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UNITED STATES — CERTAIN MEASURES RELATING TO THE RENEWABLE ENERGY SECTOR

REPORT OF THE PANEL

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Argentina – Financial Services	Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Brazil – Taxation	Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
Canada – Dairy (Article 21.5 – New Zealand and US)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, p. 6829
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Agricultural Producers	Panel Report, *China – Domestic Support for Agricultural Producers*, WT/DS511/R and Add.1, adopted 26 April 2019
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Auto Parts	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, Add.1 and Add.2 / WT/DS340/R, Add.1 and Add.2 / WT/DS342/R, Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535

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

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

EXHIBITS REFERRED TO IN THIS REPORT

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

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

ABBREVIATIONS USED IN THIS REPORT

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

1 INTRODUCTION

1.1 Complaint by India

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

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

1.2 Panel establishment and composition

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

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

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

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

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

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

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

1.3 Panel proceedings

1.3.1 General

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3.2 Preliminary ruling on the Panel's terms of reference

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

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

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

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

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

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

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

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

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

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

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

2 FACTUAL ASPECTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1 Measure 1: Washington State additional incentive

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 Measure 2: California Manufacturer Adder

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3 Measure 4: Montana tax incentive

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.4 Measure 5: Montana tax credit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.5 Measure 6: Montana tax refund

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

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

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

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

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

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

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

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

2.6 Measure 7: Connecticut additional incentive

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

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

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

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[86] Montana Annotated Code, Section 15-70-433(1) (Exhibit IND-37).

[87] This term is not defined in the relevant sections of the Montana Annotated Code submitted to the Panel.

[88] Montana Annotated Code, Section 15-70-433(2) (Exhibit IND-37).

[89] Montana Annotated Code, Section 15-70-433 (Exhibit IND-37).

[90] Montana Annotated Code, Section 15-70-434 (Exhibit IND-123).

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

[92] General Statutes of Connecticut, Section 16-245ff(b) (Exhibit IND-124). The Connecticut Green Bank is established in General Statutes of Connecticut, Section 16-245n(d)(1)(A) as a "a body politic and corporate, constituting a public instrumentality and political subdivision of the state of Connecticut established and created for the performance of an essential public and governmental function". General Statutes of Connecticut, Section 16-245n(d) (Exhibit IND-124).

[93] General Statutes of Connecticut, Section 16-245ff(c) (Exhibit IND-124). The term "qualifying residential solar photovoltaic system" is defined as "solar photovoltaic project that receives funding from the Connecticut Green Bank, is certified by the authority as a Class I renewable energy source, as defined in subsection (a) of section 16-1, emits no pollutants, is less than twenty kilowatts in size, is located on the customer-side of the revenue meter of one-to-four family homes and serves the distribution system of an electric distribution company". See General Statutes of Connecticut, Section 16-245ff(a)(3) (Exhibit IND-124).

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

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

[96] General Statutes of Connecticut, Section 16-245ff(a)(1) (Exhibit IND-124).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.7 Measure 8: Michigan Equipment Multiplier / Michigan Labour Multiplier

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[123] Michigan Case No. U-15800, Temporary Order, p. 27 (Exhibit IND-48).

[124] Michigan Case No. U-15800, Temporary Order, pp. 27-28 (Exhibit IND-48).

[125] Michigan Public Act No. 342 (Exhibit IND-44). We note that Michigan Public Act No. 342 was "[a]pproved by the Governor" on 21 December 2016, prior to the Panel's establishment, but it did not become "effective" until 20 April 2017.

[126] Michigan Public Act No. 342, Sections 39(2)(d) and (e) (Exhibit IND-44).

[127] We discuss this amendment in further detail in our findings.

[128] Michigan Public Act No. 295, Section 21 (Exhibit IND-43) and Michigan Public Act No. 342, Section 22 (Exhibit IND-44).

2.8 Measure 9: Delaware Equipment Bonus / Delaware Workforce Bonus

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.9 Measure 10: Minnesota production incentives and rebates

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

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

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

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

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

2.9.1 Minnesota solar energy production incentive (SEPI)

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

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[140] India's first written submission, para. 939.

[141] Senate Session Laws, Chapter 94, S.F. 1456 (Exhibit IND-100). We discuss the relevance of this repeal in our findings below.

[142] United States' response to Panel question No. 117, and India's comments on the United States' response to Panel question No. 117.

[143] India's response to Panel question No. 102 and comments on the United States' response to Panel question No. 117; United States' response to Panel question No. 117. We discuss the relevance of this information in our findings below.

[144] India's response to Panel question No. 102 and comments on the United States' response to Panel question No. 117; and United States' response to Panel question No. 117. We discuss the relevance of this information in our findings below.

[145] "Solar photovoltaic module" is defined as the smallest, nondivisible, self-contained physical structure housing interconnected photovoltaic cells and providing a single direct current of electrical output. See 2016 Minnesota Statutes, Chapter 216C, Section 216C.411 referring to 2016 Minnesota Statutes, Section 116C.7791, subdivision 1, paragraph (e) (Exhibit IND-66).

[146] "Residential property" is defined as "residential real estate that is occupied and used as a homestead by its owner or by a renter and includes 'multifamily housing development' as defined in section 462C.02, subdivision 5, except that residential property on which solar photovoltaic modules (i) whose capacity exceeds 10 kilowatts is installed; or (ii) connected to a utility's distribution system and whose electricity is purchased by several residents, each of whom own a share of the electricity generated, shall be deemed commercial property". See 2016 Minnesota Statutes, Chapter 216C, Section 216C.415, subdivision 5 (Exhibit IND-66).

[147] "Commercial property" is defined as "real property on which is located a business, government, or nonprofit establishment". See 2016 Minnesota Statutes, Chapter 216C, Section 216C.415, subdivision 5 (Exhibit IND-66).

[148] 2016 Minnesota Statutes, Chapter 216C, Section 216C.415, subdivision 1 (Exhibit IND-66).

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

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

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

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

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

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

2.9.2 Minnesota solar thermal rebate

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

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

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

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

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

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

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

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

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

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

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

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

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

2.9.3 Minnesota solar photovoltaic (PV) rebate

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

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

2.67. To be eligible for this rebate:

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

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

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

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

[158] "Qualified property" is defined as "a residence, multifamily residence, business, or publicly owned building located in the assigned service area of the utility subject to section 116C.779". See 2016 Minnesota Statutes, Section 116C.7791, Subdivision 1(d) (Exhibit IND-66).

[159] "Installation" is defined as "an array of solar photovoltaic modules attached to a building that will use the electricity generated by the solar photovoltaic modules or placed on a facility or property proximate to that building". See 2016 Minnesota Statutes, Section 216C.7791, Subdivision 1(a) (Exhibit IND-66).

[160] "Solar photovoltaic module" is defined as "the smallest, nondivisible, self-contained physical structure housing interconnected photovoltaic cells and providing a single direct current of electrical output." See 2016 Minnesota Statutes, Section 116C.7791, Subdivision 1(e) (Exhibit IND-66).

[161] 2016 Minnesota Statutes, Section 216C.7791, Subdivision 2 (Exhibit IND-66).

[162] 2016 Minnesota Statutes, Section 216C.7791, Subdivision 1(b) (Exhibit IND-66).

[163] 2016 Minnesota Statutes, Section 216C.7791, Subdivision 3(a) (Exhibit IND-66).

[164] 2016 Minnesota Statutes, Section 216C.7791, Subdivision 3(b) (Exhibit IND-66).

[165] 2016 Minnesota Statutes, Section 216C.415, Subdivision 6 (Exhibit IND-66).

[166] 2016 Minnesota Statutes, Section 216C.415, Subdivision 4(a) (Exhibit IND-66).

[167] 2016 Minnesota Statutes, Section 216C.415, Subdivision 4(b) (Exhibit IND-66).

[168] 2016 Minnesota Statutes, Section 216C.7791 (Exhibit IND-66).

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

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

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

4 ARGUMENTS OF THE PARTIES

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

5 ARGUMENTS OF THE THIRD PARTIES

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

6 INTERIM REVIEW

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

7 FINDINGS

7.1 Measures amended or repealed following the establishment of the Panel

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

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

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

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

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

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

7.1.1 Measures amended following the establishment of the Panel

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

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

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

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

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

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

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

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

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

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

7.1.1.1 Overview of applicable principles

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

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

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

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

7.10. Additionally, in *EC – Selected Customs Matters*, the Appellate Body explained that "a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure".[193]

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

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

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

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

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

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

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

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

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

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

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

[196] See para. 7.6 above.

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

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

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

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

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

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

7.1.1.2 Measure 1: Washington State additional incentive

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.1.1.3 Measure 2: California Manufacturer Adder

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

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

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

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

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

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

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

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

[232] See para. 2.19 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.1.1.4 Measure 8: Michigan Equipment Multiplier / Michigan Labour Multiplier

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

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

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

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

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

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

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

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

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

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

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

7.1.1.5 Conclusion on measures amended following panel establishment

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

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

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

[252] India's panel request, WT/DS510/2, p. 8.

[253] India's response to Panel question No. 102, para. 7; and United States' comments on India's response to Panel question No. 102, para. 8.

7.1.2 Measures repealed following the establishment of the Panel

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

7.1.2.1 Overview of applicable principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[263] See para. 2.56 above.

[264] Senate Session Laws, Chapter 94, S.F. 1456 (Exhibit IND-100). We discuss the relevance of this repeal in our findings below.

[265] India's response to Panel question No. 102, para. 8.

[266] India's response to Panel question No. 102, para. 8 (referring to 2017 Minnesota Session Laws, S. F. No. 1456, Chapter 94, Article 10, Section 22, Subdivision 1 (Exhibit IND-100)).

[267] United States' comment on India's response to Panel question No. 102.

[268] United States' response to Panel question No. 117, para. 8.

[269] We nonetheless note that India and the United States do not agree on the deadline for approving applications and the last day of payment. The disagreement between the parties on these particular issues is irrelevant for the purposes of our analysis.

[270] Appellate Body Reports, *China – Raw Materials*, para. 264.

7.1.2.3 Minnesota solar thermal rebate under Measure 10

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

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

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

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

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

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

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

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

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

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

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

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

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

7.1.2.4 Conclusion on measures repealed following the establishment of the Panel

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

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[283] Minnesota Department of Commerce Guidance for Completing the Made in Minnesota Solar Incentive Application - A 2017 Reference Guide for Applicants, 30 December 2016, p. 3 (Exhibit US-28).

[284] 2016 Minnesota Statutes, Section 216C.415 (Exhibits IND-66 and IND-100) (emphasis added).

[285] Minnesota Department of Commerce Guidance for Completing the Made in Minnesota Solar Incentive Application - A 2017 Reference Guide for Applicants, 30 December 2016, p. 9 (Exhibit US-28) (emphasis added).

[286] Minnesota Department of Commerce Guidance for Completing the Made in Minnesota Solar Incentive Application - A 2017 Reference Guide for Applicants, 30 December 2016, pp. 12 and 17 (Exhibit US-28).

[287] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.43.

7.2 Order of analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.3.1 Introduction

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

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

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

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

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

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

7.3.2 Products at issue and "likeness"

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

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

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

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

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

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

[304] See Section 7.1 above.

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

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

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

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

7.3.2.1 Measure 1: Washington State additional incentive

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

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

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

[305] India's first written submission, paras. 35-40, 155-161, 258-264, 351-356, 448-453, 548-553, 660-666, 757-766, 854-862, 996-1001 and 1104-1109 (referring to Panel Reports, *India – Autos*, para. 7.174; *Canada – Wheat Exports and Grain Imports*, para. 6.164; *Argentina – Hides and Leather*, paras. 11.168-11.170; *Canada – Autos*, para. 10.74; and *Turkey – Rice*, para. 7.213-7.216).
[306] Appellate Body Report, *EC – Asbestos*, para. 99.
[307] Appellate Body Report, *EC – Asbestos*, paras. 101-103.
[308] See e.g. Panel Reports, *India – Autos*, para. 7.174; *Canada – Autos*, para. 10.74; and *Turkey – Rice*, paras. 7.214-7.216.
[309] Appellate Body Report, *Argentina – Financial Services*, para. 6.36.
[310] India's first written submission, paras. 35-40, 155-161, 258-264, 351-356, 448-453, 548-553, 660-666, 757-766, 854-862, 996-1001 and 1104-1109 (referring to Panel Reports, *India – Autos*, para. 7.174; *Canada – Wheat Exports and Grain Imports*, para. 6.164; *Argentina – Hides and Leather*, paras. 11.168-11.170; *Canada – Autos*, para. 10.74; and *Turkey – Rice*, para. 7.21).
[311] See para. 2.8 above.
[312] India's first written submission, para. 35.
[313] India's first written submission, para. 36.
[314] India's first written submission, para. 40.

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

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

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

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

7.3.2.2 Measure 2: California Manufacturer Adder

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

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

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

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

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

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

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

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

7.3.2.3 Measure 4: Montana tax incentive

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

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

[324] India's first written submission, para. 156.

[325] See para. 2.18 above. We recall that the 2016 SGIP Handbook does not define the term "eligible distributed generation technologies", and the 2017 SGIP Handbook provides a list of equipment covered under the term "generation and energy storage equipment" instead of providing a definition.

[326] See paras. 2.15 - 2.17 above.

[327] 2016 SGIP Handbook, p. 34 (Exhibit IND-16) (emphasis added).

[328] 2017 SGIP Handbook, p. 25 (Exhibit IND-15) (emphasis added).

[329] 2017 SGIP Handbook, p. 26 (Exhibit IND-15).

[330] 2017 SGIP Handbook, p. 102 (Exhibit IND-15).

[331] See para. 2.20 above.

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

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

[334] India's first written submission, para. 351.

[335] India's first written submission, para. 356.

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

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

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

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

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

7.3.2.4 Measure 5: Montana tax credit

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

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

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

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

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

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

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

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

7.3.2.5 Measure 6: Montana tax refund

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

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

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

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

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

7.3.2.6 Measure 7: Connecticut additional incentive

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

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

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

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

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

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

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

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

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

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

7.3.2.7 Measure 8: Michigan Equipment Multiplier / Michigan Labour Multiplier

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

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

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

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

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

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

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

7.3.2.8 Measure 9: Delaware Equipment Bonus / Delaware Workforce Bonus

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

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

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

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

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

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

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

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

7.3.2.9 Measure 10: Minnesota production incentives and rebates

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

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

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

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

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

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

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

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

7.3.2.10 Conclusion on likeness

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

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

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

7.3.3.1 "Laws, regulations and requirements"

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

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[379] 2016 Minnesota Statutes, Section 216C.411 through 216C.415 (Exhibit IND-66).

[380] See para. 2.58 above.

[381] 2016 Minnesota Statutes, Section 216C.7791 (Exhibit IND-66).

[382] India's first written submission, paras. 42-47, 163-168, 358-365, 455-460, 555-562, 668-672, 768-774, 864-872, and 1003-1010.

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

[384] India's first written submission, paras. 44, 165, 360, 458, 557, 670, 770, 866, and 1005.

[385] India's first written submission, paras. 44, 165, 360, 458, 557, 670, 770, 866, and 1005.

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

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

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

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

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

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

[388] See paras. 7.52 and 7.76 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.3.3.2.1 Measure 1: Washington State additional incentive

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

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

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

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

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

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

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

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

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

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

7.3.3.2.2 Measure 2: California Manufacturer Adder

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

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

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

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

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

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

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

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

7.3.3.2.3 Measure 4: Montana tax incentive

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

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

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

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

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

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

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

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

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

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

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[437] United States' first written submission, para. 99.

[438] See para. 2.20 above.

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

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

[441] Montana Department of Transportation Records file (Exhibit US-10). Our uncertainty is caused by the heading of the document, which refers to "Payments to Alcotech, Ringling, MT". It is not clear whether the document relates only to these recipients, and if so whether there were or may be other recipients that received payments after 1995.

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

7.3.3.2.4 Measure 5: Montana tax credit

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

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

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

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

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

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

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

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

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

7.3.3.2.5 Measure 6: Montana tax refund

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

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

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

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

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

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

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

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

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

7.3.3.2.6 Measure 7: Connecticut additional incentive

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.3.3.2.7 Measure 8: Michigan Equipment Multiplier / Michigan Labour Multiplier

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

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

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

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

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

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

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

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

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

7.3.3.2.8 Measure 9: Delaware Equipment Bonus / Delaware Workforce Bonus

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.3.3.2.9 Measure 10: Minnesota production incentives and rebates

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

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

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

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

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

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

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

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

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

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

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

7.3.4 Less favourable treatment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.3.4.1 Measure 1: Washington State additional incentive

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

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

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

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

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

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

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

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

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

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

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

7.3.4.2 Measure 2: California Manufacturer Adder

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

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

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

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

[568] See para. 7.170 above.

[569] See paras. 7.167 - 7.168 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

7.3.4.3 Measure 4: Montana tax incentive

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

[584] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.
[585] United States' first written submission, para. 92.
[586] See para. 7.176 above.
[587] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[588] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[589] India's first written submission, para. 366.
[590] India's first written submission, para. 369.

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

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

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

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

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

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[591] United States' first written submission, para. 99.

[592] See para. 2.20 above.

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

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

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

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

[597] See Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, fn 253 and *EC – Tariff Preferences*, para. 105. We also recall the Appellate Body's statement in *US – Wool Shirts and Blouses* that it would be "difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof." Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

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

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

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

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

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

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

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

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

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

7.3.4.4 Measure 5: Montana tax credit

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

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

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

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

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

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

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

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

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

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

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

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

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

7.3.4.5 Measure 6: Montana tax refund

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

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

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

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

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

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

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

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

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

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

[630] See paras. 2.28 - 2.30 above.

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

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

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

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

[635] See para. 7.198 above.

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

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

7.3.4.6 Measure 7: Connecticut additional incentive

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

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

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

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

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

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

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

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

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

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

[643] India's response to Panel question No. 118, para. 42.
[644] See para. 2.32 - 2.35 above.
[645] General Statutes of Connecticut, Section 16-245ff(c) (Exhibit IND-124).
[646] As noted, the term "major system components" is not defined in the relevant legal instruments.
[647] Connecticut General Statutes, Section 16-245ff(i) (Exhibit IND-124).
[648] We recall that we have found that the Connecticut additional incentive is mandatory, in the sense that the Connecticut Public Utilities Regulatory Authority (PURA) is *required* to set an additional incentive of more than 0% and no higher than 5% if certain requirements are met. See para. 7.209 above.
[649] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[650] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than Connecticut) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. See Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).
[651] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.

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

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

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

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

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

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

7.3.4.7 Measure 8: Michigan Equipment Multiplier / Michigan Labour Multiplier

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

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

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

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

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

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

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

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

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

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

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

7.316. We now turn to the United States' other argument, namely that, because India has not shown that Measure 8 affects the sale, purchase, transportation, distribution or use of the relevant products, it consequentially cannot accord imported products less favourable treatment.[671]

7.317. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 8 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[672] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 8 accords less favourable treatment to imported than to domestic products.

7.318. Finally, we recall the United States' argument, in the context of whether Measure 8 affects the sale, purchase, transportation, distribution or use of products, that evidence on the record shows that only a miniscule number of credits generated under the RESPM have been issued pursuant to the Michigan Equipment Multiplier. We discussed the evidence above.[673] In the context of the claim before us, and insofar as this argument might be relied upon to argue that the measure does not accord less favourable treatment, it suffices to recall that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[674] Here, the implications of Measure 8 for competitive conditions are explicit from the text, design, and structure of the relevant legislation. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of the measure at issue.[675] Accordingly, we do not consider that evidence showing that Measure 8 may have had minimal or no market effects in recent years is sufficient to rebut India's *prima facie* case that Michigan Equipment and the Michigan Labour

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

[668] India's first written submission, paras. 745-746.

[669] See para. 7.309 above.

[670] United States' second written submission, para. 10.

[671] India's first written submission, para. 118.

[672] See para. 7.220 above.

[673] See para. 7.218 above.

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

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

Multipliers treat non-local products, including imported products, less favourably than like local products.

7.319. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Michigan Equipment and Michigan Labour Multipliers modify the conditions of competition to the detriment of renewable energy systems made from imported components, or constructed using non-local labour. These Multipliers therefore accord less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.8 Measure 9: Delaware Equipment Bonus / Delaware Workforce Bonus

7.320. India submits that the Delaware Equipment Bonus and the Delaware Workforce Bonus accord less favourable treatment to imported products than to like domestic products "by offering the additional incentives based on the in-state manufacture level of the specified renewable energy equipment".[676] According to India, this "den[ies] the effective equality of opportunity to the imported products to compete in the domestic market of Delaware".[677] India argues that "a potential buyer will prefer to purchase the specified products satisfying the in-state manufacture level than those which are imported" because of the additional incentive, thereby modifying "the conditions of competition to the detriment of the imported products and in favour of the 'like products' of Delaware-origin".[678]

7.321. The United States responds that, insofar as India has failed to show that Measure 9 affects the sale, purchase, transportation, distribution or use of the relevant products, it follows that India has "likewise" failed to show that Measure 9 modifies the conditions of competition to the detriment of imported products and thus accords less favourable treatment to such products.[679]

7.322. As explained above[680], the Delaware Equipment Bonus and the Delaware Workforce Bonus consist of an additional 10% credit towards meeting the renewable energy portfolio standards for solar or wind energy installations, provided that a minimum of 50% of the cost of renewable energy equipment, inclusive of mounting components, are manufactured in Delaware, or that the facility is constructed or installed with a minimum of 75% in-state workforce.

7.323. We find compelling India's argument that the Delaware Equipment and Workforce Bonuses accord less favourable treatment to non-local products, including imported products. Looking at the text, design, and structure of the Equipment and Workforce Bonuses, we note that both programs give retail electricity suppliers an additional 10% credit towards meeting the renewable energy portfolio standards for solar or wind energy installations sited in Delaware provided that (i) a minimum of 50% of the cost of renewable energy equipment, inclusive of mounting components, are manufactured in Delaware, or (ii) the facility is constructed or installed with a minimum of 75% of instate workforce. This means that retail electricity suppliers that sell such electricity will more easily meet the renewable energy portfolio standards. In the context of a regulatory system requiring retail electricity suppliers to obtain a certain number of credits per year, the possibility of obtaining extra credits without having to sell additional energy is a clear incentive favouring the use of renewable energy equipment, including mounting components, containing local inputs and facilities constructed using local workforce. We therefore agree with India that the "fundamental thrust and effect"[681] of the Bonuses is to incentivize the purchase of such renewable energy equipment, mounting components, and facilities.

7.324. In our view, therefore, India has made a *prima facie* case that the Delaware Equipment Bonus and the Delaware Workforce Bonus modify the conditions of competition in favour of renewable energy equipment, inclusive of mounting components, manufactured in Delaware (at least 50% of its cost) and facilities constructed or installed with a minimum of 75% in-state

[676] India's first written submission, para. 873.
[677] India's first written submission, para. 873. See also India's first written submission, para. 878.
[678] India's first written submission, para. 878.
[679] United States' first written submission, para. 125.
[680] See para. 2.52 above.
[681] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

workforce by creating a financial incentive favouring their usage.[682] We recall in this connection that past cases have consistently found that the provision of incentives or advantages for the use of domestic over imported products accord less favourable treatment to such imported products.[683]

7.325. As noted, the United States' primary response to India's claim is that, because India has failed to show that Measure 9 affects the sale, purchase, transportation or use of the relevant products, it follows that it has also failed to show that the measure accords treatment less favourable to imported than to domestic products.[684]

7.326. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 9 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[685] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 9 accords less favourable treatment to imported than to domestic products.

7.327. Finally, we recall the United States' arguments, in the context of whether Measure 9 affects the sale, purchase, transportation, distribution or use of products, concerning the tradability and monetary value of renewable energy credits and solar renewable energy credits, the absence of solar panel manufacturing activities in Delaware, and the fact that the measure is addressed to entities that distribute electricity and do not generate it. We have discussed this evidence above.[686] For present purposes, and insofar as this argument might be relied on to argue that the measure does not accord less favourable treatment, it suffices to recall that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[687] The implications for competitive conditions of the Delaware Bonuses challenged by India are explicit from the text, design, and structure of the relevant provisions. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of Measure 9.[688] Accordingly, we do not consider that the United States has rebutted India's *prima facie* case that the Delaware Equipment Bonus and the Delaware Workforce Bonus treat non-local products, including imported products, less favourably than like local products.

7.328. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the Delaware Equipment Bonus and the Delaware Workforce Bonus modify the conditions of competition to the detriment of imported renewable energy equipment, mounting components, and facilities, and therefore accords less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.9 Measure 10: Minnesota production incentives and rebates

7.329. India submits that the Minnesota solar energy production incentive (SEPI) and the Minnesota solar photovoltaic (PV) rebate under Measure 10 accord less favourable treatment to imported products than to like domestic products "by incentivizing and, thereby, deny[ing] the effective equality of opportunity to the imported products to compete in the domestic market of Minnesota".[689]

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

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

[684] United States' first written submission, para. 125.

[685] See para. 7.198 above.

[686] See paras. 7.222 - 7.224 above.

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

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

[689] India's first written submission, para. 1011.

According to India, by "creating a distinction between the domestic and imported products on the basis of origin and by giving the end consumers a direct financial advantage in terms of incentives or rebates for using the domestic products", the SEPI and the Minnesota solar PV rebate "alter the conditions of competition in the market in favour of the domestic products and to the obvious detriment of the imported products".[690]

7.330. The United States responds that insofar as India has failed to show that the two programs affect the sale, purchase, transportation, distribution or use of the relevant products, India has necessarily failed to show that they accord less favourable treatment to imported products.[691]

7.331. As explained above[692], the SEPI and the Minnesota solar PV rebate provide incentives and rebates for the use of solar PV modules made in Minnesota.

7.332. We find convincing India's submission that the SEPI and the Minnesota solar PV rebate accord less favourable treatment to relevant non-local products, including imported products. Looking at the text, design, and structure of the two programs, we note that both offer an advantage to owners of grid-connected solar PV modules (SEPI), and owners of qualified properties (for the solar PV rebate) provided that they install solar PV modules made in Minnesota. The definitions of "made in Minnesota (for SEPI)[693] and "manufactured in Minnesota" (for the Minnesota solar PV rebate)[694] leave no doubt that imported solar PV modules cannot qualify for the incentives and rebates at issue. Thus, we consider that the "fundamental thrust and effect"[695] of the two programs at issue is to promote the use of solar PV modules made in Minnesota.

7.333. In our view, therefore, India has made a *prima facie* case that the SEPI and the Minnesota solar PV rebate modify the conditions of competition by creating a financial incentive favouring solar PV modules made in Minnesota.[696] We note in this connection that past cases have consistently found that the provision of incentives or advantages for the use of domestic over imported products accord less favourable treatment to such imported products.[697]

7.334. As noted, the United States' primary response to India's claim is that, because India has failed to show that Measure 10 affects the sale, purchase, transportation or use of the relevant products, it follows that it has also failed to show that the measure accords treatment less favourable to imported than to domestic products.[698]

7.335. We have already found that, because it provides an advantage for the use of domestic products but not for the use of imported products, and thus impacts the conditions of competition between imported and domestic products, Measure 10 *does* affect the sale, purchase, transportation, distribution or use of the relevant products.[699] Moreover, as explained above, in our view the question whether a measure accords treatment less favourable to imported products is related to, but distinct from, the question whether it affects the sale, purchase, transport, distribution or use of products. It follows that the United States' argument in this regard is not capable of rebutting India's *prima facie* case that Measure 10 accords less favourable treatment to imported than to domestic products.

7.336. Finally, we recall the United States' argument, in the context of whether the SEPI affects the sale, purchase, transportation, distribution or use of products, that evidence on the record shows

[690] India's first written submission, para. 1013.
[691] United States' first written submission, para. 129.
[692] See para. 2.55 above.
[693] See para. 2.58 above.
[694] See para. 2.67 above.
[695] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[696] The fact that domestic but non-local like products (i.e. like products from areas of the United States other than Minnesota) are accorded the same treatment as imported products under the measure at issue does not affect this conclusion. See Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.294 (fn omitted, referring to Panel Report, *US – Malt Beverages*, paras. 5.17 and 5.33).
[697] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *India – Solar Cells*, para. 7.95; *US – COOL*, para. 7.358; *Mexico – Taxes on Soft Drinks*, para. 8.117; *US – FSC (Article 21.5 – EC)*, para. 8.156.
[698] United States' first written submission, para. 129.
[699] See para. 7.239 above.

that only a "negligible amount" of solar installations have received incentives under the SEPI during 2016.[700] We discussed this evidence above.[701] In the present context, and insofar as this argument might be relied upon to argue that the measure does not accord less favourable treatment, it suffices to recall that past cases have consistently held that neither evidence of actual market effects nor proof that "the sourcing decisions of private firms have actually been impacted by" the measure at issue is necessary to make out a case of less favourable treatment.[702] The implications for competitive conditions of the SEPI are explicit from the text, design, and structure of the relevant provisions. To use the words of the panel in *US – FSC (Article 21.5 – EC)*, "[t]he less favourable treatment we have found arises by necessary implication from the words actually used in the text" of the two programs at issue.[703] Accordingly, we do not consider that evidence showing that the SEPI granted incentives to a "negligible amount" of solar installations during 2016 is sufficient to rebut India's *prima facie* case that the SEPI treats non-local products, including imported products, less favourably than like local products.

7.337. We therefore find that India has shown *prima facie*, and the United States has not rebutted, that the SEPI and the Minnesota solar PV rebate modify the conditions of competition to the detriment of imported solar PV modules, and therefore accords less favourable treatment to such products within the meaning of Article III:4 of the GATT 1994.

7.3.4.10 Conclusion on less favourable treatment

7.338. In conclusion, we find that India has shown *prima facie*, and the United States has not rebutted, that each of the measures at issue accords to imported products treatment less favourable than that accorded to like domestic products within the meaning of Article III:4 of the GATT 1994.

7.3.5 Conclusion on India's claims under Article III:4 of the GATT 1994

7.339. We have found that the relevant domestic and imported products under each measure at issue are like products within the meaning of Article III:4 of the GATT 1994. We have also found that each measure at issue is a "law", "regulation" or "requirement" "affecting the[] internal sale, offering for sale, purchase, transportation, distribution or use" of the relevant products within the meaning of Article III:4 of the GATT 1994. Finally, we have concluded that each measure at issue accords to relevant imported products[704] treatment less favourable than that accorded to like domestic products within the meaning of Article III:4 of the GATT 1994.

7.340. We therefore conclude that India has established, and the United States has not rebutted, that each measure at issue fulfils all three elements of the legal test under Article III:4 of the GATT 1994 and is therefore inconsistent with Article III:4 of the GATT 1994.

7.341. Having found that the measures at issue are inconsistent with Article III:4 of the GATT 1994, we turn to India's other claims in this dispute. As noted, India challenges the measures at issue under Articles 2.1 and 2.2 of the TRIMs Agreement, Articles 3.1(b), 3.2 and 25 of the SCM Agreement, and Article XXIII:1(a) of the GATT 1994, and we address these claims in this order.

7.4 India's claims under the TRIMs and SCM Agreements

7.342. We recall that, for India, "[its] claims under the TRIMs Agreement and the SCM Agreement clearly emanate from the violation of Article III:4 of the GATT 1994"[705], as "the core of [its] claims lie in the *discriminatory treatment* between the imported products and 'like' products of domestic origin".[706] We also recall that, according to the Appellate Body, some of the key provisions invoked

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[700] United States' first written submission, para. 129.
[701] See paras. 7.237 - 7.238 above.
[702] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[703] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[704] Although we have found that India has not made a *prima facie* case that the Montana tax incentive accords less favourable treatment to imported *ethanol* (i.e. the final product), this does not affect our overall conclusion that, because Measure 4 accords less favourable treatment to imported ethanol *ingredients*, it is inconsistent with Article III:4 of the GATT 1994.
[705] India's opening statement at the first meeting of the Panel, para. 11.
[706] India's opening statement at the first meeting of the Panel, para. 11 (emphasis original).

by India in the present dispute overlap as regards discriminatory conduct involving local content requirements:[707]

> Both the national treatment obligations in Article III:4 of the GATT 1994 and the TRIMs Agreement, and the disciplines in Article 3.1(b) of the SCM Agreement, are cumulative obligations. Article III:4 of the GATT 1994 and the TRIMs Agreement, as well as Article 3.1(b) of the SCM Agreement, prohibit the use of local content requirements in certain circumstances. These provisions address discriminatory conduct …[708]

7.343. This raises the question whether a positive resolution of this dispute requires us to assess India's additional claims under the TRIMs Agreement and the SCM Agreement, or whether – in light of our findings under Article III:4 of the GATT 1994 – we should exercise judicial economy on India's claims under the TRIMs and SCM Agreements.

7.344. India has requested us to address each of its claims under the GATT 1994, the TRIMs Agreement and the SCM Agreement.[709] The United States, on the contrary, has argued that "the Panel may consider the reasons behind this case in deciding on the extent to which the Panel exercises its discretion to use judicial economy."[710] Recalling that rulings made by the DSB "shall be aimed at achieving a satisfactory settlement of the matter"[711], the United States adds that "the Panel should consider the extent to which it needs to reach India's claims that raise the same basic issues under three different WTO agreements".[712]

7.345. According to the Appellate Body, "[j]udicial economy refers to the discretion of a panel to address only those claims that must be addressed 'in order to resolve the matter in issue in the dispute'", and "th[is] discretion of a panel … is consistent with the aim of the WTO dispute settlement mechanism, as articulated in Article 3.7 of the DSU, to 'secure a positive solution to a dispute'".[713]

7.346. Bearing these considerations in mind, we turn to examine the appropriateness of exercising judicial economy in respect of India's claims under the TRIMs and the SCM Agreements, respectively.

[707] The United States does not contest this, whereas India explicitly argues that the core of its claims lies in the "discriminatory treatment" between the products imported to the US and those like products of domestic origin and explains that all its claims emanate from the violation of Article III:4 of the GATT 1994. India' response to Panel question No. 54.

[708] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.5. See also Panel Reports, *Brazil – Taxation*, para. 7.48.

[709] India's first written submission, paras. 1175-1178. See also India's remarks at the first meeting of the Panel, part of the official record (minute 15:19 of the meeting on 10 October 2018), and second written submission, para. 99 and fn 76.

[710] United States' opening statement at the second meeting of the Panel, para. 5.

[711] United States' opening statement at the second meeting of the Panel, para. 8, quoting Article 3.4 of the DSU.

[712] United States' opening statement at the second meeting of the Panel, para. 8. In particular, the United States has suggested that "if the Panel finds that India has established that a measure is inconsistent with Article III:4 of the GATT 1994, the Panel could decline to make a separate finding under the TRIMs Agreement". See United States' response to Panel question No. 53.

[713] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.20 (fns omitted, referring to Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 19; *India – Patents (US)*, para. 87; *Brazil – Retreaded Tyres*, para. 257; *Canada – Wheat Exports and Grain Imports*, para. 133; *US - Lead and Bismuth II*, paras. 71 and 73; *Argentina – Footwear (EC)*, para. 145; *Australia – Salmon*, para. 223; and *Japan – Agricultural Products II*, para. 111).

7.4.1 India's claims under the TRIMs Agreement

7.347. India's claims under the TRIMs Agreement relate to Articles 2.1[714] and 2.2[715] of that Agreement, and paragraph 1(a) of the Illustrative List[716] contained in the Agreement's Annex and referenced in its Article 2.2.

7.348. We begin by observing that, according to the recent panel reports in *Brazil – Taxation*, "[a]lthough there is some overlap between these … provisions, … there are also differences in their respective scope of application"[717]: "[i]n particular, the scope of Article III:4 of the GATT 1994 is broader than that of Article 2.1 of the TRIMs Agreement …, since it refers generally to 'laws, regulations and requirements'", whereas "[a] measure is only covered by Article 2.1 of the TRIMs Agreement if it is a TRIM within the meaning of that agreement".[718] This suggests to us that, in principle, compliance with a finding of inconsistency with Article III:4 of the GATT 1994 would bring about compliance with the narrower obligations of the TRIMs Agreement, and therefore where a panel has already found a violation of Article III:4 of the GATT 1994 it may not be necessary to make additional findings on the same measure(s) under the TRIMs Agreement.

7.349. Indeed, in several past cases, panels have decided to exercise judicial economy on claims under the TRIMs Agreement after having found violations under the GATT 1994, in particular its Article III:4. Thus, in *Turkey – Rice*, the panel recognized that there is a close link between Article 2 of the TRIMs Agreement and Article III:4 of the GATT 1994. It explained that "[b]oth provisions of the TRIMs Agreement, Article 2.1 and paragraph 1(a) of the Annex, refer to the obligation of Members not to apply trade-related investment measures in a manner that is inconsistent with specific rules contained in the GATT 1994, notably in Article III and in Article XI."[719] The panel concluded that "if [it] found that the domestic purchase requirement is inconsistent with Article III:4 of the GATT 1994, [it] need not make a finding under the TRIMs Agreement".[720]

7.350. The panel in *India – Autos* followed a similar approach. It stated that, having found that the measures at issue were inconsistent with Article III:4 of the GATT 1994, "it [wa]s not necessary to consider separately whether they are also inconsistent with the provisions of the TRIMs Agreement".[721] The panel added that:

> It seems that an examination of the GATT provisions in this case would be likely to make it unnecessary to address the TRIMs claims, but not vice-versa. If a violation of the GATT claims was found, it would be justifiable to refrain from examining the TRIMs claims under the principle of judicial economy.[722]

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[714] According to Article 2.1 of the TRIMs Agreement, "[w]ithout prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994."

[715] According to Article 2.2 of the TRIMs Agreement, "[a]n illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement".

[716] According to paragraph 1(a) of the Illustrative List contained in the Annex to the TRIMs Agreement and referenced in its Article 2.2:

> "1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
>
> > (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production …".

[717] Panel Reports, *Brazil – Taxation*, para. 7.47.

[718] Panel Reports, *Brazil – Taxation*, para. 7.47 (fn omitted, referring to Panel Report, *Indonesia – Autos*, para. 14.82).

[719] Panel Report, *Turkey – Rice*, para. 7.184.

[720] Panel Report, *Turkey – Rice*, para. 7.184.

[721] Panel Report, *India – Autos*, para. 7.324.

[722] Panel Report, *India – Autos*, para. 7.161.

7.351. Likewise, the panel in *China – Auto Parts* decided to exercise judicial economy with respect to claims made under the TRIMs Agreement after having found a violation of Article III:4 of the GATT 1994. The panel explained that its findings under the GATT 1994 were "sufficient for the resolution of the dispute" because "bringing the measures into conformity with China's obligations pursuant to [its] findings under Article III:4 of the GATT 1994 would also remove any inconsistency of these measures with the TRIMs Agreement".[723]

7.352. The panel in *EC – Bananas III* decided to exercise judicial economy for similar reasons, by holding that it did not:

> [C]onsider it necessary to make a specific ruling under the TRIMs Agreement with respect to the [measures at issue]. On the one hand, a finding that the measure in question would not be considered a trade-related investment measure for the purposes of the TRIMs Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMs and, on the other hand, steps taken to bring [the measures at issue] into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMs Agreement.[724]

7.353. Like the above panels, we do not find it necessary to address India's claims under the TRIMs Agreement in order to provide a positive solution to this dispute. Bearing in mind that Article 2 of the TRIMs Agreement is only concerned with TRIMs that are inconsistent with Article III (or Article XI) of the GATT 1994[725], and also in light of the relatively consistent practice of past panels when faced with claims under Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement, we consider that steps taken by the United States to bring the measures at issue into compliance with Article III:4 of the GATT 1994 will also eliminate the alleged non-conformity of the same measures with obligations under the TRIMs Agreement.

7.354. We therefore exercise judicial economy with regard to India's claims under Articles 2.1 and 2.2 of the TRIMs Agreement.

7.4.2 India's claims under the SCM Agreement

7.355. As noted, India requests that the Panel find that all of the measures at issue are inconsistent with Articles 3.1(b), 3.2, and 25 of the SCM Agreement.[726]

7.4.2.1 Articles 3.1(b) and 3.2 of the SCM Agreement

7.356. In the above-mentioned *Brazil – Taxation* dispute, the panel explained that the scope of Article 3.1(b) of the SCM Agreement is also narrower than the scope of Article III:4 of the GATT 1994. In particular, "[a]lthough there is some overlap between these … provisions, … there are also differences in their respective scope of application"[727] insofar as "the scope of Article III:4 of the GATT 1994 is broader than that of … Article 3.1(b) of the SCM Agreement, since [Article III:4 of the GATT 1994] refers generally to 'laws, regulations and requirements'", whereas "a measure is only covered by Article 3.1(b) of the SCM Agreement if it is a subsidy within the meaning of that agreement".[728] On appeal, the Appellate Body confirmed that establishing the existence of a

[723] Panel Reports, *China – Auto Parts*, para. 7.368.
[724] Panel Reports, *EC – Bananas III*, para. 7.186.
[725] Article 2.1 of the TRIMs Agreement.
[726] India's first written submission, paras. 1175-1176.
[727] Panel Reports, *Brazil – Taxation*, para. 7.47.
[728] Panel Reports, *Brazil – Taxation*, para. 7.47 (fn omitted). Likewise, the panel in *Canada – Autos* "recognize[d] that Article 3.1(b) in some sense has its roots in Article III:4 of GATT and in certain interpretations of that provision, which relates to non-discrimination. We do not consider however that Article 3.1(b) *ipso facto* has the same scope as Article III:4. To the contrary, while Article III:4 of GATT speaks of 'treatment no less favourable' and of requirements 'affecting' internal sale, Article 3.1(b) speaks of subsidies 'contingent upon the use of domestic over imported goods'." Panel Report, *Canada – Autos*, para. 10.215.

prohibited subsidy under Articles 3.1(b)[729] and 3.2[730] of the SCM Agreement requires meeting a "more demanding standard than demonstrating that an incentive to use domestic goods exists under Article III:4 of the GATT 1994".[731]

7.357. In the context of the dispute before us, this suggests that, by bringing the challenged measures into conformity with Article III:4 of the GATT 1994, the United States would also eliminate the alleged non-conformity of the same measures with the narrower obligations of Article 3 of the SCM Agreement, and therefore where a panel has already found a violation of Article III:4 of the GATT 1994 it may not be necessary to make additional findings on the same measure(s) under Article 3 of the SCM Agreement.

7.358. We also recall that in *China – Auto Parts*, after having found a violation under Article III of the GATT 1994, the panel exercised judicial economy on claims under both the TRIMs Agreement and the SCM Agreement. The panel held that, regarding the local content requirements challenged in that dispute, addressing the complainant's SCM claims would not be necessary to secure a positive solution of the dispute, because "bringing the measures into conformity with China's obligations pursuant to [the] findings under Articles III:2 and III:4 of the GATT 1994 also would remove any inconsistency of those measures with Articles 3.1(b) and 3.2 of the SCM Agreement".[732] On appeal, the Appellate Body noted – without criticism – that "[t]he [p]anel exercised judicial economy with respect to the claims under the TRIMs Agreement … and Articles 3.1(b) and 3.2 of the SCM Agreement".[733]

7.359. Likewise, in *Canada – Autos* the Appellate Body validated the panel's exercise of judicial economy on claims under Article 3 of the SCM Agreement following findings of violation under Article III:4 of the GATT 1994. On appeal, the European Communities argued that the panel in that dispute had committed legal error by failing to address its claim under Article 3.1(a) of the SCM Agreement.[734] The Appellate Body disagreed. Although it criticised the panel for failing to make explicit its decision to exercise judicial economy[735], the Appellate Body held that the panel was entitled not to address the claim under Article 3.1(a) because, having already found that the aspects of the measure in question were inconsistent with Article III:4 of the GATT 1994 (and Article XVII of the GATS), findings under Article 3.1(a) of the SCM Agreement were not necessary to secure a positive solution to the dispute.[736]

7.360. We are cognizant that, in *EC – Export Subsidies on Sugar*, the Appellate Body reversed a panel's decision to exercise judicial economy on claims under Article 3 of the SCM Agreement. In that case, the Appellate Body concluded that the panel's exercise of judicial economy in regard to the complainants' claims under Article 3 of the SCM Agreement following findings of violation under Articles 9 and 10 of the Agreement on Agriculture constituted legal error.[737] The Appellate Body noted[738] that the SCM Agreement contains "special rules and additional procedures on dispute settlement" in respect of subsidies prohibited under Article 3, in particular, Article 4.7 of the

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[729] According to Article 3.1(b) of the SCM Agreement:

> "1. Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
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> …
>
> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."

[730] According to Article 3.2 of the SCM Agreement, "[a] Member shall neither grant nor maintain subsidies referred to in paragraph 1".

[731] Appellate Body Reports, *Brazil – Taxation*, para. 5.254.

[732] Panel Reports, *China – Auto Parts*, para. 7.635.

[733] Appellate Body Reports, *China – Auto Parts*, para. 7.

[734] Appellate Body Report, *Canada – Autos*, para. 110.

[735] Appellate Body Report, *Canada – Autos*, para. 117.

[736] Appellate Body Report, *Canada – Autos*, para. 116.

[737] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335.

[738] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335.

SCM Agreement.[739] According to the Appellate Body, by declining to rule on the claim under Article 3 of the SCM Agreement, the panel "precluded the possibility of a remedy being made available to the Complaining Parties, pursuant to Article 4.7 of the SCM Agreement, in the event of the [p]anel finding in favour of the Complaining Parties with respect to their claims under Article 3".[740] In the Appellate Body's view, by precluding itself from making a recommendation under Article 4.7 of the SCM Agreement, the panel had failed to make "such … findings as [would] assist the DSB in making the recommendations … provided for in the covered agreements", as required by Article 11 of the DSU.[741]

7.361. We are mindful of our obligation to make an objective assessment of the matter before us, in line with Article 11 of the DSU, including an assessment of the appropriateness of exercising judicial economy on India's claims under Article 3 of the SCM Agreement. That said, in our view, the Appellate Body's analysis in *EC – Export Subsidies on Sugar* is not directly applicable to the dispute before us.

7.362. In *EC – Export Subsidies on Sugar*, the Appellate Body addressed the relationship between agreements and provisions that are different in important respects from those invoked by India in the present dispute. The provisions at issue in *EC – Export Subsidies on Sugar*, Articles 3.3 and 8 (through Articles 9.1(a) and 9.1(c)) of the Agreement on Agriculture and Article 3 of the SCM Agreement, all address subsidies. The existence of a specific relationship of these provisions is recognized in Article 3 of the SCM Agreement, which explicitly refers to the Agreement on Agriculture.[742]

7.363. Moreover, the panel's decision in *EC – Export Subsidies on Sugar* to exercise judicial economy with regard to the complainants' claim under Article 3 of the SCM Agreement was introduced by reference to its earlier finding that "the EC sugar regime [was] inconsistent with the European Community's export subsidy obligations under Articles 3.3 and 8 (through Article 9.1(a) and 9.1(c)) of the Agreement on Agriculture".[743] We also recall that in *EC – Export Subsidies on Sugar*, before exercising judicial economy, the panel had already found that the measures at issue were subsidies subject to prohibition under Article 8 of the Agreement on Agriculture, but had then declined to make findings under the SCM Agreement, or explore the possible applicability of Article 4.7 thereof, which provides for panels to make a special recommendation where they have found a challenged measure to be prohibited subsidy.[744]

7.364. In light of this, we do not read the Appellate Body's report in *EC – Export Subsidies on Sugar* as articulating a general principle that a panel may never exercise judicial economy on claims under the SCM Agreement. Rather, as we understand it, where a measure is found to be a subsidy prohibited under the Agreement on Agriculture[745], a panel should consider the implications of its subsidy-related findings under the Agreement on Agriculture for the consistency of those measures with the provisions of the SCM Agreement dealing with prohibited subsidies.

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[739] According to Article 4.7 of the SCM Agreement, "[i]f the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn".

[740] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335.

[741] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335.

[742] The *chapeau* of Article 3 of the SCM Agreement is introduced with the phrase "Except as provided in the Agreement on Agriculture …". See also Article 13(c)(ii) of the Agreement on Agriculture and Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 123-124.

[743] Panel Report, *EC – Export Subsidies on Sugar*, para. 7.381.

[744] All three complainants in that dispute (i.e. Australia, Brazil, and Thailand) explicitly requested that the Panel recommend to the DSB that the European Communities bring its measures at issue into conformity with its WTO obligations in accordance with both Article 19.1 of the DSU and Article 4.7 of the SCM Agreement. See Panel Report, *EC – Export Subsidies on Sugar*, paras. 4.3, 4.5, and 4.8.

[745] According to the Appellate Body, "[i]t is clear from the plain wording of Article 8 [of the Agreement on Agriculture] that Members are *prohibited* from providing export subsidies otherwise than in conformity with the Agreement on Agriculture and the commitments specified in their Schedules". Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 216 (emphasis added).

7.365. The present dispute is, however, different from *EC – Export Subsidies on Sugar* in key respects. As noted, *EC – Export Subsidies on Sugar* addressed the issue of judicial economy in regard to provisions different from the ones invoked by India before us. Importantly, Article III:4 of the GATT 1994 and Articles 2.1 and 2.2 of the TRIMs Agreement do not relate to subsidies. Our finding that the measures at issue violate Article III:4 of the GATT 1994 neither entails nor implies that the measures at issue are or are not subsidies.[746]

7.366. Instead of *EC – Export Subsidies on Sugar*, we find the more recent *China – Auto Parts* dispute to provide more relevant and compelling guidance on the issue of judicial economy before us. That case dealt with precisely the same main provisions as the ones invoked by India before us. The circumstances of *China – Auto Parts* were also closer to the present dispute, in that the panel in that case decided to exercise judicial economy in respect of local content requirements that it had already found to be inconsistent with Article III of the GATT 1994. It was in the specific context of those local content requirements and legal provisions invoked that the panel in *China – Auto Parts* concluded that addressing the United States' SCM claims would not be necessary to secure a positive resolution of the dispute as "bringing the measures into conformity with China's obligations pursuant to [the] findings under Articles III:2 and III:4 of the GATT 1994 also would remove any inconsistency of those measures with Articles 3.1(b) and 3.2 of the SCM Agreement."[747] As summarized above, on appeal the Appellate Body explicitly noted that "[t]he [p]anel exercised judicial economy with respect to the claims under the TRIMs Agreement … and Articles 3.1(b) and 3.2 of the SCM Agreement".[748] In doing so, the Appellate Body did not make any reference to Article 4.7 of the SCM Agreement or its earlier report in *EC – Export Subsidies on Sugar*, let alone criticise the panel for having exercised judicial economy with regard to Article 3 of SCM Agreement following a finding of violation under Article III:4 of the GATT 1994.

7.367. Given the similarity of the matter in *China – Auto Parts*, i.e. local content requirements challenged under the non-discrimination provisions of Article III of the GATT, the TRIMs Agreement, and Articles 3.1(b) and 3.2 of the SCM Agreement, and the matter before us in this dispute, we consider that the United States bringing its measures at issue into conformity with its obligations pursuant to Article III:4 of the GATT 1994 would "remove any inconsistency of those measures with Articles 3.1(b) and 3.2 of the SCM Agreement".[749] As discussed above, India has argued, and we have found, that the measures at issue violate Article III:4 of the GATT 1994 because they condition an advantage on the use of domestic over imported products. It seems to us that, if the United States removed such conditionality in order to bring itself into compliance with Article III:4 of the GATT 1994, it would also eliminate the alleged non-conformity of the same conditionality with its obligations under Article 3 of the SCM Agreement, thus removing the basis or need for any finding that the measures are prohibited subsidies within the meaning of Article 3 of the SCM Agreement.

7.368. For these reasons, we exercise judicial economy on, and refrain from addressing, India's claims under Articles 3.1(b) and 3.2 of the SCM Agreement.

7.4.2.2 Article 25 of the SCM Agreement

7.369. India also challenges the measures at issue under Article 25 of the SCM Agreement. In particular, according to India, the United States has acted inconsistently with Article 25 of the SCM Agreement, specifically paragraphs 2 and 3[750], by failing to notify the measures at issue to the SCM Committee.[751]

7.370. The notification obligation under Article 25.2 of the SCM Agreement covers "any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or

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[746] As the panel in *Canada – Autos* stated, "while Article III:4 of [the] GATT [1994] speaks of 'treatment no less favourable' and of requirements 'affecting' internal sale, Article 3.1(b) [of the SCM Agreement] speaks of subsidies 'contingent upon the use of domestic over imported goods'". Panel Report, *Canada – Autos*, para. 10.215.

[747] Panel Reports, *China – Auto Parts*, para. 7.635.

[748] Appellate Body Reports, *China – Auto Parts*, para. 7.

[749] Panel Reports, *China – Auto Parts*, para. 7.635.

[750] Article 25.2 of the SCM Agreement provides that "Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories", whereas Article 25.3 prescribes the content of such notifications.

[751] India's first written submission, para. 30.

maintained within their territories". An examination of a claim under Article 25.2 of the SCM Agreement thus presupposes a finding, *inter alia*, that the measure at issue is a subsidy as defined in Article 1.1, and is specific within the meaning of Article 2 of the SCM Agreement. India has not made any independent arguments regarding specificity; India merely argues that, pursuant to Article 2.3 SCM Agreement[752], the measures at issue are specific subsidies as a result of being prohibited under Article 3.1 of the SCM Agreement.[753]

7.371. Thus, India's claim under Article 25 of the SCM Agreement is directly linked to, and depends on, the outcome of its claims under Article 3.1(b) of the SCM Agreement. As we have chosen to exercise judicial economy on India's claims under Article 3.1(b) of the SCM Agreement, there is no basis for us to rule on India's claim under Article 25 of the SCM Agreement. Having decided that it is not necessary for us to determine whether the measures at issue are subsidies within the meaning of the SCM Agreement, in particular Article 3.1(b), it follows *a fortiori* that it is not necessary for us to assess whether the measures should have been notified as subsidies under Article 25 of the SCM Agreement in order to secure a positive resolution of this dispute.

7.372. Accordingly, we also exercise judicial economy on India's claims under Article 25 of the SCM Agreement.

7.5 India's claim under Article XXIII:1(a) of the GATT 1994

7.373. India has requested us to find that "the measures at issue, individually and/or collectively, have nullified and/or impaired the benefits accruing to India under Article XXIII:1(a) of the GATT [1994]".[754]

7.374. We recall that, pursuant to Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We therefore conclude that, to the extent that the measures at issue are inconsistent with Article III:4 of the GATT 1994, they have nullified or impaired benefits accruing to India under that agreement.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. As regards our terms of reference, we have found that:

a) for the reasons set forth in our preliminary ruling[755], the Los Angeles Manufacturing Credit (LAMC) Adder (Measure 3), and the Massachusetts Manufacturer Adder (Measure 11) fall outside our terms of reference, whereas the Minnesota solar thermal rebate and the Minnesota solar photovoltaic rebate under Measure 10 fall within our terms of reference; and

b) for the reasons set forth in section 7.1.1.2 of this Report, the "made in Washington" bonus in Section 82.16.165 of the Revised Code of Washington under Measure 1 does not fall within our terms of reference

8.2. In light of their amendment following the establishment of the Panel, for the reasons set forth in section 7.1.1 of this Report:

a) we have decided to make findings, and, if necessary, recommendations on Measures 1 and 8 as amended; and

b) we have decided to make findings, and, if necessary, recommendations on Measure 2 as implemented through both the 2016 and 2017 California Self-Generation Incentive Program (SGIP) Handbooks.

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[752] According to Article 2.3 of the SCM Agreement, "[a]ny subsidy falling under the provisions of Article 3 shall be deemed to be specific".

[753] India's first written submission, paras. 118, 233, 321, 424, 523, 623, 730, 831, 934, 1037, 1075, and 1167.

[754] India's first written submission, para. 1177.

[755] See Annex D-1 containing the preliminary ruling of the Panel.

8.3. In light of their repeal following the establishment of the Panel, for the reasons set forth in section 7.1.2 of this Report, we have decided:

a) to make findings, and, if necessary, recommendations on the Minnesota solar energy production incentive (SEPI) program under Measure 10; and

b) not to make findings and recommendations on the Minnesota solar thermal rebate under Measure 10.

8.4. For the reasons set forth in this Report, we conclude that the following measures are inconsistent with the United States' obligations under Article III:4 of the GATT 1994:

a) the Washington State additional incentive (Measure 1), as contained in Sections 82.16.110 to 82.16.130 of the Revised Code of Washington, and Section 458-20-273 of the Washington Administrative Code;

b) the California Manufacturer Adder (Measure 2), as embodied in Section 379.6 of the California Public Utilities Code, and implemented through the 2016 and 2017 SGIP Handbooks;

c) the Montana tax incentive (Measure 4), as embodied in Sections 15-70-502, 15-70-503, and 15-70-522 of the Montana Annotated Code, and Administrative Rules of Montana, Sections 18.15.701 – 18.15.703 and 18.15.710 – 18.15-712;

d) the Montana tax credit (Measure 5), as embodied in Section 15-32-703 of the Montana Annotated Code;

e) the Montana tax refund (Measure 6), as embodied in Section 15-70-433 of the Montana Annotated Code;

f) the Connecticut additional incentive (Measure 7), as embodied in Section 16-245ff of the General Statutes of Connecticut, and Request for Qualification for Eligible Contractors and Third Party PV System Owners;

g) the Michigan Equipment and Labour Multipliers (Measure 8), as embodied in Public Act No. 342;

h) the Delaware Equipment and Workforce Bonuses (Measure 9), as embodied in Sections 356(d) and (e) of the Renewable Energy Portfolio Standards Act, and Rules and Procedures to Implement the Renewable Energy Portfolio Standard;

i) the Minnesota solar photovoltaic rebate under Measure 10, as embodied in Section 116C.7791 of the 2016 Minnesota Statutes; and

j) the Minnesota solar energy production incentive (SEPI) under Measure 10, as embodied in Sections 216C.411 – 216C.415 of the 2016 Minnesota Statutes.

8.5. For the reasons set forth in this Report, we conclude as follows:

a) With respect to India's claims under Articles 2.1 and 2.2 of the TRIMs Agreement, the Panel exercises judicial economy for the reasons set forth in section 7.4.1 of this Report.

b) With respect to India's claims under Articles 3.1(b), 3.2, and 25 of the SCM Agreement, the Panel exercises judicial economy for the reasons set forth in section 7.4.2 of this Report.

8.6. In light of Article 3.8 of the DSU, the Panel concludes that, to the extent that the measures at issue are inconsistent with Article III:4 of the GATT 1994, they have nullified or impaired benefits accruing to India under that agreement within the meaning of Article XXIII:1(a) of the GATT 1994.

8.7. Pursuant to Article 19.1 of the DSU, we recommend that the DSB request the United States to bring the following measures into conformity with its obligations under Article III:4 of the GATT 1994:

a) the Washington State additional incentive (Measure 1), as embodied in Sections 82.16.110 to 82.16.130 of the Revised Code of Washington, and Section 458-20-273 of the Washington Administrative Code;

b) the California Manufacturer Adder (Measure 2), as embodied in Section 379.6 of the California Public Utilities Code, and implemented through the 2017 SGIP Handbook; and additionally, as implemented through the 2016 SGIP Handbook to the extent that the latter continues to govern certain aspects of the California Manufacturer Adder for past applicants;

c) the Montana tax incentive (Measure 4), as embodied in Sections 15-70-502, 15-70-503, and 15-70-522 of the Montana Annotated Code, and Administrative Rules of Montana, Sections 18.15.701 – 18.15.703 and 18.15.710 – 18.15-712;

d) the Montana tax credit (Measure 5), as embodied in Section 15-32-703 of the Montana Annotated Code;

e) the Montana tax refund (Measure 6), as embodied in Section 15-70-433 of the Montana Annotated Code;

f) the Connecticut additional incentive (Measure 7), as embodied in Section 16-245ff of the General Statutes of Connecticut, and Request for Qualification for Eligible Contractors and Third Party PV System Owners;

g) the Michigan Equipment and Labour Multipliers (Measure 8), as embodied in Public Act No. 342;

h) the Delaware Equipment and Workforce Bonuses (Measure 9), as embodied in Sections 356(d) and (e) of the Renewable Energy Portfolio Standards Act, and Rules and Procedures to Implement the Renewable Energy Portfolio Standard;

i) the Minnesota solar photovoltaic rebate under Measure 10, as embodied in Section 116C.7791 of the 2016 Minnesota Statutes; and

j) the Minnesota solar energy production incentive (SEPI) program under Measure 10, as embodied in Sections 216C.411 – 216C.415 of the 2016 Minnesota Statutes, to the extent that incentive payments under this program continue following its repeal.