UNITED STATES – CERTAIN MEASURES RELATING TO THE RENEWABLE ENERGY SECTOR

(DS510)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

November 27, 2018

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I. INTRODUCTION

1. As the United States has explained in its written and oral submissions, India has failed to make out a *prima facie* case that the measures at issue breach U.S. obligations under any covered agreement. India's argumentation consists of conclusory allegations that presume – rather than demonstrate – that India has satisfied the required elements of the legal claims at issue. The new material in India's subsequent statements at the first substantive meeting and in India's written responses to questions from the Panel does not advance India's case.

2. In this submission, the United States primarily responds to certain new arguments that India advanced at the first meeting of the parties and in written responses to questions from the Panel. In short, none of these arguments are convincing or serve to make out India's case that the measures at issue are inconsistent with U.S. obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement"), or the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

3. In Part II of this submission, the United States identifies some further deficiencies with India's argument that the measures at issue are inconsistent with Article III:4 of the GATT 1994. In Part III, the United States explains why none of India's new arguments support a finding that the measures at issue breach the TRIMs Agreement. Finally, in Part IV, the United States elaborates on why India has failed to establish a breach of Article 3 of the SCM Agreement.

II. INDIA HAS NOT MADE OUT A CASE THAT THE MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

4. In its first written submission, India asserted that the measures at issue accord "less favorable" treatment to imported products within the meaning of Article III:4 by "incentivizing" the "purchase" or "use" of locally manufactured renewable energy products.[1] India therefore needs to establish that the challenged measures operate to incentivize the "purchase" or "use" of domestic products in order to make out its case. As the United States has explained, however, the evidence and argumentation set forth in India's first written submission does not substantiate India's contention that the measures at issue incentivize the "purchase" or "use" of domestic goods.[2] India's failure on this score means that India has failed to meet its burden of argument with respect to its claims under Article III:4 of the GATT 1994. None of India's subsequent statements to the Panel or responses to the Panel's question serve to make out India's case.

5. To prevail on a claim under Article III:4, a complaining party must meet its basic burden of argument. To be sure, there is no single, prescribed mode of analysis for establishing a claim under Article III:4. That choice lies in the hands of the Member asserting the claim. In some prior disputes involving Article III:4, reports have found that this burden may be met by providing an analysis of the challenged measure's "design, structure, and expected operation" on

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

[2] *See,* U.S. Opening Statement at the First Meeting of the Panel with the Parties, para. 6.

the relevant market.[3] In this dispute, India apparently has adopted a different approach. In particular, India argues that the measures at issue accord "less favorable" treatment within the meaning of Article III:4 because they incentivize the "purchase" or "use" of locally manufactured renewable energy products.[4] Accordingly, having asserted this approach as the basis for its case, India must meet its burden of showing – through specific and detailed analysis – how each measure at issue operates in the manner India asserts. India failed to do so.

6. Specifically, as explained below, India's arguments on the purported "incentivizing" effects of the measures at issue are comprised primarily of conclusory statements that are unsupported by an analysis of the challenged measures or the markets in which the measures operate. Instead, India's typical approach is (1) to briefly characterize selected aspects of a challenged measure, and then (2) based on that characterization, summarily state or infer that the measure incentivizes the "purchase" or "use" of locally manufactured products, and thereby accords "less favorable" treatment to imported products. This approach is conclusory, and does not meet India's burden of argument.

7. For example, at paragraph 57 of its first written submission India describes certain aspects of the measures at issue under **RECIP (Measure 1)** and then – without providing any intervening analysis – begins paragraph 58 with the declaration that "*Given the measures at issue incentivize [] the use of certain specified products manufactured in Washington*..."[5] In other words, India simply takes it as a "given" that the **RECIP** measures incentivize the "use" of products made in Washington *without* first analyzing whether the measures – in light of their "design, structure, and expected operation" – are even likely to have such an incentivizing effect. This pattern is repeated through India's first written submission.

8. At paragraph 176 of its first written submission, India briefly characterizes the measures at issue under **SGIP (Measure 2)** and then immediately declares that that "a potential buyer will prefer to purchase" locally made products "over those which are imported."[6] India's conclusion that the SGIP measures "induce" (*i.e.*, incentivize) buyers to purchase products of California-

[3] *See*, U.S. First Written Submission, para. 81 (citing *US – FSC (Article 21.5 – EC) (AB)*, para. 215) ("The examination of whether a measure involves 'less favourable treatment' of imported products within the meaning of Article III:4 of the GATT 1994 must be grounded in close scrutiny of the "fundamental thrust and effect of the measure itself". This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace.").

[4] India has re-affirmed this "incentivization" argument in subsequent statements to the Panel and in responses to questions from the Panel. *See*, India's Opening Statement at the First Substantive Meeting of the Panel ("India's Opening Statement), para 11; Response by India to Questions from the Panel after the First Substantive Meeting ("India's Responses to Panel Questions"), para. 56.

[5] India's First Written Submission, paras. 57-58.

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

origin is not preceded by an analysis of whether the measures are expected to operate to such an effect.

9. At paragraph 679 of its first written submission, India briefly describes the measures at issue under the **CRSIP** (**Measure 7**) and then declares that "*any* incentive would play a decisive role in the choice a consumer makes between domestic and imported products."[7] Of course, the measures at issue are not "any incentive," but the *particular* CRSIP measures challenged by India. Again, India does not provide a particularized analysis of the CRSIP measures' expected operation before summarily inferring that they play a "decisive" role in incentivizing the purchase or use of products made in the state of Connecticut.

10. At paragraph 782 of its first written submission, India characterizes the measures at issue under **RESPM (Measure 8)**, and then states "Since the buyers are induced to purchase 'renewable energy system' [sic] of Michigan -origin, the 'like' imported products, which are negated the *equality of opportunity*, become undesirable in the eyes of a potential buyer."[8] India, however, does provide any analysis as to why the RESPM measures would result in buyers being "induced to purchase" equipment made in Michigan or cause imported products to become "undesirable." Instead, India simply presumes in passing (*i.e.*, "Since the buyers are induced…) that the RESPM measures will incentivize the purchase of locally manufactured equipment on the Michigan market.

11. Similarly, after briefly characterizing the measures at issue under **RESPA (Measure 9)** at paragraphs 877 and 878 of its first written submission, India immediately states that "In view of the additional incentives, a potential buyer [*i.e.*, a "retail electricity supplier"[9]] will prefer to purchase" locally-manufactured renewable energy equipment. India, however, does not set forth any analysis of *why* the measures are likely to inform the purchasing decisions of potential buyers on the Delaware market. India's omission on this score is crucial because, as the United States has explained, "retail electricity suppliers in Delaware" do not appear to "make *any* purchasing decisions with respect to renewable energy generation equipment."[10] Accordingly, India has failed to explain why the RESPA measures are even capable of having the incentivizing effect alleged by India.

12. India's analytical omissions with respect to the measures at issue under **SEPI (Measure 10)** are particularly glaring. As noted, India is challenging three separate measures under SEPI, namely the **(**1) Made in Minnesota Solar Energy Production Incentives; (2) Rebates for installation of Solar Thermal Systems; and (3) Rebate for Solar PV Modules.[11] However, the

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

[8] India's First Written Submission, para. 782. (emphasis original)

[9] *See*, U.S. First Written Submission, para. 119.

[10] *See*, U.S. First Written Submission, paras. 121-123.

[11] *See*, U.S. First Written Submission, para. 28.

portion of India's first written submission that addresses whether the SEPI measures accord "less favourable" treatment does not include a particularized analysis of the three measures.[12] Again, India appears to simply presume that each of the measures incentivize the purchase or use of products made in Minnesota because there are certain "financial advantages" or "rebates" available to consumers under SEPI.[13] India, however, does not support this presumption with an analysis of the measures' design, structure, or expected operation on Minnesota's market for renewable energy products.

13. Once again, to be clear, the United States does not – as India argues – assert that the existence of "actual trade effects" is an essential element of a claim under Article III:4 of the GATT 1994.[14] Accordingly, the United States does not argue that India must proffer empirical evidence that the measures at issue *have* incentivized the purchase or use of domestic products. However, given that India has chosen to argue that the measures at issue accord "less favorable treatment" to imported products *by* incentivizing the purchase or use of domestic products, India *does* bear of the burden of demonstrating that the challenged measures are bound or likely to have such incentivizing effects. For the foregoing reasons, India has failed to do so. Accordingly, the Panel should find that India has failed to establish that the measures at issue are inconsistent with Article III:4 of the GATT 1994.

III. INDIA HAS NOT MADE OUT A CASE THAT THE MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLE 2.1 OF THE TRIMS AGREEMENT

14. As the United States has explained, the text of the relevant provisions of the TRIMs Agreement makes clear that the Agreement's disciplines are concerned with measures that impose requirements or conditions on the purchase, use, importation, or exportation of goods by *enterprises*.[15] Conversely, measures that do not regulate such actions of enterprises are not within the scope of the TRIMs Agreement. India has ignored this, and instead argues as if any alleged breach of Article III:4 of the GATT 1994 is necessarily also a breach of the TRIMs Agreement. This flaw is particularly problematic for India given that the measures at issue are focused on final consumers, not enterprises.[16]

15. In its statements to the Panel and responses to Panel questions, India has advanced several new arguments to support its view that the measures at issue fall within the scope of the TRIMs Agreement. As explained below, each of India's new arguments is without merit.

[12] *See*, India's First Written Submission, paras 1011-1014.

[13] *See*, India's First Written Submission, paras 1011.

[14] *See*, U.S. Responses to Question from the Panel

[15] *See*, U.S. First Written Submission, paras. 138.

[16] *See*, U.S. First Written Submission, paras. 138-143.

16. First, India has failed to substantiate its argument that the measures "induce"[17] manufacturing enterprises to purchase or use locally made inputs, and thereby impose "indirect" or implicit requirements to purchase or use domestic products.

17. Second, India's argument that the TRIMs Agreement extends to any measure that could have a restrictive, distortive, or discriminatory effect on trade[18] writ large – *even if* the measure imposes no requirements or conditions on "enterprises" – is not supported by the "object and purpose" of the Agreement, as India contends.

18. Third, the findings in the prior reports relied upon by India do not support India's argument that the word "enterprise" encompasses "any person … that engages in economic activity," such as "persons [that] purchase renewable energy equipment."[19]

A. The measures at issue do not impose any direct or *indirect* purchase or use requirements on enterprises that manufacture renewable energy equipment

19. As the United States has explained, India has failed to make out its claim by showing that each measure at issue imposes requirements or conditions on enterprises' purchases or uses of goods.[20] India does not appear to dispute that most of the measures at issue impose no explicit purchase or use requirement on enterprises. Instead, India now argues that the measures impose "indirect" or implicit requirements that enterprises must fulfill to obtain an "advantage" within the meaning of paragraph 1(a) of the Illustrative List of the Annex to the TRIMs Agreement. These arguments are unconvincing.

20. First, India suggests that the measures "indirectly induce[]" enterprises that manufacture renewable energy equipment to purchase or use locally-made "inputs."[21] India, however, has not demonstrated that a renewable-equipment-manufacturing enterprise would need to source *any* of the inputs used in the manufacturing process from local suppliers in order to obtain the advantages alluded to by India.

21. Specifically, as characterized by India, the measures at issue in this dispute accord preferences to renewable energy systems that are manufactured *within* a particular U.S. state-level jurisdiction.[22] India has not demonstrated that a renewable energy equipment

[17] *See*, India's Opening Statement, para. 54.

[18] *See*, India's Opening Statement, paras. 40 and 46.

[19] *See*, India's Opening Statement, para. 47; India's Responses to Questions from the Panel, response to Question 62.

[20] *See*, U.S. First Written Submission, paras. 138-143.

[21] *See*, India's Opening Statement, para. 54.

[22] *See*, India's First Written Submission, para. 4.

manufacturing enterprise would need to purchase or use locally manufactured inputs (*i.e.*, "products of domestic origin") to obtain an advantage, *so long* as the manufacturing *process* takes place within the U.S. state in question. That is, it appears that the manufacturing enterprises can enjoy the advantages referred to by India, *even if* they acquire their inputs from other U.S. states or import them from overseas sources. India has therefore failed to substantiate its theory that the measures impose "indirect" requirements on enterprises by "inducing" them to purchase or use locally manufactured inputs.

22. Second, India suggests that the measures at issue impose implicit requirements on renewable energy system *component* producers because they "will necessarily need to locate to a [local jurisdiction] to obtain the advantage of a protected market."[23] Again, even if a manufacturing enterprise must conduct its manufacturing activities *within* a certain jurisdiction in order to obtain an advantage, this does not mean that the enterprise would need to "purchase" or "use" products that are made in that jurisdiction. Indeed, an enterprise could presumably establish a manufacturing facility in a particular state, while sourcing the entirety of its inputs and capital equipment from outside that jurisdiction or from overseas. As India appears to acknowledge, a manufacturing enterprise could simply "shift[] investments" into a local jurisdiction instead of "purchasing" or "using" any "products of local origin" in the production process. [24]

23. For the foregoing reasons, India has failed to establish that the measures indirectly or implicitly require manufacturing enterprises to purchase or use "products of domestic origin" "in order to obtain an advantage" within the meaning of paragraph 1(a) of the Illustrative List.

B. The "object and purpose" of the TRIMs Agreement does not support the view that the Agreement's scope extends beyond measures that impose purchase or use requirements on *enterprises*

24. India suggests that measures with the potential to have trade-restrictive, distortive, or discriminatory effects fall within the scope of the TRIMs Agreement, *even if* they impose no requirements or conditions on enterprises.[25] India argues that this interpretation flows from the object and purpose of the TRIMs Agreement. India's argument has two unsurmountable problems.

25. First, under customary rules of interpretation, the text of the agreement must be interpreted in accordance with their ordinary meaning, in their context, and in light of the object and purpose of the agreement.[26] Here, the terms of the agreement explicitly state that the

[23] *See*, India's Opening Statement, para. 46.

[24] *See*, India's Opening Statement, para. 46.

[25] *See*, India's Opening Statement, paras. 40 and 46.

[26] *See*, Vienna Convention, Article 31.

relevant purchase or use is "by an enterprise." The object and purpose of the agreement is not some independent source of law that can be used to read explicit language out of an agreement. But, that is exactly what India suggests by arguing that the object and purpose of the agreement somehow makes this clear textual language irrelevant.

26. Second, and furthermore, India's proposed "object and purpose" of the TRIMs Agreement is not correct. In particular, India argues that the "primary object" of the TRIMs Agreement is to "discipline investment measures" that may have "trade-restrictive," "distortive," or discriminatory effects.[27] This statement, however, is fundamentally circular. This formulation avoids the fundamental question of "what *is* an 'investment measure' covered by the scope of the agreement?" As the United States explained in its prior submissions,[28] the preamble of the TRIMs agreement sheds additional light on this issue. In addition to the textual provision linking the purchase or use of domestic products to "enterprises," the preamble states that an objective of the agreement is "to facilitate investment across international frontiers."[29] Investments are typically in the form of an investment in an enterprise, and are not, for example, in the form of payments or incentives to home consumers. Thus, it makes sense for the relevant text in the TRIMs Agreement to impose disciplines on measures affecting purchase or use *by an enterprise*, as an enterprise could potentially be associated with an investment across international frontiers.

27. Indeed, India's proposed object and purpose of the TRIMs Agreement is similar to the stated aims of the GATT 1994. Specifically, the preamble to the GATT 1994 refers to the need to reduce "trade-barriers" (*i.e.*, trade restrictions) and "eliminate discriminatory treatment in international commerce." The national treatment provisions of Article III of the GATT 1994 of course generally prohibit measures that distort trade by discriminating against imported products. The similarity between the object and purpose of the GATT 1994 and India's position on the object and purpose of the TRIMs Agreement undermines India's argument regarding the intended scope of the TRIMs Agreement. In particular, the measures that fall within the scope of the TRIMs Agreement are, *by definition*, a narrower subset of measures that fall within the scope of Article III:4 of the GATT 1994.[30] Crucially, India's interpretive approach, if adopted, would render the TRIMs Agreement essentially superfluous in light of Article III:4 of the GATT 1994. India's litigation position thus contravenes core principles of treaty interpretation. As stated by the Appellate Body in *US – Gasoline*:

> One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. *An interpreter is not free to adopt*

[27] *See*, India's Opening Statement, paras. 40 and 46.

[28] *See*, U.S. Responses to Questions from the Panel, para. 29.

[29] TRIMs Agreement, Preamble

[30] *See*, U.S. Responses to Question from the Panel, paras. 15-16.

> *a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility*.[31]

28. Therefore, India's argument that the scope of the TRIMs Agreement – based on India's asserted object and purpose of the TRIMS Agreement – extends to any measures that may have trade-restrictive, distortive, or discriminatory effects on the trade in goods must fail. In sum, India's "object and purpose" argument does not support the view that the scope of the TRIMs Agreement extends to measures that impose no requirements or conditions on enterprises' purchases or use of goods.

C. India has failed to establish that the term "enterprise" can encompass "persons who engage in *any* economic activity such as purchasing renewable energy equipment"

29. As the United States noted, the ordinary meaning of "enterprise" refers to a "business firm" or "company."[32] In light of the preambular language of the TRIMs Agreement, the relevant business firm or company would be of the type that could be involved in a cross-border investment.[33] India's response is to rely on irrelevant findings by the Appellate Body in *US – Washing Machines.* In particular, based on that report, India argues that the term "enterprise" can encompass any "person engaged in any economic activity, such as purchasing renewable energy equipment."[34] As explained below, however, none of the Appellate Body's reasoning in *US – Washing Machines* supports such an interpretation for the term "enterprise" within the meaning of the TRIMs Agreement (or any other covered Agreement for that matter).

30. First, the United States notes that the Appellate Body did not interpret the meaning of the term "enterprise" in *US – Washing Machines*, but rather the phrase "certain enterprises" within the meaning of Article 2.2 of the SCM Agreement.[35] India asserts that the Appellate Body's views are "instructive in interpreting the meaning of the term 'enterprise' under the TRIMs Agreement."[36] Beyond this assertion, however, India does not explain why the Appellate Body's observations on this score – that is, on different terminology as used in a different agreement – are relevant to how the Panel should interpret the term "enterprise" within the meaning of the

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[31] *US – Gasoline (AB)*, p. 23.

[32] *See*¸ U.S. First Written Submission, note 161, citing the The New Shorter Oxford English Dictionary (4th Edition), p. 828.

[33] *See*, U.S. Responses to Questions from the Panel, para. 29.

[34] *See*, India's Opening Statement, para. 47; India's Responses to Questions from the Panel, response to Question 62.

[35] *See, US – Washington Machines (AB)*, para. 5.217 – 5.225.

[36] India's Opening Statement, para. 47.

TRIMs Agreement. For this reason alone, the Panel should reject India's suggestion to draw guidance from *US – Washing Machines.*

31. Second, at any rate, the issue in *US – Washing Machines* was not whether the term "enterprise" or "certain enterprises" could have a broader meaning than "a business firm" or a "company." Rather, the issue was whether the term "certain enterprises" pertained only to where a *company* was legally incorporated[37] or whether other parts of a business could be the recipient of a "subsidy" within the meaning of the SCM Agreement. In the end, the Appellate Body concluded that the term "certain enterprises" *not* was limited to the part of a company with "distinct legal personality" but could also refer to other parts of the company such as "its headquarters, branch offices, and manufacturing facilities."[38] Simply put, nothing in *US – Washington Machines* suggests that the Appellate Body entertained the notion that the word "enterprise" could refer to anything other than a "business firm" or "company," consistent with the ordinary meaning of term. While the Appellate Body noted that a "wide variety of economic actors" could be the recipient of a "subsidy" within the meaning of Article 1 of SCM Agreement,[39] it did not – as India suggests – state or imply that any "person[] who engages in any economic activity" is an "enterprise" within the meaning of the SCM Agreement.

32. India has therefore failed to adduce any legal support for the contention that the term "enterprise" can encompass "persons who engage in *any* economic activity such as purchasing renewable energy equipment."[40] India has provided no basis to consider that a special meaning should replace the ordinary meaning of the term "enterprise," *i.e.*, a "business firm" or company.

33. For the foregoing reasons, the United States reiterates that the Panel should find that India has not made out its case by demonstrating that each of the measures at issue is an investment measure within the scope of the TRIMs Agreement.

IV. INDIA HAS NOT MADE OUT A CASE THAT THE MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLE 3 OF THE SCM AGREEMENT

34. As the United States has explained, India has failed to establish that each of the measures at issue are inconsistent with U.S. obligations under the SCM Agreement. In particular, India has not met its burden to establish the existence of a "subsidy" within the meaning of the SCM Agreement, because it failed to demonstrate that the measures at issue involve a "financial contribution" or confer a "benefit" within the meaning of Articles 1.1(a) and 1.1(b) of the SCM

[37] *See, US – Washington Machines (AB)*, para. 5.224 ("[I]f accepted, Korea's interpretation of the term 'certain enterprises' would entail that a regional specificity analysis should focus solely on the place(s) where the recipient companies are incorporated, without regard to the place(s) where those companies effectively establish their commercial presence by, for instance, setting up sub-units such as branch offices or manufacturing facilities.")

[38] *See, US – Washington Machines (AB)*, para. 5.222.

[39] *See, US – Washington Machines (AB)*, para. 5.223

[40] *See*, India's Opening Statement, para. 47.

Agreement, respectively.[41] Further, India has failed to establish that any subsidy would be "contingent . . . upon the use of domestic over imported goods." In its statements to the Panel and responses to Panel questions, India makes some new arguments to attempt to bolster its claim that the measures at issue provide for subsidies that are inconsistent with Article 3.1(b) and 3.2 of the SCM Agreement. As explained below, however, India's new arguments do not cure the deficiencies in India's first written submission. Indeed, to the extent that India is attempting to present a new *prima facie* case, it may not do so after its first written submission.[42] Accordingly, India has failed to make out its case that the measures at issue are inconsistent with U.S. obligations under the SCM Agreement.

A. India has failed to establish that the measures at issue involve a "financial contribution" within the meaning of Article 1.1(a) of the SCM Agreement

35. In its first written submission, India did not present evidence that any "financial contributions" had been made under the measures at issue. As noted, India – at most – presented evidence that certain entities may have the legal authority to provide such a contribution under the challenged measures.[43] As the United States has explained, however, India's minimal showing in this regard does not suffice to demonstrate "there *is* a financial contribution" under the measures at issue within the meaning of Article 1.1(a)(1) of the SCM Agreement.[44] Accordingly, India did not meet its burden to establish that a "subsidy" exists within the meaning of Article 1 of the SCM Agreement.

36. India now argues that it need not demonstrate that a financial contribution has been made in order to establish that a "subsidy" exists within the meaning of the SCM Agreement.[45] Specifically, India references Article 3.2 of the SCM Agreement, which provides that Members "shall neither grant nor maintain" the subsidies prohibited under Article 3.1. India asserts that the inclusion of the term "maintain" in Article 3.2 of the SCM Agreement indicates that "whether a Member has actually made a financial contribution is *irrelevant*" to establishing whether "there *is* a financial contribution" within the meaning of Article 1.1(a)(1) of the Agreement.[46] India's argument fails.

37. In particular, India's reliance on the term "maintain" is misplaced. Under Article 3.2 of the SCM Agreement, the object of the verb "maintain" is the noun "subsidies." The term

[41] *See, e.g.*, U.S. Opening Statement, para. 17.

[42] *See*, U.S. Responses to Questions from the Panel, para. 2 (citing Working Procedures of the Panel, para. 3.1 ("Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.")).

[43] *See*, U.S. First Written Submission, para. 159.

[44] *See*, U.S. Response to Questions from the Panel, paras. 49-50.

[45] *See*, India's Opening Statement, para. 69.

[46] *See*, India's Opening Statement, para. 69. (emphasis added)

"subsidy" is in turn defined in Article 1 of the SCM Agreement, and Article 1 requires a financial contribution. Thus, nothing in the use of the verb "maintain" indicates any derogation from the requirement that a subsidy requires a financial contribution.

38. Apparently, India is arguing that the Article 3.2 should be read as follows: "a Member shall not maintain certain measures pursuant to which a subsidy, as defined in Article 1, might be granted or maintained." But stating India's argument in this explicit manner illustrates its fundamental weakness. If this had been the intent of the SCM Agreement, this would have been the language set out in the SCM Agreement. Of course, this was not the language actually used in the Agreement, and there is no basis for departing from the text of the agreement.

39. In sum, India has failed to explain how the argument that "whether a Member has actually made a financial contribution is *irrelevant*" coheres with the text of Article 1.1(a)(1) of the SCM Agreement. As noted, Article 1.1(a)(1) provides that "a subsidy shall be deemed to exist if [*inter alia*] there *is* a financial contribution by a government or any public body." The use of the operative term "is" in Article 1.1(a)(1) indicates that a subsidy can be said to "exist" only where the government *has* made a "financial contribution" under the measure at issue. Therefore, India's position that it is "irrelevant" whether or not a financial contribution has been made is clearly contradicted by the text of Article 1.1(a)(1) of the SCM Agreement.

40. Furthermore, the ordinary meaning of the term "maintain" – read in context with Article 3.2 – does not support India's implicit argument[47] that "there is a financial contribution" within the meaning of Article 1.1(a)(1) of the SCM Agreement whenever a measure gives certain entities the legal authority to provide such a contribution. The ordinary meaning of "maintain" is to "preserve or maintain" or "cause to continue."[48] The inclusion of the term "maintain" in Article 3.2 (*i.e.*, Members "shall neither grant nor maintain") simply means that Members may not maintain prohibited subsidies beyond the initial grant of the subsidy.

41. For the foregoing reasons, India has failed to support its argument that "there is a financial contribution" within the meaning of Article 1.1(a)(1) of the SCM Agreement, whenever certain entities may have the legal authority to provide such a contribution under a measure at issue.

B. India has failed to establish that the measures at issue confer a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement

42. As the United States explained in its first written submission, India failed to establish that the measures at issue confer a "benefit" within the meaning of Article 1.1(b) of the SCM

[47] *See*, India's Opening Statement, paras. 67 and 69; India's Response to Questions from the Panel, Response to Question 71 ("The obligation that a Member "neither *grant nor maintain* subsidies", referred to in Article 3.1 provides relevant context confirming that Article 1.1(a)(1), may encompass commitments by the government, e.g. to forego revenue that would otherwise be due or to transfer funds.")

[48] *See*¸ The New Shorter Oxford English Dictionary (4th Edition), p. 1669.

Agreement. In fact, India did not even present a single theory of "benefit". Rather, India argued that the measures at issue might confer a "benefit" on (1) direct recipients in the amount of the "financial contribution" granted to the recipient; and/or (2) local/seller producers in the form of "additional sales."[49] As the United States explained, however, India's arguments in this regard are based on India's "assumptions" and not supported by record evidence or relevant economic analyses.[50]

43. India now appears to advance an alternative factual scenario. Specially, in its opening statement at the first panel meeting, India posits that the entirety of the "benefit" initially conferred on direct recipients (*i.e.*, homeowners) is somehow transferred to local sellers/producers of renewable energy equipment.[51] This differs, however, from the fact-pattern that India set out in its first written submission, in which India makes no mention of a "benefit" that purportedly flowed from direct recipients to sellers/producers. Rather – per the story set out in India's first written submission – the measures at issue conferred a "benefit" on local sellers/producers in the form of "additional sales" *not* via a transfer of the "benefit" initially conferred by direct recipients.

44. Therefore, India appears to advance inconsistent theories in support of its argument that the measures at issue confer a "benefit" within the meaning of Article 1.1.(b) of the SCM Agreement. As the complaining party, however, India bore the burden of establishing its *prima facie* case in its first written submission, by demonstrating what it believes the facts *are*, and by explaining precisely how the relevant WTO disciplines apply to the specific measures at issue.[52] This means that it is not sufficient for India to simply put forward different versions of what the facts *might* be. And, by now presenting yet another possible theory of benefit, India has in fact further confirmed that it did not present a *prima facie* case of benefit in its first written submission. Accordingly, there is no basis for the Panel to conclude that India has made a *prima facie* showing that the measures at issue confer a "benefit" within the meaning of Article 1.1(b).

[49] *See*, *e.g.*, India's First Written Submission, para. 112 ("…the sales of local producers would increase.").

[50] *See*, *e.g.*, U.S. First Written Submission, para. 165; U.S. Opening Statement, para. 20 (India, however, does not actually demonstrate that the measures at issue have resulted in increased sales for local producers. 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.).

[51] *See*, India's Opening Statement, para. 81.

[52] *See*, *US — Shrimp (Thailand) / US — Customs Bond Directive*, para. 300 ("It is well established that the party asserting the affirmative of a claim or defence bears the burden of establishing both the legal and factual elements of that claim or defence. It is also well accepted that a panel cannot make a prima facie case for a party who bears that burden.")

C. India has failed to establish that the measures at issue are "contingent … upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement

45. In its statements to the Panel and responses to questions from the Panel, India does not appear to have set out any new arguments in support of its claim that the measures at issue are "contingent … upon the use of domestic over imported goods" within the meaning of Article 3.1(b) of the SCM Agreement. The United States therefore reiterates its view that India has failed to make out a case that the measures at issue are so "contingent" within the meaning of that provision.

46. As noted,[53] in its first written submission, India's arguments with respect to the "use" contingency under Article 3 are entirely conclusory, without the necessary measure-by-measure analysis to show precisely how India believes the contingency applies. In particular, to show that Article 3.1(b) applies, India needed to show, through evidence and argument in its first written submission, that each measure at issue is a subsidy "contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods." But India failed to explain where in each measure this "use" contingency might be found. Further, India failed to specify which economic actors are "using" the goods in question. Accordingly, India has failed to make out a case of contingency under Article 3.1(b) of the SCM Agreement.

V. CONCLUSION

47. For the forgoing reasons, the United States respectfully reiterates its request that the Panel find that India has failed to make out its case 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.

[53] *See*, U.S. Responses to Question from the Panel, paras. 46 and 61.