*, *Residential Solar Investment Program* Evaluation ("2015 Green Bank Report"[133]) statement that "As of June 30, 2013, [the Green Bank] has disbursed $8.4 million in [RSIP] incentive payments to 1,419 Connecticut homeowners to purchase PV systems."[134] The evidence upon which India relies, however, does not support India's assertions.

106. First, the figure India cites does not indicate what proportion of the 1,419 referenced PV systems – if any – were made in Connecticut or contain components manufactured in Connecticut. In other words, while the base-level RSIP incentives (*See*, section II.G) may have incentivized the "purchase" of solar PV systems *writ large* by "Connecticut homeowners," the information that India presents does not demonstrate that the "measures at issue" have incentivized or "affected" the "use" of Connecticut-made solar PV systems or components *in particular*. Moreover, while the 2015 Green Bank Report notes that the Greenbank had "disbursed $8.4 million incentive payments" as June 2013, the document does not indicate what proportion of incentive payments – if any – were associated with the "use" or "purchase" of Connecticut-made solar PV systems or components.

107. Second, the Greenbank does not have the legal authority to grant CCIs under applicable Connecticut statute. Specifically, the United States draws attention to Section 16-245ff(c) of the General Statutes of Connecticut (Exhibit IND – 39), which provides in relevant part that

> The Connecticut Green Bank shall offer direct financial incentives, in the form of performance-based incentives or expected performance-based buydowns, for the purchase or lease of qualifying residential solar photovoltaic systems or power

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[131] The United States uses the term "Connecticut Component Incentive (CCI)" as shorthand for India's description of the "measures at issue" under the RSIP, which India describes in the following manner:

> The measures at issue are: (i) additional incentive of up to five per cent of the then-applicable incentive provided for the use of major system components manufactured or assembled in Connecticut; and (ii) another additional incentive of up to five per cent of the then-applicable incentive provided for the use of major system components manufactured or assembled in a distressed municipality or a targeted investment community. *See*, India's First Written Submission, para. 653

[132] India's First Written Submission, para. 679.

[133] *See*, *Residential Solar Investment Program* Evaluation, p 12. (Exhibit – IND 84).

[134] *See, Residential Solar Investment Program* Evaluation, p 12. (Exhibit – IND 84).

> purchase agreement from such systems until the earlier of the following: (1) December 31, 2022, or (2) the deployment of three hundred megawatts, in the aggregate, of residential solar photovoltaic installation. *The bank shall consider willingness to pay studies and verified solar photovoltaic system characteristics, such as operational efficiency, size, location, shading and orientation, when determining the type and amount of incentive.*

108. Thus, section 16-245ff(c) authorizes the Greenbank to determine the amount of "financial incentives" under RSIP based on a solar PV system's "operational efficiency, size, location, shading and orientation." That is, it does not authorize the Greenbank to grant RSIP incentives based on where a solar PV system or components were manufactured. Moreover, section 16-245ff(i) of the General Statutes of Connecticut clarifies that Connecticut's Public Utilities Regulatory Authority (PURA) – *not* the Greenbank – has the authority to grant CCIs under RSIP. Specifically 16-245ff(i) provides that

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

109. Therefore, Sections 16-245ff(c) and 16-245ff(i) of the General Statutes of Connecticut make clear that the Connecticut Greenbank does not have the legal authority to issue RSIP incentives payment associated with the "purchase" or "use" of Connecticut-manufactured solar PV systems or components. Likewise, the same indicates that none of the $8.4 million in RSIP "incentives payments" that the Greenbank reportedly disbursed through 2013 were linked to the "purchase" or "use" of Connecticut-manufactured solar PV systems or components.

110. Third, section 16-245ff(i) of General Statutes of Connecticut does not *mandate* that PURA grant any such incentive. Rather, it gives PURA *authority* to grant "an additional incentive" of up to five percent for solar PV systems or components "manufactured…in Connecticut." Specifically, the operative text of 16-245ff(i) provides that PURA "shall provide an additional incentive of *up to five per cent* of the then-applicable incentive…" (emphasis added). The use of the phrase "*up to* five percent" indicates that the Connecticut General Assembly has given PURA the discretion to grant zero "additional incentive…for the use of major system components manufactured or assembled in Connecticut."

111. In this regard, the United States notes that India has provided no evidence demonstrating that PURA has issued rules, regulations, or guidelines that relate to the CCI, much less ever made the incentive available to Connecticut homeowners pursuant to its discretionary authority. In other words, India has failed to demonstrate that the CCI is (or has ever been) legally capable of "affecting" the "purchase" or "use" of products within the meaning of Article III:4.

112. For the aforementioned reasons, India has failed to demonstrate that the RSIP "measures at issue" (*i.e.*, the CCI) operate to "affect" the "purchase" or "use" of solar PV systems of components in Connecticut within the meaning of Article III:4. Consequently, India has also

failed to demonstrate that the measures at issue "modify the conditions of competition" between imported and domestic products in Connecticut. As explained above, a measure that does not affect" the "use" (or "purchase", "sale", etc.) of a product *necessarily* does not "modify the conditions of competition to the detriment of imported products" and, by definition, does not accord "less favorable" treatment to imported products within the meaning of Article III:4 of the GATT 1994.

113. For the foregoing reasons, the Panel should find that India has failed to establish that the "measures at issue" with respect to Connecticut's RISP are inconsistent with Article III:4 of the GATT 1994.

H. India has failed to establish that the "Michigan Equipment Multiplier" provided for under Michigan's Renewable Energy Standards Program ("Michigan RESP") is inconsistent with Article III:4 of the GATT 1994

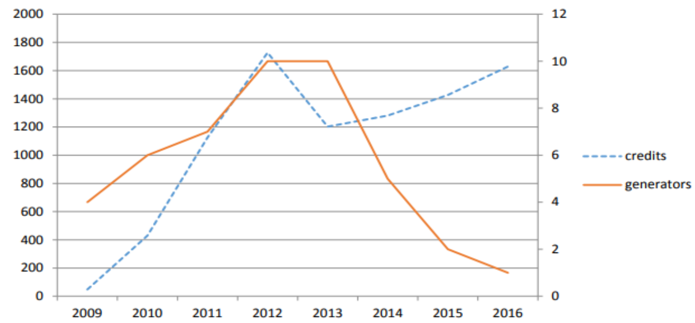
114. The evidence submitted by India with respect to the Michigan RESP in fact rebuts India's own contentions that the Michigan Equipment Multiplier has "induced" (*i.e.,* incentivized) buyers to purchase renewable energy systems of "Michigan–origin" or rendered "'like' imported products… undesirable in the eyes of [] potential buyer[s]."[135]

115. Specifically, at paragraph 747 of its first written submission, India inscribes a graph from a 2017 Michigan Public Service Commission ("MPSC") "annual report" on the "implementation" of the RESP (*i.e.*, Annual *Report of Implementation of PA 295 Renewable Energy Standard and the Cost-Effectiveness of the Energy Standards* ("2017 RESP Report")).[136] The graph displays that total number of "Michigan Equipment Incentive RECs" issued in years 2009-2016. Specifically, the graph indicates that there were approximately 1800 Michigan-equipment incentive RECs issued since the inception of RESP in 2009, through 2016. The United States has replicated this graph below as it appears in India's first written submission.

Figure 12: Michigan Equipment Incentive Credits (2009-2016)

[135] *See*, India's First Written Submission, para. 782 ("Given that the Michigan Equipment Multiplier and the Michigan Labour Multiplier provide additional incentives for the use of products manufactured in Michigan, the relevant imported products do not get the *equality of opportunity* to compete in the domestic market of Michigan. Since, the buyers are induced to purchase 'renewable energy system' of Michigan -origin, the 'like' imported products, which are negated the *equality of opportunity*, become undesirable in the eyes of a potential buyer.")

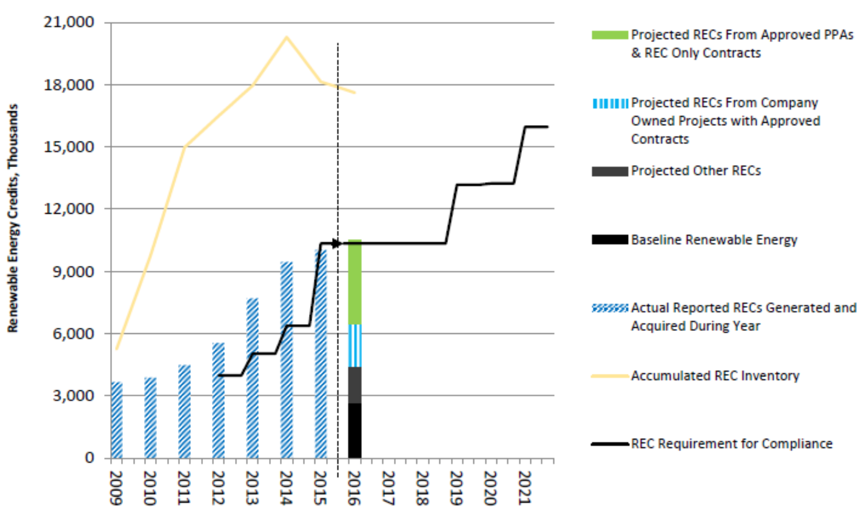
[136] *See*, MPSC, Annual *Report of Implementation of PA 295 Renewable Energy Standard and the Cost-Effectiveness of the Energy Standards* (February 15, 2017), p. 21 (Figure 9) (Exhibit US – 20).



Source: Report on Implementation of PA 295 of 2017

116. The 2017 RESP Report also includes the following graph (which India does not reference in its first written submission). This graph displays the total number of Michigan RECs created in years 2009 – 2015, with projections for years 2016-2021. The graph indicates that there were approximately 20.5 million total RECs generated in years 2009-2016.

Figure 3: Michigan Renewable Energy Credit Projection



117. Therefore, the figures above demonstrate that "Michigan-equipment incentive RECs (*i.e.*, RECs issued pursuant to the Michigan Equipment Multiplier) have accounted for only 0.0000878% of all RECs generated since RESP began in 2009.

118. The fact that "Michigan-equipment Incentive RECs" have accounted for an infinitesimal amount of the all RECs generated over the life of RESP rebuts any suggestion that Michigan Equipment Multiplier has "induced" (*i.e.*, incentivized) buyers to "purchase" or "use" renewable energy systems made in Michigan as opposed to imported like products. Since incentivization is the vector by which India claims that the Michigan Equipment Multiplier "affects" the "use" of products within the meaning of Article III:4, India has necessarily failed to establish that the Incentive RECs "affect" the "use" of products with the meaning of that provision. Likewise, India has also failed to demonstrate the Incentive RECs accord "less favorable" treatment to imported products within the meaning of Article III:4 of the GATT 1994.

I. India has failed to demonstrate the "Delaware Equipment Bonus" provided under Delaware's Renewable Energy Portfolio Standards Act (REPSA) is inconsistent with Article III:4 of the GATT 1994

119. India has failed to demonstrate that the Delaware Equipment Bonus[137] incentivizes the "purchase" of renewable energy products manufactured in Delaware. Specifically, the United States draws attention to 26 Del. C. § 351(d), the REPSA provision that provides for the "Delaware Equipment Bonus". It reads as follows.

> A *retail electricity supplier* shall receive an additional 10% credit toward meeting the renewable energy portfolio standards [RPS] established pursuant to this subchapter for solar or wind energy installations sited in Delaware provided that a minimum of 50% of the cost of renewable energy equipment, inclusive of mounting components, are manufactured in Delaware. [138]

As discussed at section II.I above, the "credits" referenced in 26 Del. C. § 351(d) are "renewable energy credits" or RECs.[139] A "retail electricity supplier" is "an entity that sells electrical energy to end-use customers in Delaware." [140]

120. The United States understands India to argue that the prospect of "additional RECs" would be attractive to "potential buyers" of renewable energy products because RECs are "tradable instruments" with monetary value.[141] This argument, however, is flawed. While RECs are *generally* tradable in Delaware, India has failed to demonstrate that RECs associated with the "Delaware Equipment Bonus" (*i.e*., "Bonus RECs") *in particular* are tradable instruments or have independent monetary value. Specifically, the United States observes that 26 Del. C. § 351(d) provides the retail electricity suppliers shall receive an additional 10% credit *toward meeting the renewable energy portfolio standards*..." This statutory language indicates that retail electricity suppliers <u>cannot</u> trade Bonus RECs for monetary value, but use them only for purposes of satisfying their obligations under Delaware's RPS.

121. Moreover, India has not demonstrated that the prospect of receiving Bonus RECs incentivizes retail electricity suppliers to purchase renewable energy generation equipment made in Delaware. Indeed, India has failed to show that retail electricity suppliers in Delaware make *any* purchasing decisions with respect to renewable energy generation equipment.

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[137] *See*, India's First Written Submission, 847. ("measures at issue comprise of: (i) the additional 10% credit toward meeting the renewable energy portfolio standards established for solar or wind energy installations sited in Delaware, provided that a minimum of 50% of the cost of renewable energy equipment, inclusive of The mounting components, are manufactured in Delaware ("**Delaware Equipment Bonus**")").

[138] 26 Del. C. § 351(d). (Exhibit – IND 54.)

[139] 26 Del. C. § 351(d)

[140] 26 Del. C. § 352

[141] *See*, India's First Written Submission, para. 909 ("The renewable energy credits are tradable instruments and, indeed, are traded for money.").

122. Specifically, under Delaware's statutory scheme, "retail electricity suppliers" (*i.e.*, companies that sell electricity to end-use consumers") [142] and "generation units" [143] (*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.

123. Therefore, if the Delaware Equipment Bonus is not available to generation units, it follows that the Bonus RECs do not incentive them to "purchase" or "use" equipment manufactured in Delaware. Relatedly, if retail electricity suppliers are not in the business of generating power – and therefore do not purchase generation equipment as a matter of course – the Delaware Equipment Bonus necessarily does not incentivize them to "purchase" or "use" generation equipment manufactured in Delaware. In this regard, the United States draws attention to paragraph 845 of India's First Written Submission, where India notes that Delmarva Power and Light Company ("Delmarva") is the principal "retail electricity supplier" in Delaware and the "*de facto* long-term buyer for the majority of the RECs" pursuant to REPSA.[144] As Delmarva Power states on its website, "Delmarva Power is an electric distribution company *only and does not generate electricity*."[145]

124. Moreover, SREC Delaware[146] reports that "Solar panels are no longer manufactured in Delaware" and have not been produced in Delaware since 2013.[147] If solar panels are not produced in Delaware, the Delaware Equipment Bonus, by definition cannot "affect" the "purchase" or "sale" of such products within the meaning of Article III:4.

125. For the reasons explained above, India has failed to demonstrate that the Delaware Equipment Bonus operates to incentivize the "purchase" or "use" of renewable energy generation equipment made in Delaware. Because incentivization is the vector by which India claims that Delaware Equipment Bonus "affects" the "purchase" or "use" of products within the

[142] 26 Del. C. § 352

[143] *See*, 26 Del. C. § 352 ("'Generation unit' means a facility that converts a fuel or an energy resource into electrical energy.")

[144] *See*, India's First Written Submission, para. 845 (citing Energize Delaware, Solar Renewable Energy Program (Exhibit IND -55)). (emphasis original)

[145] Delmarva Power, Infrastructure 101 (Exhibit US – 21).

[146] SREC Delaware is a program established to this Program to "procure SRECs for Delmarva Power so they can meet their requirement under the Delaware Renewable Portfolio Standard." http://www.dev.srecdelaware.com/documentation/#pilot. (Exhibit IND-57).

[147] *See, See*, 2017 Delaware SREC Procurement Program Webinar at minute 1:56 (noting that "Solar panels are no longer manufactured in DE." (Exhibit US – 23); *see also* 2014 Delaware SREC Procurement Program Webinar, Slide 4 (noting that "Solar panels are no longer manufactured in DE.") (Exhibit US – 24).

meaning of Article III:4, India has necessarily failed to establish that the Bonus "affects" the "use" of products with the meaning of that provision. Consequently, India has failed to demonstrate the Delaware Equipment Bonus "modifies the conditions of competition" between imported and domestic products in Delaware. As explained above, a measure that does not affect" the "use" (or "purchase", "sale", etc.) of a product does not breach Article III:4. In addition, India has not shown that the Delaware equipment Bonus "modifies the conditions of competition to the detriment of imported products" and thus has shown that the measure accords "less favourable" treatment to imported products within the meaning of Article III:4 of the GATT 1994.

J. India has failed to demonstrate the Incentives and Rebates provided for under the Minnesota Solar Incentive Program (MSIP) are inconsistent with Article III:4 of the GATT 1994.

126. As explained in section II.J above, India uses the term "Minnesota Solar Incentive Program" as an umbrella term for three "distinct" Minnesota solar programs: (1) the Solar PV Incentive Minnesota; (2) the Solar Thermal Rebate; and (3) the Solar PV Rebate.. As noted in the preliminary ruling request in Part III above, two of these programs (*i.e.*, the Rebates for the Installation of Solar Thermal Systems and Rebate for Solar PV Modules) fall outside the Panel's terms of reference because they were not the subject of consultations between the parties (*See*, section III.B).

127. [148]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." [149] Specifically, the United States draw attention to paragraph 983 of India's first written submission, where India inscribes a graph from a 2016 Minnesota Department of Revenue (DOR) press release.[150] The chart is reproduced below as it appears in India's Submission.

[150] Department of Commerce, 2016 MiM Solar PV Incentive Program completes random selection of applicants; program to support 393 new projects state wide, (Exhibit IND – 69).

Made in Minnesota Solar PV Incentive Program Random Selection Results for 2016

Xcel Energy	**Applicants**	**Funding reserved**
Commercial*	717	87
Residential	711	295
Total kW		5,559.45 kW

Otter Tail Power	**Applicants**	**Funding reserved**
Commercial	16	1
Residential	9	4
Total kW		58.74 kW

Minnesota Power	**Applicants**	**Funding reserved**
Commercial	9	1
Residential	31	5
Total kW		71.18 kW

Total projects funded 393
Total kW funded=5,689
***Includes community solar gardens**

128. According to chart, the solar projects that received funding from the Solar PV Incentive program in 2016 accounted for 5,698 kilowatts of generating capacity. The United States understands that India presents these figures as evidence that the Solar PV Incentive Program has incentivized the "purchase" or "use" of solar PV equipment made in Minnesota. However, the United States observes that DOR *also* reports that a total of 219 megawatts (or 219,000 kilowatts) of solar generating capacity was installed in Minnesota during 2016.[151] In other words, solar installations that received incentives under the Solar PV Incentive program accounted for <u>less than 3 percent</u> of all solar installations in Minnesota during 2016.

129. 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 or that the incentives have modified the conditions of competition to the detriment of imported products. Since incentivization is the vector by which India claims that this measure "affects" the "purchase" or "use" of products within the meaning of Article III:4, India has necessarily failed to establish that this measure "affects" the "use" of products with the meaning of that provision. Likewise, India has also failed to demonstrate the measures at issue accord "less favourable" treatment to imported products within the meaning of Article III:4 of the GATT 1994.

K. <u>India has failed to demonstrate the "Massachusetts Manufacturer Adder" provided for under the Massachusetts Commonwealth Solar Hot Water Program (SHWP) is inconsistent with Article III:4 of the GATT 1994</u>

[151] *See*, Burger, Mark. Minnesota more than doubles installed solar in 2017, *pv Magazine* (January 12, 2018) ("The story of Minnesota's meteoric rise in PV has been in the years 2016 and 2017. The total capacity of PV through 2015 was only an estimated 36 MW. In *2016, 209 MW was installed*, and more than doubled to 471 MW installed in 2017.") (Exhibit US – 22). (emphasis added)

130. As noted in the preliminary ruling request in Part III above, the Massachusetts Manufacturer Adder falls outside the Panel's terms of reference as it was no longer in legal effect when the Panel was established on March 21, 2017 (*See*, section III.A.3).

131. 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. At any rate, as noted at section III.A.3 above, the MassCEC terminated the Manufacturer Adder on December 15, 2016; to the extent that the Manufacturer Adder had *ever* incentivized the "use" of solar hot water systems or components manufactured in Massachusetts, it was no longer doing so when this Panel was established.

132. 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. Accordingly, the Panel should find that India has failed to establish that any of the measures at issue are inconsistent with Article III:4 of the GATT 1994.

V. INDIA HAS NOT DEMONSTRATED A BREACH OF ARTICLE 2.1 OF THE TRIMS AGREEMENT

133. Measures not inconsistent with Article III:4 of the GATT are *necessarily* not inconsistent with Article 2.1 of the TRIMs Agreement. Consequently, given that India has failed to establish that the measures at issue are inconsistent with Article III:4 of the GATT 1994 (*See* section IV above), India has *necessarily* failed to establish they are inconsistent with Article 2.1 of the TRIMs Agreement. For this reason, the Panel's ruling on the GATT 1994 claims should resolve the issues in dispute, and the United States suggests that the Panel exercise judicial economy with respect to India's claims under the TRIMS agreement.

134. Nonetheless, for the sake of completeness, the United States will address India's claims under Article 2.1 of the TRIMs Agreement. As discussed below, while a finding of a breach of Article III:4 is *necessary* for a finding of a breach of TRIMS article 2.1, an Article III:4 breach is not *sufficient* for a finding of a TRIMs Article 2.1 breach. Rather, to establish a breach of TRIMS Article 2.1, India must establish additional elements unique to the TRIMS Agreement. India has not established those additional elements.

135. Article 1 of the TRIMs Agreement provides that:

> This Agreement *applies* to investment measures related to trade in goods only (referred to in this Agreement as "TRIMs")

136. Article 2 of the TRIMs Agreement in turn provides that:

> 1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994 (emphasis added).

> 2. An *illustrative list of TRIMs* that are inconsistent with the obligations of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in Annex to this Agreement. (emphasis added)

137. As the United States will explain below, India has failed to establish that most of the "measures at issue" fall within the scope of the TRIMs Agreement, much less establish that those measures are inconsistent with any provision of the Agreement.

A. <u>The scope of the TRIMs Agreement extends only to measures that impose requirements or conditions on an *enterprise's purchase or use of goods*</u>

138. 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 <u>not</u> regulate such actions of *enterprises* fall outside the scope of the TRIMs Agreement.

139. <u>First</u>, the text of Article 5 of the TRIMs Agreement makes clear that TRIMs are measures that are "applicable to… enterprises." Specifically, Article 5 provides in relevant part that

> 1. Members, within 90 days of the date of entry into force of the WTO Agreement, shall notify the Council for Trade in Goods of all TRIMs they are applying that are not in conformity with the provisions of this Agreement.
>
> …
>
> 2. … a Member, in order not to disadvantage established *enterprises which are subject to a TRIM* notified under paragraph 1, may apply during the transition period the same TRIM to a new investment (i) where the products of such investment are like products to those of the established *enterprises*, and (ii) where necessary to avoid distorting the conditions of competition between the new investment and the established *enterprises*. Any TRIM so applied to a new investment shall be notified to the Council for Trade in Goods. The terms of such a *TRIM shall be equivalent in their competitive effect to those applicable to the established enterprises*, and it shall be terminated at the same time.

140. The numerous references in Article 5 to "enterprises" – 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*.

141. 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 *enterprises*.[152] Specifically,

- Paragraph 1(a) of the Illustrative List refers to "the purchase or use *by an enterprise* of products…"
- Paragraph 1(b) refers to "an *enterprise's* purchase or use of imported products…"
- Paragraphs 2(a) & (b) refer to "the importation *by an enterprise* of product…"; and
- Paragraph 2(c) refers to "the exportation or sale for export *by an* enterprise…"

142. While the Illustrative List is, by definition, not an "exhaustive statement"[153] of the type of measures that could fall within the scope of the TRIMs Agreement, it is instructive that every illustrative example of "TRIMs that are inconsistent with [Articles III:4 and XI of the GATT 1994]" has the purchase, sale, import or export by an "enterprise" as its object. Based on this context, TRIMs are measures that impose requirements on *enterprises.*

143. Third, in each of the prior disputes where the panel found a measure was inconsistent with the TRIMs Agreement, the measure at issue imposed requirements or conditions on *enterprises*. Specifically, the panels in *Indonesia – Autos*, *Canada – FIT*, and *India – Solar* Cells respectively found that the measures at issue were inconsistent with the Article 2.1 of the TRIMs Agreement. Under the "local content requirements"[154] at issue in *Indonesia – Autos*, automobile producers received certain tax benefits and import duty exemptions based on the percentage of locally manufactured components imported by the enterprise and used to produce automobiles or automobile parts.[155] Under the "minimum domestic content level" measures at issue in *Canada – FIT*, "generators of electricity"[156] were able to lock-in long-term fixed-price electricity purchase contracts with the Government of Ontario on the condition that they purchased a minimum percentage of "generation equipment"[157] from local producers.[158] Similarly, under the

[152] *See, China – Publications and Audiovisual Products (AB)*, para. 227 ("In addition, the Illustrative List in Annex 1 to the Agreement on Trade-Related Investment Measures (the 'TRIMs Agreement') sets out a number of requirements imposed on enterprises that are deemed to be inconsistent with either Article III:4 or Article XI:1 of the GATT 1994.")

[153] *See, Canada – Autos (Panel)*, para. 10.89.

[154] *See, Indonesia – Autos (Panel*), para. 2.16

[155] *Indonesia – Autos (Panel)*

[156] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (Panel)*, para. 7.64.

[157] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (Panel)*, para. 7.11.

[158] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (Panel)*

"domestic content requirements"[159] issue in *India—Solar*, "solar power developers"[160] that erected solar power facilities purchasing and using solar cells and modules "made in India" were eligible to enter into long-term electricity supply contracts ("power purchase agreements") with the Indian government.

B. 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

144. As the United States will explain below, most of the measure at issue in the present dispute impose no requirement or conditions on enterprises' purchases or uses of goods and thus fall outside the scope of the TRIMs Agreement.[161]

1. The "cost recovery incentives" provided under Washington's Renewable Energy Cost Recovery Program (RECIP) impose no requirements or conditions *enterprises' purchases or uses of goods* and therefore fall outside the scope of the TRIMs Agreement

145. As the United States explained at section II.A above, the "cost recovery incentives" provided under Washington's Renewable Energy Cost Recovery Program (RECIP) are broadly available to individuals, households, businesses, non-profit organizations, and local government entities that are customers of participating utility companies in the state of Washington. To qualify for inventive payments under RECIP, the aforementioned entities must "own a renewable energy system" that generates electricity and the system must be located on their property.

146. 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. Therefore, the "cost recovery incentive" measures fall outside the scope of the TRIMs Agreement. Accordingly, the RECIP measures necessarily do not require the "purchase or use *by an enterprise*" of any product in order to "obtain an advantage" within the meaning of paragraph 1(a) of the TRIMs Illustrative List. [162]

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[159] *India – Solar Cells (Panel)*, para. 8.1.

[160] *India – Solar Cells (Panel)*, para. 8.1.

[161] The Oxford English Dictionary defines "enterprise" as a "business firm" or "company." *See*, The New Shorter Oxford English Dictionary (4th Edition), p. 828.

[162] *See*, India's First Written Submission, paras. 76,78. ("[T]he measures at issue *require the use* of certain specified components manufactured in Washington in order to receive additional investment cost recovery incentive…[and therefore] involve the use of products from a domestic source (i.e. Washington), within the meaning of Paragraph 1(a) of the Illustrative List. Compliance with such measures is necessary for the *applicants* to obtain the additional investment cost recovery incentives (i.e. an advantage) and therefore, the measures at issue squarely fall within paragraph 1(a) of the Illustrative List and thus, under Article 2.2 of the TRIMs Agreement.") (emphasis added)

2. The SGIP Adder under California's Self-Generation Incentive Program (SGIP) imposes no requirements or conditions on enterprises' purchases or uses of goods and therefore falls outside the scope of the TRIMs Agreement

147. As explained at section II.B above, "any" retail customer of one of the California's four major investor-owned utility companies is eligible to receive incentives under the SGIP.[163] Customers qualify for the incentive by purchasing and installing qualifying renewable energy generation or storage equipment (*e.g.*, wind turbines, batteries).[164]

148. 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. Therefore, the incentive provided under SGIP falls outside the scope of the TRIMs Agreement. Accordingly, the SGIP incentives necessarily do not "require the purchase or use *by an enterprise*" of any product in order to "obtain an advantage" within the meaning of paragraph 1(a) of the TRIMs Illustrative List.[165]

3. 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

149. As explained at section II.C above, the incentive payments under the Los Angeles SIP are broadly available to "customers" of the Los Angeles Department of Water and Power (LADWP), the municipal water and power utility for the city of Los Angeles. To qualify for incentives under SIP, customers must "purchase or lease, and install solar PV systems" on their property.[166]

150. 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. Therefore, the incentives provided under the SIP – including the LAMC Adder – fall outside the scope of the TRIMs Agreement. Accordingly, India has also failed to establish that the SIP incentive measures at issue "require the purchase or use *by an enterprise*" of any product in order to "obtain an advantage" within the meaning of paragraph 1(a) of the TRIMs Illustrative List. [167]

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[163] *See*, 2017 SGIP Handbook (Exhibit IND-15), Section 4.1.1("Any retail electric or gas distribution class of customer (industrial, agricultural, commercial or residential) of PG&E, SCE, SoCalGas, or SDG&E is eligible to be the Host Customer and receive incentives from the SGIP.")

[164] *See*, 2017 SGIP Handbook, p. 9.

[165] *See*, India's First Written Submission, paras. 194-195.

[166] *See*, e.g., *2015 SIP Guidelines* (Exhibit IND-26), p. 12. ("The SIP provides an estimated performance-based incentive to LADWP *customers* who purchase or lease, and install *solar PV system*s."). (emphasis original)

[167] *See*, India's First Written Submission, paras 296-297. "India alleges that certain incentive measures under the Los AngelesAngeles Solar Incentive Program (SIP) fall within paragraph 1(a) of the TRIMs Illustrative List because they "require the use of certain specified components manufactured in Los Angeles in order to" qualify for the incentive (i.e., to obtain an advantage.

4. <u>The "incentives" provided under the Connecticut Residential Solar Investment Program (RSIP) impose no requirements or conditions on enterprises' purchases or uses of goods and therefore fall outside the scope of the TRIMs Agreement</u>

151. As explained above, incentive payments under RSIP are available <u>only</u> to utility customers that own and occupy residential "family homes" in Connecticut.[168] 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.[169]

152. 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. Therefore, the incentive payments under RSIP fall outside the scope of the TRIMs Agreement. Moreover, because "enterprises" are ineligible to receive incentive payments under RSIP, the RSIP measures at issue *necessarily* do <u>not</u> require the "purchase or use *by an enterprise*" of any product in order to "obtain an advantage" within the meaning of paragraph 1(a) of the TRIMs Illustrative List. [170]

5. <u>The incentives and rebates provided under the Minnesota Solar Incentive Program (MSIP) impose no requirements or conditions on *enterprises*' purchases or uses of goods and therefore fall outside the scope of the TRIMs Agreement</u>

153. As explained in section II.J above, the incentives provided under the MSIP were available to Minnesota property owners that installed solar photovoltaic or solar thermal systems on their property. 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 programs. Therefore, the incentive measures provided under the MSIP fall outside the scope of the TRIMs Agreement. Accordingly, the incentive measures necessarily do <u>not</u> require the "purchase or use

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[168] *See*, Section 16-245ff(a)(3) of the General Statutes of Connecticut (Exhibit IND – 39) (" Qualifying residential solar photovoltaic system" means a solar photovoltaic project that receives funding from the Connecticut Green Bank, is certified by the authority as a Class I renewable energy source, as defined in subsection (a) of section 16-1, emits no pollutants, is *located on the customer-side of the revenue meter of one-to-four family homes* and serves the distribution system of an electric distribution company.") (emphasis added); *see also*, Energize Connecticut, Residential Solar Investment Program, Eligibility, available at: http://www.energizect.com/your-home/solutions-list/residential-solarinvestment-program (Exhibit IND – 81) ("If your home is a *1-4 family owner-occupied residential property* in the Eversource or UI service territories, and offers a good location for a solar system, you can qualify for residential solar incentives. Mobile homes are not eligible.") (emphasis added).

[169] *See*¸ Energize Connecticut, Residential Solar Investment Program, Incentive, available at: http://www.energizect.com/your-home/solutions-list/residential-solar-investment-program (Exhibit IND – 81).

[170] *See*, India's First Written Submission, paras, 699-700. India alleges that certain incentives provided under Connecticut's Residential Solar Investment Program (CRSIP) fall within paragraph 1(a) of the TRIMs Illustrative List because they "are contingent on [the] purchase/lease of solar photovoltaic systems whose major system components are manufactured or assembled in Connecticut."

by an enterprise" of any product in order to "obtain an advantage" within the meaning of paragraph 1(a) of the TRIMs Illustrative List.

6. <u>The rebates provided under the Commonwealth Solar Hot Water Program (SHWP) impose no requirements on *enterprises*' purchases or uses of goods therefore fall outside the scope of the TRIMs Agreement</u>

154. As explained in section II.K above, the rebates provided under the Solar Hot Water Programs (SHWP) are broadly available to residential, institutional, and commercial customers that install "solar hot water systems" on their premises. An entity is <u>not</u> required to be an "enterprise" (*i.e.*, a "business firm" or "company") in order to qualify for a rebate under program. Therefore, the rebates provided under the SHWP program fall outside the scope of the TRIMs Agreement. Accordingly, the rebate measures necessarily do <u>not</u> require the "purchase or use by an enterprise" of any product in order to "obtain an advantage" within the meaning of paragraph 1(a) of the TRIMs Illustrative List.

155. For the foregoing reasons, the Panel should find that each of the "measures at issue" with respect to the (i) <u>Renewable Energy Cost Recovery Incentive Program</u>; (ii) <u>Self-Generation Incentive Program</u>; (iii) <u>Los Angeles Solar Incentive Program</u>; (iv) <u>Residential Solar Investment Program</u>; (v) <u>Minnesota Solar Incentive Program</u>; and (vi) <u>Commonwealth Solar Hot Water Program</u> fall outside of the scope of the TRIMs Agreement.

VI. RESPONSE TO INDIA'S CLAIMS UNDER ARTICLE 3 OF THE SCM AGREEMENT

156. India argues that each of the measures at issue is inconsistent with Article 3.1(b) and 3.2 of the SCM Agreement, which prohibit Members from adopting "subsidies contingent…upon the use of domestic over imported goods." India, however, has failed to demonstrate that any of the measures at issue meet the definition of a "subsidy" within the meaning of Article 1 of the SCM Agreement.

157. Article 1.1 of the SCM Agreement provides in relevant part that

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a) (1) there is a financial contribution by a government or any public body within the territory of a Member…and
>
> (b) A benefit is thereby conferred

158. India has failed to make a prima facie case that any of the measures at issues are subsidies within the meaning of Article 1.1.

159. <u>First</u>, 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. As a general matter, however, India has not presented evidence of the extent to which, if any, a government entity actually make financial contributions pursuant to

those measures. This absence of evidence is particularly problematic given that, as explained in Part II above, many of the measures at issue at issue have fallen into general disuse and are essentially moribund. Without presenting evidence of actual contributions, India has failed to present a prima facie case that the measures at issue meet the "financial contribution" element of a subsidy.

160. Second, as the United States explains below, 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 Washington's Renewable Energy Cost Recovery Program (RECIP) confer a "benefit"

161. India has failed to establish that the measure at issue under RECIP ("hereinafter the "Washington Adder"[171]) 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.

162. 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.[172]

163. For the reasons explained below, India has failed to demonstrate that the Washington Adder confers a "benefit" on direct recipients *or* local producers.

1. India has failed to demonstrate that the Washington Adder confers a "benefit" on direct recipients

164. India argues that Washington Adder confers a "benefit" on direct recipients because it enables them to purchase renewable energy systems at a below "market" price and thereby leaves them "better off" then they would have been absent the Adder. India's argument is based on the following scenario.

> Assume the total cost of installing a renewable energy system is 'x' in the market and the amount of the additional investment cost recovery incentives offered is 'y'. In absence of the measures at issue which grant the higher incentives contingent upon the use of domestic goods over imported goods, an applicant would incur a total cost of 'x'. However, since a financial contribution exists, the applicant incurs a cost of 'x' less 'y' which is below the *market cost* of 'x' . Therefore, it is evident that a recipient is

[171] *See*, India's First Written Submission, para. 27 ("The measures at issue are the 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.")

[172] *See,* India's First Written Submission, para. 105.

"better off" than what it would have been absent such additional incentives i.e. financial contribution.[173]

165. This argument had a fundamental flaw – in India's own terms, it is based on what India "assumes" will be the total cost of a system to a Washington State consumer of a renewable energy system made of Washington State equipment. This is an unsupported assumption, without any record evidence or facts. Other scenarios are also possible. For example, sellers may have increased the price of Washington-made equipment and components *because* they know that the Washington Adder has given consumers additional spending power with respect to such products. In other words, *contra* India's example above, the price for Washington-made equipment and components may now be 'x' + 'y' rather than simply 'x'. Therefore, an incentive in the amount of 'y' would leave the consumer <u>no</u> better off (*i.e.*, 'x' + 'y' – 'y' = 'x') than they would have been absent the availability of the Adder. There is no basis on the record of this dispute to find that India's "assumption" is in fact true. Without such evidence, India has failed to make a prima facie case of the existence of a "benefit" to a Washington State user of renewable energy equipment.

2. <u>India has failed to demonstrate the Washington Adder confers a "benefit" on local producers</u>

166. India argues that the Washington Adder confers a "benefit" on "local producers" of Washington-made renewable energy equipment and components by enabling them to capture more sales for their products than would have been possible absent the Adder.[174] This argument is without merit, for three reasons.

167. <u>First</u>, as noted above, India has already argued that Washington Adder confers a "benefit" *on* direct recipients equal to the amount of the "cost recovery incentives" received. Specifically, India reasons that the if the "market cost" of a renewable energy system is 'x' and applicable cost recovery incentive is 'y', the incentive makes recipients "better off" in the amount of 'y'.[175] Therefore, India's *own* approach to calculating the "benefit" conferred by the Washington Adder appears to leave no room for "additional" benefits conferred on local producers. For this reason alone, India has failed to demonstrate that the Washington Adder confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.[176]

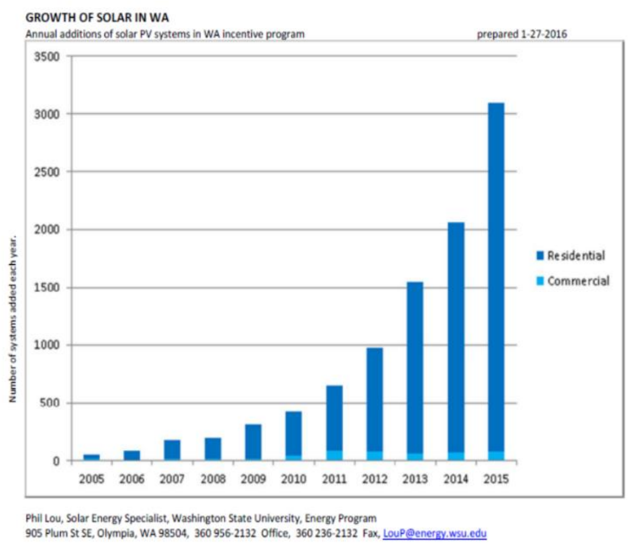
[173] India's First Written Submission, para. 107.

[175] *See,* India's First Written Submission, para. 107.

[176] *See, e.g., US – Upland Cotton (Article 22.6 – US I),* para. 4.148 (Having calculated the amount of benefit conferred by the GSM 102 guarantees consistently with Article 14(c) of the SCM Agreement, we do not see any other basis on which Brazil might calculate some additional benefit conferred by those guarantees, as this term is defined for the purposes of Article 1.1 of the SCM Agreement. *Since benefit is established in the first instance by reference to the recipient of a financial contribution, it is with regard to the recipient of the GSM 102 guarantees, i.e. the foreign obligors, that the existence of any benefit conferred by the GSM 102 guarantees must be established.*

168. Second, India provides no basis for its view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[177] In other words, India has not demonstrated that what it describes as a "benefit (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find that India has failed to establish that the Washington Adder confers a "benefit" on local producers.

169. Third, the data India cites to demonstrate that local producers have benefited from the Washington Adder does not show that local producers have enjoyed any such "benefit." In particular, India refers to "exponential rise"[178] in the number of solar PV systems installed in Washington state between 2005 – when RECIP began – and 2015 (*See*, India's First Written Submission, Figure 3 – inserted below).



170. However, the United States observes that information relied on by India does not indicate what percentage of installed systems – *if any* – contain equipment or components manufactured by "local producers" in Washington. From the chart below, it is just as possible that imported or non-Washington products account for the entirety of the increased sales and installations. In other words, the information presented by India does not demonstrate that local producers have

Thus, having calculated the benefit conferred on the foreign obligors, Brazil has effectively exhausted the potential for establishing benefit conferred by those financial contributions.") (emphasis added)

[177] *US – Upland Cotton (Article 22.6 – US I)*,para. 4.149.

[178] India's First Written Submission, para. 112

"benefited" from the rise in solar installations, much less experienced a "meteoric rise in the sales of their products."[179]

171. For the reasons explained above, India has failed to demonstrate that Washington Adder confers a "benefit" within the meaning of Articles 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the Adder is "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of SCM Article 3.1(b). Accordingly, the Panel should find that India has failed to establish that the measures at issue with respect to Washington's Renewable Energy Cost Incentive Program (RECIP) are inconsistent with the United States' obligations under Articles 3.1(b) and 3.2 of the SCM Agreement.

B. India has failed to establish that the California Manufacture Adder ("SGIP Adder") provided for under California's Self-Generation Incentive Program (SGIP) confers a "benefit"

172. 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.

1. India has failed to demonstrate that the SGIP Adder confers a "benefit" on direct recipients

176. India argues that SGIP Adder confers a "benefit" on direct recipients because it enables them to purchase renewable energy equipment at 20 percent below "market" price and thereby leaves them "better off" than they would have been absent the SGIP Adder. India illustrates its argument with the following example:

> *Assume* the total cost of the 'eligible equipment' or the renewable energy system which comprise of these eligible equipment that does not meet the California Manufacturer Adder is 'X'. Therefore, in absence of the measures at issue which provide additional incentive contingent on use of domestic goods over imported goods, an applicant would incur a total cost of 'X' in the relevant market. However, if another applicant under the SGIP meets the California Manufacturer Adder, then that recipient will receive an additional 20% incentive, reducing its total cost of acquisition. Therefore, it is evident that a recipient is "better off" than what it would have been absent such incentive i.e. financial contribution.[180]

173. India's argument is flawed because – in India's own terms it is based on what India "assumes" the "cost" of renewable energy equipment and components would be on the California market. This is just an unsupported assumption without any record evidence or

[179] India's First Written Submission, para. 113.

[180] India's First Written Submission, para. 227. (emphasis added)

supporting facts. Other scenarios are possible. For example, local suppliers and producers may have increased the price of California-made "eligible equipment" *because* they know that SGIP Adder has given consumers additional spending power with respect to such products.

174. In other words, *contra* India's example above, the price for California-made eligible equipment" may now be ['X' + ('20% x 'X') rather than simply 'X', such that the SGIP Adder does not make recipients "better off" at all. At any rate, there is no basis on the record of this dispute to find that India's "assumption" is in fact true. Without such evidence, India has failed to demonstrate that the SGIP Adder confer a "benefit" on direct recipients.

2. India has failed to demonstrate that SGIP Adder confers a "benefit" on local producers

175. India argues that the SGIP Adder confers a "benefit" on local producers of California-made renewable energy equipment and components by enabling them to capture more sales for their products than would have been possible absent the Adder.[181] This argument is without merit, for three reasons.

176. First, India has already argued that SGIP Adder confers a "benefit" *on* direct recipients in amount of an "additional 20% incentive" toward the cost of "eligible equipment."[182] Therefore, India's *own* approach to calculating the "benefit" conferred by the SGIP Adder appears to leave no room for an "additional" benefit conferred on local suppliers or producers.[183] For this reason alone, India has failed to demonstrate that the SGIP Adder confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

177. Second, India provides no basis for the view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SMC Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[184] In other words, India has not demonstrated that what it describes as a "benefit" (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find that India has failed to establish that the SGIP Adder confers a "benefit" on local producers.

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[181] India's First Written Submission, para. 197.

[182] *See,* India's First Written Submission, para. 227.

[183] *See, e.g., US – Upland Cotton (Article 22.6 – US I),* para. 4.148 (Having calculated the amount of benefit conferred by the GSM 102 guarantees consistently with Article 14(c) of the SCM Agreement, we do not see any other basis on which Brazil might calculate some additional benefit conferred by those guarantees, as this term is defined for the purposes of Article 1.1 of the SCM Agreement. *Since benefit is established in the first instance by reference to the recipient of a financial contribution, it is with regard to the recipient of the GSM 102 guarantees, i.e. the foreign obligors, that the existence of any benefit conferred by the GSM 102 guarantees must be established.* Thus, having calculated the benefit conferred on the foreign obligors, Brazil has effectively exhausted the potential for establishing benefit conferred by those financial contributions.") (emphasis added)

[184] *US – Upland Cotton (Article 22.6 – US I)*,para. 4.149.

178. Third, the evidence that India presents to demonstrate that the local suppliers and producers have *actually* benefited from the SGIP Adder does not – in fact – demonstrate that local suppliers and producers have enjoyed any such benefit. Specifically, India cites a 2017 Decision[185] of the California Public Utility Commission (CPUC), which notes that "companies manufacturing or supplying SGIP-eligible technologies" supported increased funding for SGIP.[186] The United States observes that CPUC Decision cited by India does not appear to include any reference to the SGIP Adder or indicate whether companies sought an increase in funding for the Adder in *particular*. Therefore, the CPUC Decision does not "clearly demonstrate"[187] that the SGIP Adder confers a "benefit" on local suppliers and producers within the meaning of Article 1.1(b) of the SCM Agreement.

179. For the reasons explained above, India has failed to demonstrate that the SGIP Adder confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the Adder is "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of Article 3.1(b) of the SCM Agreement.

C. India has failed to establish that the Los Angeles Manufacturing Credit ("LAMC Adder") confers a "benefit"

180. As argued in section III above, 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 (*See*, section III.2 above).

181. 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.

182. For the reasons explained below, India has failed to demonstrate that the LAMC Adder confers "benefit" on either direct recipients or local producers.

1. India has failed to demonstrate that the LAMC Adder confers a "benefit" on direct recipients

183. India argues that LAMC Adder confers a "benefit" on direct recipients because it enables them to purchase solar PV equipment at lower than "market" cost and thus leaves them "better off" then they would have been absent the LAMC Adder. India illustrates this argument with the following example.

> *Assume* the total cost of installing a solar photovoltaic system is 'X' in the relevant market Therefore, in absence of the measures at issue which provide the LAMC

[185] *See*, CPUC decision D.17-04-017 (Exhibit – IND 23).

[186] India's First Written Submission, para. 229.

[187] *See*, India's First Written Submission, para. 229.

> Adder contingent on use of domestic goods over imported goods, an applicant would incur a total cost of 'X' in the relevant market. However, if another applicant qualifies for the LAMC Adder, the applicant will still pay X amount, but will also receive the LAMC incentives which would lower its cost of acquisition. . Therefore, it is evident that a recipient is "better off" than what it would have been absent such incentive i.e. financial contribution. [188]

184. India's argument is flawed because it is based on India's "assumptions" about what the cost of solar PV equipment would be on the Los Angeles market.[189] India's assumptions, however, are unsupported by any record evidence or facts. Other outcomes are possible. For example, local producers may have increased the price of solar PV equipment manufactured in Los Angeles *because* they know that LAMC Adder had given consumers additional spending power with respect to such products.

185. In other words, *contra* India's example above, the market price for solar PV equipment made in Los Angeles may have *risen* to 'X *plus* the applicable LAMC incentive,' such that the LAMC did not make recipients "better off" at all. At any rate, there is no basis on the record of this dispute to find that India's "assumptions" are in fact true. Because India has not provided any evidence that would support its assumptions, it has failed to make a *prima facie* case of the existence of a "benefit" to direct recipients of the LAMC Adder.

2. <u>**India has failed to demonstrate the LAMC Adder confers a "benefit" on local producers**</u>

186. India argues that the LMAC Adder confers a "benefit" on local producers of solar PV equipment in Los Angeles by creating an artificial market for their products that is free of competition of "products outside of Los Angeles."[190] This argument is without merit for two reasons.

187. <u>First</u>, India has already argued that LAMC Adder confers a "benefit" *on* direct recipients in that the LAMC Adder "lowers [the] cost of acquisition" for solar PV equipment made in Los Angeles.[191] Therefore, India's *own* approach to calculating the "benefit" conferred by the LMAC Adder appears to leave no room for an "additional" benefit conferred on local producers. For this reason alone, India has failed to demonstrate that the Washington Adder confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

188. <u>Second</u>, India provides no basis for the view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SMC Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional

[188] India's First Written Submission, para. 315 (emphasis added).

[189] *See,* India's First Written Submission, para. 315 ("Assume the total cost of installing a solar photovoltaic system is 'X' in the relevant market…") (emphasis added).

[190] *See,* India's First Written Submission, paras 317-318.

[191] *See*, India' First Written Submission, para. 315.

sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[192] In other words, India has not demonstrated that what it describes as a "benefit" (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find that India has failed to establish that the LMAC Adder confers a "benefit" on local producers.

189. For the reasons explained above, India has failed to demonstrate that the LAMC Adder confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the Adder is "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of Article 3.1(b) of the SCM Agreement.

D. <u>India has failed to establish that the Montana Tax Incentive for Ethanol Production ("MTIEP") confers a "benefit"</u>

190. For the reasons explained below, India has failed to demonstrate that the MTIEP (hereinafter "Tax Incentive") confers a "benefit" on ethanol distributors or local producers of Montana wood and wood products.[193]

1. <u>India has failed to demonstrate that Tax Incentive confers a "benefit" on ethanol distributors (*i.e.*, direct recipients)</u>

191. India argues that that Tax Incentive confers a "benefit" on ethanol distributors because it effectively lowers their production costs and thereby enables them to generate higher profits from their sales of ethanol and/or increase their sales of ethanol.[194]

192. India's argument is flawed because it is premised on India's assumptions about what the "cost" of ethanol production would be in Montana. India does not support it assumptions with any evidence or facts. In that regard, the United States notes that other scenarios are also possible. For example, producers of wood and wood products may have *increased* the price of wood and wood products sold to Montana ethanol distributors in response to the additional spending power that Tax Incentive bestows on ethanol distributors. *Contra* India's hypothetical, ethanol distributors may incur the same or greater costs for Montana wood and wood products "than they would have in the absence of the tax incentive."[195] At any rate, there is no basis on the record of this dispute to find that India's assumptions are in fact true. Absent such evidence, India has failed to make a prime facie case that the Tax Incentive would confer a "benefit" on ethanol distributors.

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[192] *US – Upland Cotton (Article 22.6 – US I)*,para. 4.149.

[193] *See*, India's First Written Submission, para. 414.

[194] India's First Written Submission, para. 416.

[195] *See*, India's First Written Submission, para. 416.

2. India has failed to demonstrate that Tax Incentive confers a "benefit" on local producers of Montana wood and wood products (*i.e.*, indirect beneficiaries)

193. India argues that the Tax Incentive confers a "benefit" on local producers of Montana wood and wood products by enabling them to sell more of their product than would have been possible absent the Tax Incentive.[196]

194. First, India has already argued that Tax Incentive confers a "benefit" *on* ethanol distributors (*i.e.*, the direct recipients) in amount that the Tax Incentive "lowers [their] cost of production" and thus enables them to earn "higher profits" on sales of ethanol.[197] Therefore, India's *own* approach to calculating the "benefit" conferred by the Tax Incentive appears to leave no room for an "additional" benefit conferred on local producers of wood and wood products.[198] For this reason alone, India has failed to demonstrate that the Tax Incentive confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

195. Second, India provides no support for the view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[199] In other words, India has not demonstrated that what it describes as a "benefit" (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find that India has failed to establish that the Tax Incentive confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

196. For the reasons explained above, India has failed to demonstrate that the Tax Incentive confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the Tax Incentive is a "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of Article 3.1(b) of the SCM Agreement. Accordingly, the Panel should find that India has failed to establish that the measures at issue with respect to the Montana Tax Incentive

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[197] India's First Written Submission, para. 416.

[198] *See, e.g., US – Upland Cotton (Article 22.6 – US I),* para. 4.148 (Having calculated the amount of benefit conferred by the GSM 102 guarantees consistently with Article 14(c) of the SCM Agreement, we do not see any other basis on which Brazil might calculate some additional benefit conferred by those guarantees, as this term is defined for the purposes of Article 1.1 of the SCM Agreement. *Since benefit is established in the first instance by reference to the recipient of a financial contribution, it is with regard to the recipient of the GSM 102 guarantees, i.e. the foreign obligors, that the existence of any benefit conferred by the GSM 102 guarantees must be established.* Thus, having calculated the benefit conferred on the foreign obligors, Brazil has effectively exhausted the potential for establishing benefit conferred by those financial contributions.") (emphasis added)

[199] *US – Upland Cotton (Article 22.6 – US I)*,para. 4.149.

for Ethanol Production ("MTIEP") are inconsistent with the United States' obligations under Articles 3.1(b) and 3.2 of the SCM Agreement.

E. India has failed to establish that Montana Tax Credit for Biodiesel Blending and Storage (Biodiesel Tax Credit) confers a "benefit"

197. For the reasons explained below, India has failed to demonstrate that the Tax Credit confers a "benefit" on individual/corporate taxpayers or local producers of Montana feedstock.[200]

1. India has failed to demonstrate that the Tax Credit confers a "benefit" on individual and corporate taxpayers (*i.e.*, direct recipients)

198. India appears to argue that Tax Credit confers a "benefit" on direct recipient Montana taxpayers by lowering the "investment costs" for equipment used for blending and storing biodiesel. Specifically, India states that

> Pursuant to the measures at issue, a tax credit is provided to the applicant for tax payables under the [Montana Code Annotated], for costs of investment in depreciable property used for storing or blending biodiesel with petroleum diesel for sale. The tax credit is available up to 15% of the costs of investment. The credit would hence reduce the investment costs conferring benefit on the recipients.

199. India's assertion that that Tax Credit would necessarily reduce taxpayers' "investment costs" rests on certain assumptions that are not supported by any record facts or evidence. In this regard, the United States notes that other outcomes are possible. For example, sellers may increase the price of biodiesel ingredients may increase their prices *because* the Tax Credit gives consumers greater effective spending power with respect to such products. At any rate, India has not entered any evidence concerning the price or "cost" effects of the Tax Credit. Without such evidence, India has failed to make a prime facie case that the Tax credit would confer a "benefit" on direct recipient taxpayers.

2. India has failed to demonstrate that the Tax Credit confers a "benefit" on local producers of Montana feedstock (*i.e.*, indirect recipients)

200. India argues that the Tax Credit confers a "benefit" on local producers of Montana feedstock by enabling them to sell more of their product than would have been possible absent the Tax Credit.[201]

201. First, India has already argued that Tax Credit confers a "benefit" *on* individual and corporate taxpayers (*i.e.*, the direct recipients) by the amount it "reduces [their] investment costs."[202] Therefore, India's *own* approach to calculating the "benefit" conferred by the Tax Credit appears to leave no room for an "additional" benefit conferred on local producers

[200] *See*, India's First Written Submission, para. 514.

[202] India's First Written Submission, para. 515.

Montana feedstock.[203] For this reason alone, India has failed to demonstrate that the Tax Credit confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

202. Second, India provides no basis for the view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[204] In other words, India has not demonstrated that what it describes as a "benefit" (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find that India has failed to establish that the Tax Credit confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

203. For the reasons explained above, India has failed to demonstrate that the Tax Credit confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the Tax Credit is a "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of Article 3.1(b) of the SCM Agreement. Accordingly, the Panel should find that India has failed to establish that the measures at issue with respect to the Montana Tax Credit for Biodiesel Blending and Storage (Biodiesel Tax Credit) are inconsistent with the United States' obligations under Articles 3.1(b) and 3.2 of the SCM Agreement.

F. India has failed to establish that Montana Tax Refund for Biodiesel ("Biodiesel Refund") confers a benefit

204. For the reasons explained below, India has failed to demonstrate that the Biodiesel Refund confers a "benefit" on biodiesel distributors and the owners/operators of retail motor fuel outlets *or* local producers of Montana biodiesel ingredients.[205]

1. India has failed to demonstrate that the Biodiesel Refund confers a "benefit" on biodiesel distributors and the owners/operators of retail motor fuel outlets (*i.e.*, direct recipients)

[203] *See, e.g., US – Upland Cotton (Article 22.6 – US I)*, para. 4.148 (Having calculated the amount of benefit conferred by the GSM 102 guarantees consistently with Article 14(c) of the SCM Agreement, we do not see any other basis on which Brazil might calculate some additional benefit conferred by those guarantees, as this term is defined for the purposes of Article 1.1 of the SCM Agreement. *Since benefit is established in the first instance by reference to the recipient of a financial contribution, it is with regard to the recipient of the GSM 102 guarantees, i.e. the foreign obligors, that the existence of any benefit conferred by the GSM 102 guarantees must be established.* Thus, having calculated the benefit conferred on the foreign obligors, Brazil has effectively exhausted the potential for establishing benefit conferred by those financial contributions.") (emphasis added)

[204] *US – Upland Cotton (Article 22.6 – US I)*, para. 4.149.

[205] *See*, India's First Written Submission, para. 614.

205. India argues that the Biodiesel Refund confers a "benefit" on the recipient distributors and retail fuel outlets by allowing them to achieve tax savings on each gallon of biodiesel sold and purchased, respectively.[206] Specifically, India states that

> With respect to the tax incentives, the biodiesel distributor receives the tax refund depending on whether the biodiesel with respect to which the refund is being claimed is produced entirely from ingredients produced in Montana. The amount of incentive is 2 cents per gallon for the biodiesel distributor and 1 cent per gallon for the owner or operator of the retail motor fuel outlet. For example, if a licensed distributor is obligated to pay the special fuel tax at the rate of 27 ¾ cents per gallon, the tax refund of 2 cents a gallon would reduce the taxability to 25 ¾ per gallon.[207]

206. India's analysis is incomplete, and thus does not meet India's burden of showing the existence of a benefit. Specifically, while the Biodiesel Refund may allow taxpayers to achieve tax savings, it is not clear that they would necessarily be overall "better off" as result of the Biodiesel Refund. Other outcomes are possible. For example, sellers of Montana biodiesel ingredients may increase their prices on sales to Montana biodiesel distributors *because* they know that Biodiesel Refund has given distributors greater effective spending power with respect to Montana biodiesel ingredients. Biodiesel distributors, in turn, may pass along these additional costs by increasing their prices on biodiesel sales to Montana retail fuel outlets. In other words, while the Biodiesel Refund may allow biodiesel distributors and retail fuel outlets to achieve *nominal* tax savings on their respective sales and purchases of biodiesel they would not necessarily be "better off" in *real* terms. At any rate, India has not entered any evidence concerning possible price effects on the biodiesel ingredient market. Without such evidence, India has failed to demonstrate that the Biodiesel Refund confers a "benefit" distributors or retail fuel outlets.

2. <u>India has failed to demonstrate that the Biodiesel Refund confers a "benefit" on local producers of Montana biodiesel ingredients (*i.e.*, indirect recipients)</u>

207. India argues that the Bio Diesel Refund confers a "benefit" on local producers of Montana feedstock by enabling them to sell more of their product than would have been possible absent the Biodiesel Refund.[208]

208. <u>First</u>, India has already argued that Biodiesel Refund confers a "benefit" *on* biodiesel distributors and retail motor fuel outlets (*i.e.*, direct recipients) in the amount of their per gallon tax savings on sales and purchases of biodiesel produced with Montana products.[209] Therefore, India's *own* approach to calculating the "benefit" conferred by the Biodiesel Refund appears to leave no room for an "additional" benefit conferred on local producers of Montana biodiesel

[206] India's First Written Submission, para. 615.

[207] India's First Written Submission, para. 615.

[209] *See*, India's First Written Submission, para. 615.

ingredients.[210] For this reason alone, India has failed to demonstrate that the Biodiesel Refund confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

209. Second, India provides no basis for its view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[211] In other words, India has not demonstrated that what it describes as a "benefit" (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find that India has failed to establish that the Biodiesel Refund confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

210. For the reasons explained above, India has failed to demonstrate that the Biodiesel Refund confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the Biodiesel Refund is a "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of Article 3.1(b) of the SCM Agreement.

G. India has failed to establish that the Connecticut Component Incentive (CCI)[212] provided for under Connecticut's Residential Solar Investment Program (RSIP) confers a "benefit"

211. 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.

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[210] *See, e.g., US – Upland Cotton (Article 22.6 – US I)*, para. 4.148 (Having calculated the amount of benefit conferred by the GSM 102 guarantees consistently with Article 14(c) of the SCM Agreement, we do not see any other basis on which Brazil might calculate some additional benefit conferred by those guarantees, as this term is defined for the purposes of Article 1.1 of the SCM Agreement. *Since benefit is established in the first instance by reference to the recipient of a financial contribution, it is with regard to the recipient of the GSM 102 guarantees, i.e. the foreign obligors, that the existence of any benefit conferred by the GSM 102 guarantees must be established.* Thus, having calculated the benefit conferred on the foreign obligors, Brazil has effectively exhausted the potential for establishing benefit conferred by those financial contributions.") (emphasis added)

[211] *US – Upland Cotton (Article 22.6 – US I)*, para. 4.149.

[212] The United States uses the term "Connecticut Component Incentive (CCI)" as shorthand for India's description of the "measures at issue" under the RSIP, which India describes in the following manner:

> The measures at issue are: (i) additional incentive of up to five per cent of the then-applicable incentive provided for the use of major system components manufactured or assembled in Connecticut; and (ii) another additional incentive of up to five per cent of the then-applicable incentive provided for the use of major system components manufactured or assembled in a distressed municipality or a targeted investment community. *See*, India's First Written Submission, para. 653

212. 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).[213]

213. For the reasons explained below, 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.

1. India has failed to demonstrate that the CCI confers a benefit on solar PV system owners (*i.e.*, direct recipients)

214. India argues that the CCI confers a "benefit" on solar PV system owners and homeowners by effectively enabling them to buy a solar PV equipment at below "market" cost. Specifically, India states that

> the additional incentives place the recipient in a better position than the recipient would have been absent such financial contribution. *The incentives lower the cost to the applicant which they would have otherwise incurred in the relevant market*.[214]

215. However, India's conclusion that the CCI "place[s] the recipient in a better position" is flawed because it does not take into account other possible market effects of the CCI. For example, the sellers of Connecticut-manufactured solar PV systems and components may *increase* the price of their products *because* the CCI has given consumers additional spending power with respect to such products. It is difficult to know either way because India has not entered any evidence on the likely market effects of the CCI. Because India has not provided evidence to this effect, it has failed to demonstrate that the CCI confers a "benefit" on recipient solar PV owners within the meaning of 1.1(b) of the SCM Agreement.

216. The United India takes note of India's attempt to provide real-world evidence showing that the CCI has lowered solar PV system installation costs for Connecticut homeowners. Citing a 2015 report prepared by the Connecticut Green Bank (CGB), India asserts

> Indeed, the Green Bank has shelled out approximately USD 105 million in the form of incentives under the CRISP from the year 2012 to 2017. *These incentives have lowered cost per installed watt for the home owners who choose to install solar photovoltaic system under the CRISP*.[215]

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[213] *See*, India's First Written Submission, para. 719.

[214] India's First Written Submission, para. 721.

[215] India's First Written Submission, para. 722, referencing The Green Bank's sunny report, part I: Solar power on the rise, (May 5, 2015) (Exhibit IND – 88).

217. However, the United States observes that the report cited by India attributes the "per watt" drop in solar PV installations to a *global* decline in the price of solar PV equipment, not to incentives provided under the Residential Solar Investment Program.[216]

2. India has failed to demonstrate that the CCI confers a "benefit" on the local producers/ assemblers of the major system components (*i.e.*, indirect recipients)

218. India argues that the CCI confers a "benefit" on local producers/ assemblers of the major system components by enabling them to sell more of their products than would have been possible absent the CCI. [217]

219. First, India has already argued that CCI confers a "benefit" on solar PV system owners (*i.e.*, direct recipients) in the amount that the CCI lowers the cost of Connecticut-manufactured solar PV systems and components. [218] Therefore, India's *own* approach to calculating the "benefit" conferred by the CCI appears to leave no room for an "additional" benefit conferred on local producers of Montana biodiesel ingredients.[219] For this reason alone, India has failed to demonstrate that the CCI confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

220. Second, India provides no basis for the view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[220] In other words, India has not demonstrated that what it describes as a "benefit" (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find that India has failed to establish that the CCI confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

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[216] *See*, The Green Bank's sunny report, part I: Solar power on the rise, (May 5, 2015) ("After 2008 the cost per watt began creeping downward as demand rose modestly. During this period, international markets for solar PV were changing dynamically in Europe and Asia resulting in worldwide reductions in hardware costs (e.g., solar photovoltaic modules). In 2008 there were as many installations as in all previous years combined. However this growth leveled outduring the next few years and showed no momentum.") (Exhibit – IND 88).

[218] *See*, India's First Written Submission, para. 615.

[219] *See, e.g., US – Upland Cotton (Article 22.6 – US I)*, para. 4.148 (Having calculated the amount of benefit conferred by the GSM 102 guarantees consistently with Article 14(c) of the SCM Agreement, we do not see any other basis on which Brazil might calculate some additional benefit conferred by those guarantees, as this term is defined for the purposes of Article 1.1 of the SCM Agreement. *Since benefit is established in the first instance by reference to the recipient of a financial contribution, it is with regard to the recipient of the GSM 102 guarantees, i.e. the foreign obligors, that the existence of any benefit conferred by the GSM 102 guarantees must be established.* Thus, having calculated the benefit conferred on the foreign obligors, Brazil has effectively exhausted the potential for establishing benefit conferred by those financial contributions.") (emphasis added)

[220] *US – Upland Cotton (Article 22.6 – US I)*, para. 4.149.

221. For the reasons explained above, India has failed to demonstrate that the CCI confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the CCI is a "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of Article 3.1(b) of the SCM Agreement. Accordingly, the Panel should find that India has failed to establish that the measures at issue with respect to the Connecticut's Residential Solar Investment Program (RSIP) are inconsistent with the United States' obligations under Articles 3.1(b) and 3.2 of the SCM Agreement.

H. India has failed to establish that the "Michigan Equipment Multiplier" confers a "benefit"

222. India has failed to establish that RECs issued under the Michigan Equipment Multiplier (hereinafter "Michigan Equipment RECs") 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.

223. India argues that Michigan Equipment RECs confers a benefit on "two categories" of recipients: (1) electricity providers (*i.e.*, direct recipients); and (2) the local producers of renewable energy system equipment (*i.e.*, indirect recipients).[221]

1. India has failed to demonstrate that Michigan Equipment RECs confer a benefit on electricity providers (*i.e.*, direct recipients)

224. India argues that the Michigan Equipment Multiplier confers a "benefit" on electricity providers that use Michigan-made renewable energy equipment because it enables the electricity providers to earn and sell more RECs (*i.e.*, Michigan Equipment RECs) than they could absent the Multiplier.[222] India provides the following illustration.

> For example, an applicant purchases 'renewable energy system' which do not meet the standards set by the challenged measures at issue. The number of RECs produced by this applicant is sold for the value of 'X'. Had the same applicant purchased the 'renewable energy system' which met the standards set by the challenged measure and produced the same number of RECs, then that applicant would have received 'X + i', where 'i' is the amount of incentive calculated based on the formula prescribed by the MPSC. Therefore, the recipient is "better off" than what it would have been absent such financial contribution.

225. India's analysis is incomplete because it fails to consider the Michigan Equipment Multiplier may allow sellers and producers of Michigan-manufactured equipment to command *higher* prices for their products. Specifically, if the Michigan Equipment Multiplier enables users (*i.e.*, electricity providers, power generators) to achieve a higher income stream from the use Michigan-made systems and equipment (in the form of additional RECs), the sellers of

[221] *See*, India's First Written Submission, para. 819.

[222] India's First Written Submission, para. 821.

Michigan-made equipment may decide to charge a premium on sales of such equipment to electricity providers and generators. Depending on the size of this price premium, electricity providers may be no "better off" than they would have been in a world without the Michigan Equipment Multiplier. It is difficult to know either way because India does not provide sufficient evidence or facts to complete such an analysis. Because India has not provided evidence or facts to this effect, it has failed to demonstrate that the Michigan Equipment Multiplier confers a "benefit" on electricity providers within the meaning of 1.1(b) of the SCM Agreement. The United States submits that India's omission on this score provides sufficient grounds for the Panel to find that India has failed to establish that Michigan Equipment Multiplier is inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.

2. India has failed to establish that the Michigan Equipment Multiplier confers a "benefit" on the local producers of renewable energy system equipment (*i.e.*, indirect recipients)

226. India argues that the Michigan Equipment Multiplier confers a "benefit" on local producers of renewable energy system equipment by enabling them to sell more of their products than would have been possible absent the Multiplier.

227. First, India has already argued that the Michigan Equipment Multiplier confers a "benefit" on "potential electricity providers" in the amount of the additional 1/10 RECs earned per KWh.[223] Therefore, India's *own* approach to calculating the "benefit" conferred by the Michigan Equipment Multiplier appears to leave no room for an "additional" benefit conferred on local producers of renewable energy systems and equipment.[224] For this reason alone, India has failed to demonstrate that the Michigan Equipment Multiplier confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

228. Second, India provides no basis for its view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[225] In other words, India has not demonstrated that what it describes as a "benefit" (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find

[223] *See*, India's First Written Submission, para. 615.

[224] *See, e.g., US – Upland Cotton (Article 22.6 – US I)*, para. 4.148 (Having calculated the amount of benefit conferred by the GSM 102 guarantees consistently with Article 14(c) of the SCM Agreement, we do not see any other basis on which Brazil might calculate some additional benefit conferred by those guarantees, as this term is defined for the purposes of Article 1.1 of the SCM Agreement. *Since benefit is established in the first instance by reference to the recipient of a financial contribution, it is with regard to the recipient of the GSM 102 guarantees, i.e. the foreign obligors, that the existence of any benefit conferred by the GSM 102 guarantees must be established.* Thus, having calculated the benefit conferred on the foreign obligors, Brazil has effectively exhausted the potential for establishing benefit conferred by those financial contributions.") (emphasis added)

[225] *US – Upland Cotton (Article 22.6 – US I)*, para. 4.149.

that India has failed to establish that the Michigan Equipment Multiplier confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

229. For the reasons explained above, India has failed to demonstrate that the Michigan Equipment Multiplier confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the Michigan Equipment Multiplier is a "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of Article 3.1(b) of the SCM Agreement. Accordingly, the Panel should find that India has failed to establish that the measures at issue with respect to the Michigan's Renewable Energy Standards Program (RESP) are inconsistent with the United States' obligations under Articles 3.1(b) and 3.2 of the SCM Agreement.

I. India has failed to establish the "Delaware Equipment Bonus" provided under Delaware's Renewable Energy Portfolio Standards Act (REPSA) confers a "benefit"

230. India has failed to establish that RECs issued under the Delaware Equipment Bonus (hereinafter "Delaware Equipment RECs") 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.

231. India argues that the Delaware Equipment Bonus confers a "benefit" on two categories of recipients: the (1) the retail electricity suppliers that receive the Bonus (*i.e.*, direct recipients); and (2) local producers of renewable energy equipment and components (*i.e.*, indirect recipients).[226]

1. India has failed to demonstrate the Delaware Equipment Bonus confers a "benefit" on retail electricity suppliers

232. India argues the Delaware Equipment Bonus confers a "benefit" on retail electricity suppliers by enabling them to buy renewable energy systems and components at a sales price lower than the price they would have incurred absent the Bonus. India illustrates this argument in the following manner.

> By way of illustration, an applicant purchases 'renewable energy equipment' and 'mounting components' which do not meet the conditions set out by the measures at issue to receive the Delaware Equipment Bonus. The number of RECs and/or SRECs produced by this applicant is sold for the value of 'X'. Had the applicant purchased the 'renewable energy equipment' and 'mounting components' which met the conditions of in-state manufacture level set by the challenged measures and produced the same number of RECs and/or SRECs, then that applicant would have received the price of 'X + (X x 0.1)'. Accordingly, the financial contribution pursuant to the measures at issue confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.[227]

[226] *See*, India's First Written Submission, para. 923.

[227] India's First Written Submission, para. 925.

233. India's hypothetical is incomplete because it does not take into account the possible price effects of the Delaware Equipment Bonus. In fact, the Delaware Equipment Bonus may allow sellers and producers of Delaware-manufactured renewable energy systems and components to command *higher* prices for their products. That is, if the Delaware Equipment Bonus enables users (*i.e.*, retail electricity suppliers) to achieve a higher income stream from the use of Delaware-manufactured systems and components (*i.e*, in the form of additional RECs), the sellers of Delaware-made equipment may decide to charge a premium on sales of such equipment to retail electricity suppliers. Depending on the size of this premium, retail electricity suppliers may be no "better off" than they would have been in a world without the Delaware Equipment Bonus. It is difficult to judge either way because India has not entered any facts or evidence concerning the price effects of the Delaware Equipment Bonus. Without such evidence, India has failed to make a prima facie case of the existence of a "benefit" to retail electricity suppliers.

2. India has failed to demonstrate that the Delaware Equipment Bonus confers a "benefit" on local producers of renewable energy systems and components

234. India argues that the Delaware Equipment Bonus confers a "benefit" on local producers of renewable energy systems and components by creating an artificial market for their products that is free of competition from like products of non-Delaware origin.[228]

235. First, India has already argued that the Delaware Equipment Bonus confers a "benefit" on retail electricity suppliers in the amount of the additional .10 RECs earned/produced per kilowatt hour. [229] Therefore, India's own approach to calculating the "benefit" conferred by the Delaware Equipment Bonus appears to leave no room for an "additional" benefit conferred on local producers of renewable energy systems or components. For this reason alone, India has failed to demonstrate that the Delaware Equipment Bonus confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

236. Second, India provides no basis for the view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[230] In other words, India has not demonstrated that what it describes as a "benefit" (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find that India has failed to establish that the Delaware Equipment Bonus confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.[231]

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[228] *See,* India's First Written Submission, para. 927.

[229] *See*, India's First Written Submission, para. 925.

[230] *US – Upland Cotton (Article 22.6 – US I),* para. 4.149.

[231] The United States takes note of the evidence that India presents to demonstrate that local producers have benefited from the Delaware Equipment Bonus as an empirical matter. Specifically, at paragraph 928 of its first

237. For the reasons explained above, India has failed to demonstrate that the Delaware Equipment Bonus confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the Delaware Equipment Bonus is a "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of Article 3.1(b) of the SCM Agreement. Accordingly, the Panel should find that India has failed to establish that the measures at issue with respect to Delaware's Renewable Energy Portfolio Standards Act (REPSA) are inconsistent with the United States' obligations under Articles 3.1(b) and 3.2 of the SCM Agreement.

J. India has failed to demonstrate the "Incentives" or "Rebates" provided for under the Minnesota Solar Incentive Program (MSIP) confer a "benefit"

238. India has failed to establish that "incentive" and "rebate" measures at issue under the Minnesota Solar Incentive Program (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.

239. India argues that the MSIP measures confer a "benefit" on (1) the homeowners that receive such incentives and rebates (*i.e.*, "direct beneficiaries"); and (2) "local producers" of solar PV modules and solar thermal systems.[232]

1. India has failed to demonstrate that the measures at issue confer a benefit on recipient homeowners

240. India argues that the incentive and rebate measures at issue confer a "benefit" on Minnesota homeowners by enabling them to purchase solar PV modules and thermal systems at a lower cost than would have been possible without such measures.[233]

241. India's argument is flawed, however, because it does consider that the MSIP measures could result in *higher* prices for solar PV modules and thermal systems made in Minnesota. Specifically, the incentive and rebate measures at issue may have prompted sellers and producers to *raise* the price of the specified solar equipment *because* the incentive and rebate measures gave Minnesota homeowners additional spending power with respect to such products. The

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written submission India cites a 2013 consultant study (commissioned by Delmarva Power) which found that 52% of the solar power projects that earned RECs in 2012 had applied for Delaware Equipment Bonus (*See*, Exhibit IND – 61). First, the United States observes that the study does not indicate how many of the referenced solar projects ultimately used equipment manufactured in Delaware. Second, at any rate, SREC Delaware – the entity that procures solar power RECs (or SRECs) on behalf of Delmarva Power – reports that solar panels have not been manufactured in Delaware *since 2013*. Therefore, notwithstanding the events of 2012, it does not appear that such local producers have benefited from the Delaware Equipment Bonus as an empirical matter. *See*, 2017 Delaware SREC Procurement Program Webinar at minute 1:56 (noting that "Solar panels are no longer manufactured in DE." (Exhibit US – 23); *see also* 2014 Delaware SREC Procurement Program Webinar, Slide 4 (noting that "Solar panels are no longer manufactured in DE.") (Exhibit US – 24).

[232] *See*, India's First Written Submission, para. 1063.

[233] *See,* India's First Written Submission, para. 1068.

possibility of such price effects seems likely given that the incentives and rebates at issue were available to essentially all homeowners in Minnesota. Without some analysis into the extent of such price effects, it is not "evident"[234] that the measures have made Minnesota homeowners "better off."[235] Because India has not presented any such analysis or evidence, it has failed make a prima facie case of the existence of a "benefit" to Minnesota homeowners.

2. India has failed to demonstrate that the measures at issue confer a "benefit" on local producers of solar PV modules or solar thermal systems

242. India argues that the measures at issue confer a "benefit" on local producers of solar PV modules and solar thermal systems by creating greater demand for their products and thereby increasing their sales.[236]

243. First, India has already argued that the measures at issue confer a benefit on Minnesota homeowners in the amount the applicable incentive and rebates reduce the cost of solar PV modules and thermal equipment.[237] Therefore, India's own approach to calculating the "benefit" conferred by the MSIP measures appears to leave no room for an "additional" benefit conferred on local producers of renewable energy systems or components. For this reason alone, India has failed to demonstrate that the MSIP incentive and rebate measures confer a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

244. Second, India provides no basis for the view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[238] In other words, India has not demonstrated that what it describes as a "benefit" (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find that India has failed to establish that the MSIP measure confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

245. For the reasons explained above, India has failed to demonstrate that the MSIP measure at issue confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the measure constitutes a "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of Article 3.1(b) of the SCM Agreement. Accordingly, the Panel should find that India has failed to establish that the measures at issue with respect Minnesota Solar

[234] *See*, India's First Written Submission, para. 1068.

[235] *See*, India's First Written Submission, para. 1065.

[236] *See,* India's First Written Submission, para. 1070.

[237] *See*, India's First Written Submission, para. 1068.

[238] *US – Upland Cotton (Article 22.6 – US I)*, para. 4.149.

Incentive Program (MSIP) are inconsistent with the United States' obligations under Articles 3.1(b) and 3.2 of the SCM Agreement.

K. India has failed to demonstrate the "Massachusetts Manufacturer Adder" confers a "benefit"

246. 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.

247. India argues that the Massachusetts Manufacturer Adder confers a benefit on (1) the applicants who receive the Massachusetts Manufacturer Adder (*i.e.*, direct recipients); and (2) the local producers of qualifying solar hot water systems and components.[239]

1. India has failed to demonstrate that the Massachusetts Manufacturer Adder confers a "benefit" on recipient homeowners

248. India argues that the Massachusetts Manufacturer Adder confers a "benefit" on direct recipients by enabling them to purchase solar hot water systems and equipment at an "effective" lower cost than would be possible without the Adder.[240] India illustrates its argument with the following hypothetical.

> *Assume* the total cost of installing a SHW system under CSHWP that does not meet the Massachusetts Manufacturer Adder requirement in the relevant market is 'X'. Therefore, in absence of the measures at issue, an applicant would incur a total cost of 'X' in the relevant market. However, if the applicant meets the requirements of the Massachusetts Manufacturer Adder, then the effective cost of the SHW system for such applicant would be 'X – USD 200'. Therefore, it is evident that a recipient is "better off" than what it would have been absent such incentive i.e. financial contribution.[241]

249. India's argument has a fundamental flaw – in India's own terms, it is based on what India "assumes" will be the total cost of qualifying solar hot water system and components. This, however, is an unsupported assumption, without any record evidence or facts. Other scenarios are also possible. For example, the sellers of relevant equipment may have increased the price of Massachusetts-made equipment and components *because* they know that the Massachusetts Manufacturer Adder has given consumers additional spending power with respect to such products. In other words, *contra* India's example above, the price for Massachusetts-made solar hot water equipment and components may now be 'x' + '200' rather than simply 'x'. Therefore, an incentive in the amount of 'y' would leave the consumer no better off (*i.e.*, 'x' + '200' – '200' = 'x') than they would have been absent the availability of the Adder. There is no basis on the

[239] *See*, India's First Written Submission, para. 1159.

[240] *See*, India's First Written Submission, para. 1162.

[241] *See*, India's First Written Submission, para. 1162. (emphasis added)

record of this dispute to find that India's "assumption" is in fact true. Without such evidence, India has failed to demonstrate that the Massachusetts Manufacturer Adder confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

2. India has failed to demonstrate that the Massachusetts Manufacturer Adder confers a "benefit" on local producers

250. India argues that the Massachusetts Manufacturer Adder confers a "benefit" on local producers of solar hot water systems and components equipment by enabling them to sell more of their products than would have been possible absent the Adder.[242]

251. First, India has already argued that the Massachusetts Manufacturer Adder confers a benefit on direct recipients in the amount it reduces the cost of solar hot water systems and components.[243] Therefore, India's own approach to calculating the "benefit" conferred by the Massachusetts Manufacturer Adder appears to leave no room for an "additional" benefit conferred on local producers of renewable energy systems or components. For this reason alone, India has failed to demonstrate that the Adder incentive and rebate measures confer a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

252. Second, India provides no basis for the view that "additional sales" are a cognizable "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. In this regard, the United State recalls that the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* held that "additional sales…are properly viewed as *trade effects* that fall outside the definition of subsidy set forth in Article 1.1 of the SCM Agreement."[244] In other words, India has not demonstrated that what it describes as a "benefit" (*i.e.*, increased sales by local producers) even represents a "benefit" within the meaning of the SCM Agreement. This *alone* is sufficient grounds for the Panel to find that India has failed to establish that the Massachusetts Manufacturer Adder confers a "benefit" on local producers within the meaning of Article 1.1(b) of the SCM Agreement.

253. For the reasons explained above, India has failed to demonstrate that the Massachusetts Manufacturer Adder confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. India has therefore failed to demonstrate that the measure constitutes a "subsidy" within the meaning of the SCM Agreement, much less a subsidy "contingent…upon the use of domestic products" within the meaning of Article 3.1(b) of the SCM Agreement. Accordingly, the Panel should find that India has failed to establish that the Massachusetts Manufacturer Adder (as provided for under the Commonwealth SHWP) is inconsistent with the United States' obligations under Articles 3.1(b) and 3.2 of the SCM Agreement.

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[242] *See,* India's First Written Submission, para. 1164.

[243] *See*, India's First Written Submission, para. 1162.

[244] *US – Upland Cotton (Article 22.6 – US I),* para. 4.149.

VII. RESPONSE TO INDIA'S CLAIMS UNDER ARTICLE 25.2 OF THE SCM AGREEMENT

255. With respect to each of the measures at issue, India claims that the United States has acted inconsistently with its obligations under Article 25.2 of the SCM Agreement, which provides that

> Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

256. 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

257. For the reasons stated above, 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.

258. In addition, for the reasons set forth in section III above, 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.