

***UNITED STATES – CERTAIN MEASURES RELATING TO THE
RENEWABLE ENERGY SECTOR***

(DS510)

**FIRST INTEGRATED EXECUTIVE SUMMARY
OF THE UNITED STATES OF AMERICA**

November 6, 2018

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

I. Introduction

1. In this dispute, India addresses a number of state and local measures in which India has no trade interest. India provides minimal evidence on the extent to which these measures have been applied or are currently being applied, and provides no evidence that the measures have ever affected a single export of an Indian renewable energy good.

II. Factual Background & Measures at Issue

2. First, India appears to have no significant trading interest in the measures at issue in this dispute. Second, most of the measures at issue are no longer in legal effect or are due to expire within the next two years, as India is aware. Third, records confirm that nearly half of the measures at issue have fallen into general disuse and are essentially moribund. Fourth, at any rate, India has failed to establish that any of the measures at issue breach United States' obligations under a covered agreement.

A. WASHINGTON – Renewable Energy Cost Recovery Incentive Program (“RECIP”)

3. Under RECIP, Washington State utility “customers” that own grid-connected “renewable energy systems” are eligible to receive annual “incentive payments” from their servicing utility company based on the amount of electricity (*i.e.*, kilowatt-hours) produced by the customer’s renewable energy system over the previous fiscal year.

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

4. SGIP provides certain incentive payments to California utility “customers” that install qualifying renewable energy generation or storage systems on their property. California’s four major investor-owned utility companies provide the funding for SGIP incentives, with specific funding amounts determined and directed by the California Public Utilities Commission (“CPUC”).

C. LOS ANGELES – Solar Incentive Program (“SIP”)

5. Under SIP, the Los Angeles Department of Water and Power (“LADWP”) provides “one-time” upfront “incentive payments” to residential, commercial, and non-profit customers that install grid-connected solar rooftop systems on their property.

D. MONTANA – Tax Incentive for Ethanol Production (“MTEIP”)

6. MTEIP is a tax incentive payable to ethanol producers located in the State of Montana. Qualifying ethanol producers are eligible for a tax incentive of up to USD \$0.20 per gallon of ethanol produced for the first six years of their production.

E. MONTANA – Tax Credit for Biodiesel Blending and Storage (“Biodiesel Tax Credit”)

7. The Biodiesel Tax Credit is a tax credit available to individuals and business that “store or blend biodiesel with petroleum for sale.” To qualify for the Biodiesel Tax Credit, an individual or business must own or lease a biodiesel blending facility, or have a “beneficial interest” therein.

F. MONTANA – Tax Refund for Biodiesel (“Biodiesel Refund”)

8. The Montana Biodiesel Refund is a \$0.01 - \$0.02 per gallon tax refund available to certain gasoline “distributors” and “retail motor vehicle outlets” in Montana.

G. CONNECTICUT – Residential Solar Investment Program (“RSIP”)

9. RSIP provides incentives to Connecticut homeowners that install solar power systems on their residential property.

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

10. The Michigan Legislature established the RESP as part of Michigan’s Clean, Renewable, and Efficient Energy Act of 2008 (“PA 295”). Under the RESP, “electricity providers” in Michigan are required to source a growing percentage of their electricity retail sales from renewable energy sources each year, with a target of at least 15% renewables by 2021.

I. DELAWARE – Renewable Energy Standards Program (“Delaware RESP”)

11. Under Delaware’s RESP, “retail electricity suppliers” are required to source a growing percentage of their retail electric sales from renewable energy sources (e.g., solar, wind, hydro-power). Electricity suppliers demonstrate yearly compliance by purchasing “renewable energy credits” (RECs) from renewable energy power generators (“generation units”).

J. MINNESOTA – Minnesota Solar Incentive Program (“MSIP”)

12. India’s first written submission refers to a program called the MSIP. The United States understands India to use that nomenclature as an umbrella term for three “distinct” programs.

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

13. The Solar PV Incentive was a “performance-based” incentive available to residential and commercial property owners in Minnesota that installed “grid connected solar photovoltaic modules” on their property.

2. **Rebates for Installation of Solar Thermal Systems (“Solar Thermal Rebates”)**

14. The Solar Thermal Rebates was an incentive program that provided “rebates” to Minnesota residential and commercial property owners that installed on their property a “solar thermal system” with components “made in Minnesota.”

3. **Rebate for Solar PV Modules (“Solar PV Rebate”)**

15. The Solar PV Rebate was an incentive program that provided rebates to Minnesota property owners that installed “solar photovoltaic modules” on their property.

K. **MASSACHUSETTS – Commonwealth Solar Hot Water Program (“SHWP”)**

16. Under the SHWP, the Massachusetts Clean Energy Technology Center (“MassCEC”) provides “rebates” to offset the cost of installing “solar hot water systems (SHWs) at residential, commercial, industrial, institutional, and public facilities.”

III. **Requests for Preliminary Rulings**

17. The LAMC Adder (formally provided for under the Los Angeles SIP) and the Massachusetts Manufacturer Adder (formally provided for under the SHWP) were no longer in legal force when the Panel was established on March 21, 2017.

18. In addition, the (i) Solar Thermal Rebates; and (ii) Solar PV Rebates under the MSIP were not included in India’s request for consultations, and were not the subject of consultations between India and the United States.

A. **The “LAMC Adder” and “Massachusetts Manufacturing Adder” fall outside of the Panel’s terms of reference**

19. The LAMC Adder and the Massachusetts Manufacturing Adder fall outside the Panel’s terms of reference because both measures were no longer in legal force – and therefore were “not in existence” – when the Panel was established on March 21, 2017.

1. **The LAMC Adder falls outside the Panel’s terms of reference because it was no longer in legal effect as of January 1, 2017 and therefore was not “in existence” when the Panel was established on March 21, 2017**

20. The Los Angeles Board of Water and Power Commissioners (“the Board”) approved the *2017 SIP Guidelines* on December 6, 2017 and specified that they “shall become effective January 1, 2017.”

21. In addition to approving the *2017 SIP Guidelines*, the Board explicitly terminated the LMAC Adder in its resolution of December 6, 2016. Specifically, the Board adopted the following proposal to “remove” the LMAC Adder as a feature of the SIP.

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

22. India has failed to meet its burden to establish that the LAMC Adder was a measure “in existence” when the Panel in this dispute was established on March 21, 2017.

23. India’s assertion that “there is a risk that the LMAC Adder or similar measures are re-introduced” is wholly unsupported. Indeed, India does not even attempt to explain why it perceives such a risk or why the Panel should take this risk seriously.

2. **The Massachusetts Manufacturer Adder falls outside the Panel’s terms of reference because it was no longer in legal effect as of January 1, 2017 and therefore was not “in existence” when the Panel was established on March 21, 2017**

24. The Massachusetts Manufacturer Adder (“the Adder”) was not a measure “in existence” when the Panel was established on March 21, 2017. The legal instruments that allegedly provide for the Adder were not in legal force as of October 5, 2016, and thus not in force on March 21, 2017, when the Panel was established.

25. Accordingly, the Massachusetts Manufacturing Adder was not in existence when the Panel was established, and there is no jurisdictional basis for the Panel to examine or make legal findings with respect to the LAMC Adder.

B. The “Solar Thermal Rebate” and “Solar PV Rebate” were not the subject of consultations between India and the United States and therefore fall outside of the Panel’s terms of reference

26. India seeks legal findings with respect to the (1) Solar Thermal Rebate; and (2) Solar PV Rebate as provided under the program India characterizes as the “Minnesota Solar Incentive Program.” India, however, did not identify either of these two measures in its request for consultations of September 9, 2016. Therefore, both measures fall outside the Panel’s terms of reference, and the Panel should reject India’s request for legal findings with respect to these measures.

1. **The “Solar Thermal Rebates” does not fall within the Panel’s terms of reference because India did not identify that measure in its request for consultations**

27. India’s request for consultations identifies the MSIP as a measure “administered pursuant to the criterion established under [Minnesota Statute § 216C.414, subd. 2 (2013)].” The “criterion established under Minnesota Statute § 216C.414 subd. 2” pertains to the Solar PV Incentive (*see*, section II.J.1), under which Minnesota provides incentives to property owners that install “*solar photovoltaic modules*” not “solar thermal systems.”

28. Therefore, the scope of India’s request for consultations was limited to the “Minnesota Solar Energy Production Incentive” – that is, the measures “administered pursuant to the criterion established under Minnesota Statutes § 216C.414 *subd. 2.*”

29. Because India limited the scope of its request for consultations to measures “administered pursuant to the criterion established under Minnesota Statutes § 216C.414 *subd. 2.*” the Solar Thermal Rebates necessarily falls outside the scope of India’s request and the Panel’s terms of reference.

2. The “Solar PV Rebate” does not fall within the Panel’s terms of reference because India did not identify that measure in its request for consultations

30. The scope of India’s request for consultations was limited to the Solar PV Incentive – that is, the measures “administered pursuant to the criterion established under Minnesota Statutes § 216C.414 *subd. 2.*”. Accordingly, measures administered pursuant to different “criterion” necessarily fall outside the scope of India’s request for consultations and the Panel’s terms of reference.

31. Because India limited to scope of its request for consultations to measures “administered pursuant to the criterion established under Minnesota Statutes § 216C.414 *subd. 2.*”, the Rebate for Solar PV Modules necessarily falls outside the scope of India’s request for consultations and the Panel’s terms of reference.

IV. India Has Not Demonstrated a Breach of Article III:4 of the GATT 1994

32. India has failed to establish that the measures at issue breach Article III:4 of the GATT 1994. In particular, India has not met its burden of demonstrating that these measures (1) “affect”, *inter alia*, the internal “use”, “purchase” or “sale” of products; or (2) accord “less favourable” treatment to imported products within the meaning of that provision.

A. India has failed to establish that the “cost recovery incentives” provided under RECIP are inconsistent with Article III:4 of the GATT 1994

33. India has provided no evidence that substantiates its assertion that “the measures at issue create a demand for equipment [manufactured in Washington] and insulate them from competing ‘like products’ outside of Washington.” Nor has India provided evidence that demonstrates that the measure at issue has modified the “conditions of competition” in Washington’s market for renewable energy products “to the detriment of imported products.”

B. India has failed to establish that the California Manufacture Adder (“SGIP Adder”) provided for under SGIP is inconsistent with Article III:4 of the GATT 1994

34. India has provided no evidence that substantiates its assertion that the SGIP Adder operates to “induce []” buyers to “purchase specified products of California-origin.” Nor has India provided evidence demonstrating that the availability of the SGIP Adder otherwise

operates to modify the “conditions of competition” in the market for renewable energy equipment in California “to the determinant of imported products.”

C. India has failed to establish that the LAMC Adder provided for under SIP is inconsistent with Article III:4 of the GATT 1994

35. Affirmative evidence demonstrates that the LAMC Adder has not incentivized the “use” of solar power equipment or components manufactured in the city of Los Angeles. As noted above, the LADWP terminated the LAMC Adder on December 6, 2016 because no one had sought to avail of the LAMC Adder since at least 2013. Specifically, the Board Resolution stated that

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

36. The fact that no one has even requested (much less received) the LAMC Adder since 2013 contradicts India’s assertion that the Adder has incentivized the “use of certain components manufactured in Los Angeles.”

D. India has failed to establish that the MTIEP is inconsistent with Article III:4 of the GATT 1994

37. The Montana Department of Transportation records indicate no entity has availed of MTIEP since 1995. The fact that no entity has received a tax incentive under MTIEP in over two decades contradicts India’s assertion that MTIEP has incentivized the “use” of products of Montana-origin.

E. India has failed to establish that the Montana Biodiesel Tax Credit is inconsistent with Article III:4 of the GATT 1994

38. Montana Department of Revenue records indicate that no taxpayer has sought to claim the Biodiesel Tax Credit since 2011. The fact that no entity has sought (much less received) the Biodiesel Tax Credit in seven years contradicts India’s assertion that the Biodiesel Tax Credit has incentivized the “use” of products of Montana-origin.

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

39. Montana Department of Transportation records indicate that no taxpayer has ever applied for (much less received) the Biodiesel Refund. This clearly rebuts India’s assertion that the Biodiesel Refund has created a preference (*i.e.*, “incentivized”) “for biodiesel manufactured from Montana products.”

G. India has failed to establish that the Connecticut Component Incentive (“CCI”) provided for under Connecticut’s RSIP is inconsistent with Article III:4 of the GATT 1994

40. India has provided no evidence to substantiate its suggestion that the CCI has played a “decisive” role in inducing consumers to “purchase” or “use” renewable energy components manufactured in Connecticut.

H. India has failed to establish that the “Michigan Equipment Multiplier” provided for under the RESP is inconsistent with Article III:4 of the GATT 1994

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

I. India has failed to demonstrate the “Delaware Equipment Bonus” provided under REPSA is inconsistent with Article III:4 of the GATT 1994

42. India has not demonstrated that the prospect of receiving Bonus RECs incentivizes retail electricity suppliers to purchase renewable energy generation equipment made in Delaware. Under Delaware’s statutory scheme, “retail electricity suppliers” (*i.e.*, companies that sell electricity to end-use consumers) and “generation units” (*i.e.*, the facilities that generate electricity) are distinct entities. “Generation units” *generate* power, whereas retail electricity units *distribute* the generated power to end-use customers. This means that “generation units” – *not* retail electricity providers – make purchasing decisions with respect to renewable energy *generation* equipment. 26 Del. C. § 351(d), however, does not refer to “generation units” (*vice* retail electricity suppliers) much less indicate that *they* are eligible to earn Bonus RECs based on the amount of Delaware-made equipment or components used in their facilities.

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

43. Contrary to India’s assertion, affirmative evidence demonstrates that incentives and rebates available under the MSIP have not incentivized the “use” or “purchase” solar “products of Minnesota-origin.”

44. The fact that solar installations linked the Solar PV Incentive have accounted for a negligible amount of overall solar PV installations in Minnesota, rebuts the suggestion that this measure has incentivized buyers to “purchase” or “use” Solar PV systems or components made in Minnesota.

K. India has failed to demonstrate the “Massachusetts Manufacturer Adder” provided for under the SHWP is inconsistent with Article III:4 of the GATT 1994

45. India has provided no evidence demonstrating that the Massachusetts Manufacturer Adder operates to incentivize the “use” of solar hot water systems or components made in Massachusetts. In particular, India does not proffer any data concerning how many individuals

have availed themselves of the Manufacturer Adder, a notable omission given that the SHWP operated for nearly ten years.

46. For the foregoing reasons, India has failed to demonstrate the “measures at issue” in this dispute “affect” the “purchase” or “use” of products within the meaning of Article III:4 of the GATT 1994.

V. India Has Not Demonstrated a Breach of Article 2.1 of the TRIMs Agreement

47. Given that India has failed to establish that the measures at issue are inconsistent with Article III:4 of the GATT 1994, India has *necessarily* failed to establish they are inconsistent with Article 2.1 of the TRIMs Agreement. The scope of the TRIMs Agreement extends only to measures that impose requirements or conditions on an *enterprise’s purchase or use of goods*.

48. The TRIMs Agreement does not define “trade-related investment measure” or otherwise specify the scope of that term. However, the context provided by the text of Agreement makes clear that the Agreement’s disciplines are concerned with measures that impose requirements or conditions on purchase, use, importation, or exportation of goods by *enterprises*. Conversely, measures that do not regulate such actions of *enterprises* fall outside the scope of the TRIMs Agreement.

49. Most of the “measures at issue” in the present dispute fall outside the scope of the TRIMs Agreement because they impose no requirements or conditions on enterprises’ purchases or uses of goods.

A. The “cost recovery incentives” provided under RECIP impose no requirements or conditions on enterprises’ purchases or uses of goods and therefore fall outside the scope of the TRIMs Agreement

50. There is no requirement that an entity be an “enterprise” (*i.e.*, a “business firm” or “company”) in order to qualify to receive incentive payments under RECIP.

B. The SGIP Adder imposes no requirements or conditions on enterprises’ purchases or uses of goods and therefore falls outside the scope of the TRIMs Agreement

51. There is no requirement that a retail electricity customer be an “enterprise” (*i.e.*, a “business firm” or “company”) in order to receive incentive payments under SGIP. Certainly, India has not demonstrated that any such requirement exists.

C. The LAMC Adder under the Los Angeles SIP imposes no requirements or conditions on enterprises’ purchases or uses of goods and therefore fall outside the scope of the TRIMs Agreement

52. There is no requirement that a LADWP customer be an “enterprise” (*i.e.*, a “business firm” or “company”) in order to receive incentive payments under SIP; India has certainly not demonstrated that any such requirement exists.

D. The “incentives” provided under the RSIP impose no requirements or conditions on enterprises’ purchases or uses of goods and therefore fall outside the scope of the TRIMs Agreement

53. As explained above, incentive payments under RSIP are available only to utility customers that own and occupy residential “family homes” in Connecticut. To qualify of incentives under RSIP, a residential property owner-occupier must purchase or lease a “solar photovoltaic (PV) system” and install the system on their residential property.

54. Given that owner-occupiers of a residential property are the only legal entities eligible to receive RSIP incentive payments, RSIP necessarily excludes “enterprises” (*i.e.*, business firms or companies) from receiving such incentive payments.

E. The incentives and rebates provided under the MSIP impose no requirements or conditions on enterprises’ purchases or uses of goods and therefore fall outside the scope of the TRIMs Agreement

55. There was no requirement that a property owner be an “enterprise” (*i.e.*, a “business firm” or “company”) in order to receive incentive payments under the MSIP.

F. The rebates provided under the SHWP impose no requirements on enterprises’ purchases or uses of goods therefore fall outside the scope of the TRIMs Agreement

56. The rebates provided under the SHWP are broadly available to residential, institutional, and commercial customers that install “solar hot water systems” on their premises. An entity is not required to be an “enterprise” (*i.e.*, a “business firm” or “company”) in order to qualify for a rebate under program.

VI. Response to India’s Claims Under Article 3 of the SCM Agreement

57. First, India has failed to make a prima facie case that the measures at issue involve a financial contribution by a government or public body. At most, India has presented evidence that certain government entities had the legal authority to provide a contribution under the challenged measures.

58. Second, India has failed to demonstrate that any of the measures at issue confer a “benefit” within the meaning of Article 1.1(b) of the SCM Agreement.

A. India has failed to establish that the “cost recovery incentives” provided under RECIP confer a “benefit”

59. India has failed to establish that the measure at issue under RECIP (hereinafter the “Washington Adder”) is a “subsidy” within the meaning of Article 1 of the SCM Agreement because India has not demonstrated that Washington Adder confers a “benefit” within the meaning of Article 1.1(b) of the Agreement.

60. India argues that the Washington Adder confers a benefit on “two categories” of recipients: (1) individuals and entities that “receive” incentive payments under the Washington Adder; and (2) “local producers” of renewable energy equipment or components.

61. India has failed to demonstrate that the Washington Adder confers a “benefit” on direct recipients *or* local producers.

B. India has failed to establish that the SGIP Adder confers a “benefit”

62. India, has failed to establish that the SGIP Adder is “subsidy” within the meaning of Article 1 of the SCM Agreement because India has not demonstrated that the Adder confers a “benefit” within the meaning of Article 1.1(b) of the Agreement. In particular, India has failed to demonstrate that the SGIP Adder confers a “benefit” either on direct recipients, or on local suppliers/producers.

C. India has failed to establish that the LAMC Adder confers a “benefit”

63. The LAMC Adder is not within the Panel’s terms of reference because the LAMC Adder was no longer in legal effect when the Panel was established on March 21, 2017.

64. India has failed to establish that the LAMC Adder is “subsidy” within the meaning of Article 1 of the SCM Agreement because India has not demonstrated that the Adder confers a “benefit” within the meaning of Article 1.1(b) of the SCM Agreement.

65. India has failed to demonstrate that the LAMC Adder confers “benefit” on either direct recipients or local producers.

D. India has failed to establish that the MTIEP confers a “benefit”

66. India has failed to demonstrate that the MTIEP confers a “benefit” on ethanol distributors or local producers of Montana wood and wood products.

E. India has failed to establish that Biodiesel Tax Credit confers a “benefit”

67. India has failed to demonstrate that the Tax Credit confers a “benefit” on individual/corporate taxpayers or local producers of Montana feedstock.

F. India has failed to establish that the Biodiesel Refund confers a “benefit”

68. India has failed to demonstrate that the Biodiesel Refund confers a “benefit” on biodiesel distributors and the owners/operators of retail motor fuel outlets.

G. India has failed to establish that the CCI provided for under Connecticut’s RSIP confers a “benefit”

69. India has failed to establish that the CCI is a “subsidy” within the meaning of Article 1 of the SCM Agreement because it has not demonstrated that the CCI confers a “benefit” within the meaning of Article 1.1(b) of the SCM Agreement.

70. India argues that the CCI confers a benefit on “two categories” of recipients: (1) Solar PV “System Owners” and the homeowners (*i.e.*, direct recipients); and (2) the local producers/assemblers of the major system components (*i.e.*, indirect recipients).

71. India has failed to demonstrate that the CCI confers a “benefit” on solar PV system owners/homeowners *or* local producers/assemblers of major system components.

H. India has failed to demonstrate that the “Michigan Equipment Multiplier” confers a “benefit”

72. India has failed to establish that RECs issued under the Michigan Equipment Multiplier are “subsidies” within the meaning of Article 1 of the SCM Agreement because it has not demonstrated that Michigan Equipment RECs confer a “benefit” within the meaning of Article 1.1(b) of the SCM Agreement.

I. India has failed to establish the “Delaware Equipment Bonus” provided under REPSA confers a “benefit”

73. India has failed to establish that RECs issued under the Delaware Equipment Bonus are “subsidies” within the meaning of Article 1 of the SCM Agreement because it has not demonstrated that the Delaware Equipment Bonus confers a “benefit” within the meaning of Article 1.1(b) of the SCM Agreement.

J. India has failed to demonstrate the “Incentives” or “Rebates” provided for under the MSIP confer a “benefit”

74. India has failed to establish that “incentive” and “rebate” measures at issue under the MSIP are “subsidies” within the meaning of Article 1 of the SCM Agreement because it has not demonstrated that such measures confer a “benefit” within the meaning of Article 1.1(b) of the SCM Agreement.

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

75. India has failed to establish that the Massachusetts Manufacturer Adder (provided for under the Commonwealth SHWP) is “subsidy” within the meaning of Article 1 of the SCM Agreement because it has not demonstrated that the Adder confers a “benefit” within the meaning of Article 1.1(b) of the SCM Agreement.

VII. Response to India’s Claims under Article 25.2 of the SCM Agreement

76. As the United States has explained in section VI above, India has failed to establish that the measures at issue in this dispute meet the definition of a “subsidy” within the meaning of Article 1 of the SCM Agreement. Consequently, India has also failed to establish that the United State was obligated to notify the measures at issue pursuant to Article 25.2 of the SCM Agreement.

VIII. Conclusion

77. The United States requests that the Panel find that India has failed to meet its burden of showing that the U.S. measures at issue are inconsistent with Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Articles 3.1(b), 3.2, and 25.2 of the SCM Agreement.

78. In addition, the United States requests that the Panel find that the LAMC Adder, the Massachusetts Manufacturing Adder, the Solar Thermal Rebate, and the Solar PV Rebate fall outside of the Panel's terms of reference and deny India's request for legal findings with respect to those measures.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

1. As explained in the United States' first written submission, India has failed to make a *prima facie* case that any of the measures at issue in this dispute are inconsistent with U.S. obligations under the GATT 1994, the TRIMs Agreement, or the SCM Agreement.

II. INDIA HAS NOT DEMONSTRATED A BREACH OF ARTICLE III:4 OF THE GATT 1994

2. The Appellate Body has found that the determination of whether a measure accords "less favourable" treatment to imported products within the meaning of Article III:4 cannot rest on a "simple assertion", but must also assess the measure's "implications in the marketplace." In this dispute, India's chosen framework for meeting this fundamental burden is to attempt to prove that the measures at issue "incentivize" the purchase or use of locally manufactured products.

3. None of the evidence proffered by India demonstrates that the measures at issue have incentivized the purchase or use of locally manufactured renewable energy products. First, for some of the measures at issue, the data that India relies upon *at most* suggests that the measures may have incentivized the purchase or use of renewable energy equipment in *general* – that is, irrespective of origin. Second, in some cases, India's own evidence refutes the conclusion that the measures at issue have incentivized the purchase or use of locally made renewable energy equipment. Third, for some of the programs, the record evidence shows that few individuals have *ever* applied to receive incentives or benefits under the challenged measures.

4. Having failed to demonstrate that the measures at issue operate to incentivize the purchase or use of locally manufactured renewable energy products, India has thus failed to establish that the measures "affect" the "use" of such products within the meaning of Article III:4 (much less demonstrate that the measures accord "less favorable" treatment to imported products). Accordingly, India has failed to make a *prima facie* case that the measures at issue are inconsistent with Article III:4 of the GATT 1994.

III. INDIA HAS NOT DEMONSTRATED A BREACH OF ARTICLE 2 OF THE TRIMs AGREEMENT

5. Most of the measures at issue in this dispute do not fall within the scope of the TRIMs Agreement. Rather, the TRIMs Agreement covers measures that impose requirements or conditions on purchase, use, importation, or exportation of goods by *enterprises*. Conversely, measures that do not regulate such actions of *enterprises* fall outside the scope of the TRIMs Agreement.

6. First, the numerous references to “enterprises” in Article 5 of the TRIMs Agreement – in particular, the phrases “enterprises which are subject to a TRIM” and “a TRIM...applicable to [] established enterprises” – indicates that TRIMs are measures that impose requirements or conditions on *enterprises*. Second, the text of the Illustrative List of the Annex to the TRIMs Agreement provides further evidence that the scope of the TRIMs Agreement is limited to measures that impose requirements on *enterprises*. Based on this context, TRIMs are measures that impose requirements on *enterprises*.

7. Most of the measures at issue in this dispute are focused on end-consumers, and impose no requirements or conditions on *enterprises* with respect to purchase or use of goods. In particular, as explained in the United States’ first written submission, the Washington State, Los Angeles, California, Connecticut, Minnesota, and Massachusetts measures are not within the scope of the TRIMs Agreement because they impose no requirements on enterprises with respect to the purchase or use of goods.

IV. INDIA HAS NOT DEMONSTRATED A BREACH OF ARTICLE 3 OF THE SCM AGREEMENT

8. India has failed to establish that the measures at issue are inconsistent with U.S. obligations under the SCM Agreement. In particular, India has not met its burden of demonstrating that the measures at issue involve a “financial contribution” within the meaning of Article 1.1(a) of the SCM Agreement, or confer a “benefit” within the meaning of Article 1.1(b) of the SCM Agreement.

9. First, India has not presented evidence that any “financial contributions” have been disbursed under the measures at issue. At most, India has presented evidence that certain entities had the legal authority to provide such a contribution under the challenged measures.

10. Second, with respect to the element of “benefit,” India appears to advance contradictory arguments. On the one hand, India argues that the measures at issue confer a “benefit” on the homeowners, businesses, etc. that install qualifying renewable energy equipment by allowing them to purchase renewable energy products at an effective discount. On the other hand, India argues that measures at issue *also* confer a “benefit” on “local producers” of renewable energy equipment. However, as the United States has explained, India’s own approach to calculating the “benefit” conferred on direct recipients appears to leave no room for any additional “benefit” to be conferred on local producers.

11. Instead, India argues that the measures at issue confer a “benefit” on local producers in the form of “increased sales.” As the United States has explained, India has failed to show that the measures at issue have incentivized the purchase of locally made renewable energy equipment in a way that would result in additional sales for local producers.

12. For the foregoing reasons, India has not met the burden of demonstrating that the measures at issue are inconsistent with U.S. obligations under the SCM Agreement.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES TO THE PANEL’S QUESTIONS FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL

1. As noted in the following U.S. responses to the Panel’s questions, the United States is not in a position to provide detailed answers to a number of questions because India failed to make out its *prima facie* case in its first written submission.

2. In particular, India failed to explain how each requisite element of each of its legal claims specifically applied to the specific measures at issue. This fundamental flaw in India’s first written submission is particularly acute with respect to India’s claims under the TRIMs Agreement and the SCM Agreement. In prior disputes, the types of measures challenged by India have been addressed under Article III:4 of the GATT 1994. In contrast, and as India does not dispute, the purported application of the TRIMs Agreement and the SCM Agreement to consumer incentive programs is novel. To make out such claims, a complaining Member would need to present a well-formed legal argument explaining its interpretation of the relevant provision, and further explain how under that interpretation, each element of its claims could apply to consumer programs. India has not done so. Indeed, when pressed at the first substantive meeting, India in essence repeated the conclusory allegations in India’s request for panel establishment, without providing any supporting argumentation.

3. In making this introductory comment, the United States should not be understood as suggesting that India may attempt to establish its *prima facie* case in subsequent submissions. To the contrary, under paragraph 3 of the Panel’s Working Procedures, India was required to present its arguments in its first written submission. In contrast, also under paragraph 3 of the Working Procedures, the second written submission is for purposes of rebuttal. India has not presented any basis for why India should be excused from the fundamental requirement that a complaining Member must present its *prima facie* case in its first submission.

4. Furthermore, it would be completely inconsistent with the Working Procedures, as well as procedural fairness, for India to wait until after it had first reviewed responses of the United States and third parties on the general interpretive issues raised in the Panel’s questions (but unaddressed in India’s first submission) in order to attempt to make out a *prima facie* case. The Panel-questions-and-response process is not intended to be an exercise in which the complaining Member can conduct an initial exploration of the relevant legal issues, after which the complaining Member can then attempt to formulate its legal arguments.