WORLD TRADE ORGANIZATION

WT/DS541/R

31 October 2019

(19-7313)

INDIA – EXPORT RELATED MEASURES

REPORT OF THE PANEL

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Australia – Automotive Leather II	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, adopted 16 June 1999, DSR 1999:III, p. 951
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
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Brazil – Taxation	Appellate Body Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/AB/R and Add.1 / WT/DS497/AB/R and Add.1, adopted 11 January 2019
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 – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, p. 1443
Canada – Aircraft (Article 21.5 – Brazil)	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW, adopted 4 August 2000, as modified by Appellate Body Report WT/DS70/AB/RW, DSR 2000:IX, p. 4315
Canada – Aircraft Credits and Guarantees	Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III, p. 849
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 – 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
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
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 – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7

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EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
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Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
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
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
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 – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, p. 1675
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 – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7

Short title	Full case title and citation
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
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 – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Tax Incentives	Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R and Add.1, adopted 22 September 2017, DSR 2017:V, p. 2199
US – Tax Incentives	Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R, DSR 2017:V, p. 2305
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 – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
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

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IND-7		WTO, Negotiating group on Rules, Amendment to Articles 27.2 and 27.4 of the ASCM in relation to developing countries covered under Annex VII, Communication from the Plurinational State of Bolivia, Egypt, Honduras, India, and Sri Lanka, TN/RL/GEN/177/Rev.1 (9 March 2011)
IND-9	General Council decision WT/L/384	WTO, General Council Decision on Implementation-Related Issues and Concerns of 15 December 2000, and the report thereon of the Chairman of the Committee on Subsidies and Countervailing Measures of 3 August 2001, WT/L/384
IND-10	SCM Committee decision G/SCM/34	WTO, Committee on Subsidies and Countervailing Measures, "Chairman's Report on the Implementation-Related Issues referred to the Committee on Subsidies and Countervailing Measures in the 15 December 2000 Decision of the General Council", G/SCM/34 (3 August 2001)
IND-11	Council for Leather Exporters Guidelines	"Council for Leather Exporters: Duty Free Import Scheme - An Introduction", CLE-HO/POL/DFIS/2018-19 (22 March 2018)
IND-14		The Integrated Goods and Services Tax Act, 2017
IND-21		Letter dated 16 March 2017 from the GOI to an enterprise to be set up as EOU
IND-22	2019 Amendment to the SEZ Rules	Indian Ministry of Commerce and Industry, Department of Commerce, Special Economic Zones (amendment) Rules (7 March 2019)
IND-23		Income Tax Act (1961) as amended
USA-3	Foreign Trade Policy	Indian Ministry of Commerce and Industry, Department of Commerce, Foreign Trade Policy, Notification No. 01/2015-2020 (1 April 2015); Mid-Term Review, Notification No. 41/2015-2020 (5 December 2017)
USA-4		"Export Champions", *The Economic Times*, (12 February 2018)
USA-5	Handbook of Procedures	Indian Ministry of Commerce and Industry, Department of Commerce, Handbook of Procedures, Public Notice No. 01/2015-2020, (1 April 2015); updated by Public Notice No. 43/2015-2020 (5 December 2017)
USA-6	Appendices and Aayat Niryat forms	Indian Ministry of Commerce and Industry, Department of Commerce, Appendices and Aayat Niryat Forms of FTP 2015-2020 (1 April 2015 -31 March 2020)
USA-7		Excerpt from Customs Tariff Act (1975) as amended
USA-8		Customs Act (1962) as amended, Section 12 to Section 15
USA-11	Public Notice 2/2015-2020	Indian Ministry of Commerce and Industry, Department of Commerce, Public Notice No. 2/2015-2020, MEIS, schedule of country group, ITC (HS) code wise list of products with reward rates under Appendix 3B (1 April 2015)
USA-20		Excerpt from highlights of the Foreign Trade Policy Review, 2015-2020, mid-term review (December 2017)
USA-22	SEZ Act	Ministry of Law and Justice, Special Economic Zones Act, 2005 No. 28 of 2005, Gazette of India, Extraordinary Part II Section I (23 June 2005)
USA-23	Annual Supplement 2013-2014 to the Foreign Trade Policy 2009-2014	Address by Shri Anand Sharma, Minister of Commerce, Industry and Textiles at the Release of Annual Supplement 2013-2014 to the Foreign Trade Policy 2009-2014 (18 April 2013)
USA-24		Nirmala Sitharaman, "SEZ Scheme of India is Quite Comprehensive", *Daily News and Analysis* (20 December 2014)
USA-27	Notification No. 15/2017	Indian Ministry of Finance, Department of Revenue, Notification No. 15/2017, integrated tax (rate) (30 June 2017)
USA-28	SEZ Rules	Indian Ministry of Commerce and Industry, Special Economic Zones Rules, incorporating amendments up to July 2010 (10 February 2006)

Exhibit	Short Title (if any)	Description
USA-29	Income Tax Act, 1961, Sections 10A and 10AA	Excerpt from Income Tax Act (1961) as amended, Sections 10A and 10AA
USA-30	Income Tax Act, 1961, Section 80A	Excerpt from Income Tax Act (1961) as amended, Section 80A
USA-31	Customs Tariff Act	Excerpt from Customs Tariff Act (1975) as amended, Second Schedule
USA-32	Integrated Goods and Services Tax Act	Indian Ministry of Law and Justice, Integrated Goods and Services Tax Act, Gazette of India, part II, section 1 (12 April 2017)
USA-35	Export Promotion Schemes	Indian Ministry of Electronics and Information Technologies, website information about Export Promotion Schemes (accessed 7 December 2018)
USA-36	Notification No. 50/2017	Indian Ministry of Finance, Department of Revenue, Notification No. 50/2017-Customs (30 June 2017)
USA-38		Excerpts from Notification No. 50/2017
USA-55	MIS Report on Export Promotion Schemes	Excerpt from Indian Ministry of Commerce and Industry, Department of Commerce, MIS Report on Export Promotion Schemes 2017 (31 May 2017)
USA-56	Ministry of Commerce and Industry Department of Commerce, Annual Report, 2017-2018	Excerpt from Indian Ministry of Commerce and Industry Department of Commerce, Annual Report, 2017-2018
USA-57		Scripbazaar website (accessed 9 October 2018)
USA-60	2018 Amendment to the SEZ Rules	Indian Ministry of Commerce and Industry, Department of Commerce, Notification No. G.S.R. 909(E) Special Economic Zones (amendment) Rules (19 September 2018)
USA-62		Excerpt from Central Excise Tariff Act of 1985, as amended
USA-63		Excerpt from Central Excise Tariff Act, 1985, First Schedule (Central Excise Tariff 2016-2017), updated 2 February 2017, and subsequent notifications and rate changes
USA-65		Indian Ministry of Finance, Department of Revenue website, Rates of Goods and Services Tax (accessed 14 March 2019)
USA-84		Income Tax Act (1961) as amended
USA-85		Highlights of the Foreign Trade Policy Review, 2015-2020, mid-term review (December 2017)
USA-87		Customs Tariff Act (1975) as amended
USA-88		Central Excise Act (1944) as amended
USA-89		Excerpt from Customs Tariff Act (1975) as amended, First Schedule
USA-90		Food Shark Marfa website, at https://www.foodsharkmarfa.com/best-meat-tenderizers/ (last visited 18 July 2019)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
BTP	Bio-Technology Parks
CIF	cost insurance freight
DFIS	Duty-Free Imports for Exporters Scheme
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DTA	domestic tariff area
EHTP	Electronics Hardware Technology Park
EOU	Export Oriented Units
EPCG	Export Promotion Capital Goods
FOB	free on board
FTP	Foreign Trade Policy
GATT 1994	General Agreement on Tariffs and Trade 1994
GNP	gross national product
HBP	Handbook of procedures
Highlights	Highlights of the Foreign Trade Policy 2015 2020 Mid Term Review (5 December 2017)
IGST	Integrated Goods and Services Tax
ITC	Indian Tariff Code
MEIS	Merchandise Exports from India Scheme
MSME	micro, small & medium enterprises
Press Release	Release of the Mid Term Review of Foreign Trade Policy 2015-2020 – Annual Incentives Increased by 2% amounting to over Rs 8,000 crore for Labour Intensive/MSME sectors (5 December 2017)
NFE	net foreign exchange
SAE	statement of available evidence
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SCM Committee	Committee on Subsidies and Countervailing Measures
SEZ	Special Economic Zones
SEZ Act	Special Economic Zones Act
SEZ Rules	Special Economic Zones Rules
STP	Software Technology Park
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the United States

1.1. On 14 March 2018, the United States requested consultations with India pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Articles 4 and 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with regard to certain alleged export subsidy measures of India.[1]

1.2. Consultations were held on 11 April 2018 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 17 May 2018, the United States requested the establishment of a panel pursuant to Article 6 of the DSU and Article 4.4 of the SCM Agreement with standard terms of reference in document WT/DS541/4.[2] At its meeting on 28 May 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the United States, in accordance with Article 6 of the DSU and Article 4.4 of the SCM Agreement.[3]

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 the United States in document WT/DS541/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 16 July 2018, the United States requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU and Article 4.12 of the SCM Agreement. On 23 July 2018, the Director-General accordingly composed the Panel as follows[5]:

Chairperson:	Mr Jose Antonio S. Buencamino
Members:	Ms Leora Blumberg Mr Serge Pannatier

1.6. Brazil, Canada, China, Egypt, the European Union, Japan, Kazakhstan, the Republic of Korea, the Russian Federation, Sri Lanka, Chinese Taipei, and Thailand notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[6] and timetable on 22 August 2018.

1.8. The United States and India submitted their first written submissions on 23 August and 20 September 2018, respectively, and their second written submissions on 11 October and 1 November 2018, respectively. The Panel held a substantive meeting with the parties on 12 and 13 February 2019. A session with the third parties took place on 13 February 2019. On 14 May 2019, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim

[1] Request for consultations by the United States, WT/DS541/1-G/SCM/D119/1 (United States' request for consultations).
[2] Request for the establishment of a panel by the United States, WT/DS541/4 (United States' panel request).
[3] Dispute Settlement Body, Minutes of Meeting held on 28 May 2018, WT/DSB/M/413, para. 7.7.
[4] Constitution note of the Panel, WT/DS541/5.
[5] Constitution note of the Panel, WT/DS541/5.
[6] See the Panel's Working Procedures in Annex A-1.

Report to the parties on 28 August 2019. The Panel held an interim review meeting with the parties on 16 September 2019 and issued its Final Report to the parties on 30 September 2019.

1.3.2 Single substantive meeting of the Panel with the parties

1.9. On 3 August 2018, the Chairperson of the Panel, on behalf of the Panel, held a meeting with the parties to obtain their views in preparation of the Panel's draft Working Procedures and timetable. He stressed the need to reconcile different considerations, namely, the provision for accelerated procedures in Article 4 of the SCM Agreement, the obligation to provide special and differential treatment to developing country Members, and resource constraints in the Secretariat. At that meeting, the United States proposed that the Panel hold a single meeting with the parties in this case, a proposal which India opposed.

1.10. As a means to balance the competing obligations and constraints in the particular circumstances of this case, in its draft Working Procedures and timetable sent to the parties on 8 August 2018, the Panel proposed holding a single meeting with the parties, after the filing of both parties' first and second written submissions[7], and reserved the right to schedule further meetings with the parties as required.[8] On 22 August 2018, the Panel adopted its draft Working Procedures and timetable. In response to communications from India to the Chairperson[9], on 9 and 19 October 2018 the Panel confirmed that it would proceed with the adopted Working Procedures and timetable, while reserving the right to schedule additional meetings as necessary.[10] On 19 October 2018, the Panel indicated that it would communicate the reasons supporting its decision in due course.[11]

1.11. India objected to the Panel's approach in its comments on the draft Working Procedures and timetable[12], comments on the United States' comments[13], first written submission[14], and in communications dated 5 October and 16 October 2018[15], and sought a preliminary ruling from the Panel that an additional substantive meeting with the parties should be held before the filing of the second written submissions.[16]

1.12. In its own communications, the United States took the view that the Panel could hold a single substantive meeting with the parties, or even decide the case entirely on the basis of the parties' written submissions, without holding any substantive meeting with the parties.[17] The United States set out its arguments on the matter in its comments on the draft Working Procedures and timetable[18], comments on India's comments[19], and second written submission.[20]

1.13. Brazil commented on this matter in its third-party submission. In Brazil's view, a panel's decision to deviate from the working procedures set out in Appendix 3 to the DSU and hold

[7] Draft Working Procedures (8 August 2018), paras. 3, 5, and 15-16; Draft timetable (8 August 2018).
[8] Draft timetable (8 August 2018), fn 1.
[9] Communication dated 5 October 2018 from India to the Chairperson of the Panel; Communication dated 16 October 2018 from India to the Chairperson of the Panel.
[10] Communication dated 9 October 2018 from the Panel to the parties and third parties; Communication dated 19 October 2018 from the Panel to the parties and third parties.
[11] Communication dated 19 October 2018 from the Panel to the parties and third parties.
[12] Communication dated 14 August 2018 from India to the Chairperson of the Panel, paras. 1-2 and 5-7.
[13] Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 1-15.
[14] India's first written submission, paras. 16-18 and 105-116.
[15] Communication dated 5 October 2018 from India to the Chairperson of the Panel; Communication dated 16 October 2018 from India to the Chairperson of the Panel.
[16] India's first written submission, paras. 18 and 105-115; Communication dated 5 October 2018 from India to the Chairperson of the Panel, pp. 1-4. See also Communication dated 16 October 2018 from India to the Chairperson of the Panel, p. 2.
[17] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 4-7; Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, para. 1.
[18] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 1-7.
[19] Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, paras. 1-8.
[20] United States' second written submission, paras. 45-52.

a single substantive meeting with the parties should only happen with the agreement of both parties to the dispute.[21]

1.14. On 22 January 2019, the Panel, as it had anticipated, communicated the reasons for its earlier decision to proceed with the adopted Working Procedures and timetable, while reserving the right to schedule additional meetings, as necessary (see Annex D-1).

1.15. During the substantive meeting with the parties and subsequently in writing, the Panel asked the parties whether they considered a second substantive meeting necessary.[22] On both occasions, it also asked India whether and how concretely the fact of holding a single substantive meeting affected India's ability to defend itself.[23] The parties responded to these questions on 4 March 2019 and commented on each other's responses on 18 March 2019. Having studied the parties' responses and comments[24], and in light of the proceedings thus far, the Panel did not consider that there was a need to depart from the structure of the proceedings as originally envisaged in this dispute by adding a second substantive meeting with the parties; the Panel communicated its decision to the parties on 16 April 2019.[25]

1.3.3 Partially open meeting

1.16. On 8 August 2018, the Panel transmitted the draft Working Procedures to the parties, pursuant to which the Panel would "meet in closed session".[26] On 14 August 2018, the United States requested the Panel to open the meeting(s) with the parties to the public, either in whole or in part.[27] On 17 August 2018, India "completely oppose[d]" the United States' request.[28]

1.17. In the Working Procedures adopted on 22 August 2018, the Panel indicated that it would "revert to this issue in due course before the date of [its] meeting" with the parties.[29]

1.18. On 3 January 2019, the Panel invited the third parties to express their views on holding a partially open meeting. Canada, China, the European Union, and Japan considered panels to have discretion to hold a partially open meeting. China and Thailand expressed concern about granting a request for a partially open meeting without the consent of both parties to the dispute. In the event that the Panel held a partially open meeting, Brazil, Canada, the European Union, and Japan agreed to open their statements to the public.[30] China, Egypt, the Russian Federation, and Sri Lanka indicated their intention to keep their respective statements confidential.[31]

1.19. By communication dated 22 January 2019[32], the Panel declined the United States' request for a partially open meeting.

[21] Brazil's third-party submission, paras. 27-32.
[22] Panel question No. 91.
[23] Panel question No. 92(a)-(c).
[24] Including the parties' responses and comments to all other questions the Panel had asked during and after the hearing, which India had indicated would themselves require an additional substantive meeting with the parties.
[25] Communication dated 16 April 2019 from the Panel to the parties concerning the Panel's Working Procedures and Timetable, (Annex D-3).
[26] Draft Working Procedures (8 August 2018), para. 10.
[27] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, para. 18. See also, ibid. paras. 11-17.
[28] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 21. See also, ibid. paras. 22-26.
[29] Working Procedures (22 August 2018), para. 10.
[30] Communication dated 11 January 2019 from Brazil to the Panel; Communication dated 11 January 2019 from Canada to the Panel; Communication dated 11 January 2019 from the European Union to the Panel; and Communication dated 11 January 2019 from Japan to the Panel.
[31] Communication dated 11 January 2019 from China to the Panel; Communication dated 11 January 2019 from Egypt to the Panel; Communication dated 11 January 2019 from the Russian Federation to the Panel; and Communication dated 11 January 2019 from Sri Lanka to the Panel.
[32] Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting (Annex D-1), paras. 3.1-3.16.

1.3.4 The Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence

1.20. In its first written submission, India requested the Panel to issue a preliminary ruling to the effect that (a) the United States' panel request does not meet the requirements of Article 6.2 of the DSU with respect to both the identification of the specific measures at issue and the summary of the legal basis of the United States' complaint; (b) the provisions of Article 4 of the SCM Agreement could not, at that stage of the proceedings, apply to the dispute before the Panel; and (c) the statement of available evidence in the United States' request for consultations does not meet the requirements of Article 4.2 of the SCM Agreement.[33]

1.21. In its second written submission, the United States disagreed with India's request on all counts.[34]

1.22. In a communication of 22 January 2019, the Panel ruled that the United States' panel request meets the requirements of Article 6.2 of the DSU.[35] It however declined to rule, at that stage, on the applicability of Article 4 of the SCM Agreement[36] and the conformity of the statement of available evidence with Article 4.2 of the SCM Agreement.[37] The Panel rules on these matters in this Report.

2 FACTUAL ASPECTS

2.1. This dispute concerns the United States' challenge of the following schemes maintained by India:

a. the Export Oriented Units (EOU) Scheme and Sector-Specific Schemes, including the Electronics Hardware Technology Parks (EHTP) Scheme and the Bio-Technology Parks (BTP) Scheme (the EOU/EHTP/BTP Schemes);

b. the Merchandise Exports from India Scheme (MEIS);

c. the Export Promotion Capital Goods (EPCG) Scheme;

d. the Special Economic Zones (SEZ) Scheme; and

e. the Duty-Free Imports for Exporters Scheme (DFIS).

2.2. These measures provide for certain exemptions from, or reductions of, customs duties or taxes, or for the granting by the government of freely transferable "scrips" to be used to satisfy certain liabilities *vis-à-vis* the government.

2.3. Section 7.5 below outlines key characteristics of the five schemes at issue.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that each of the challenged measures is a prohibited export subsidy inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement. The United States further requests, pursuant to Article 4.7 of the SCM Agreement, that the Panel

[33] India's first written submission, paras. 19-70.
[34] United States' second written submission, paras. 11-52.
[35] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), paras. 2.1-2.126.
[36] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), paras. 3.1-3.13.
[37] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), paras. 4.1-4.8.

recommend that India withdraw the subsidies within 90 days from the date the DSB adopts its recommendations.

3.2. India requests the Panel to find that Article 3 of the SCM Agreement does not apply to India by virtue of Article 27.2(b) granting India an eight-year exemption period from India's Annex VII(b) graduation. India also requests that the Panel find that, in any event, the challenged schemes are not export subsidies and are not inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement. Moreover, India requests the Panel to find that the dispute could not be subject to Article 4 of the SCM Agreement or, in the alternative, to dismiss the dispute due to the insufficiency of the statement of available evidence under Article 4.2 of the SCM Agreement.

4 ARGUMENTS OF THE PARTIES

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

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, Egypt, the European Union, Japan, Sri Lanka, and Thailand are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1 to C-7). China, Kazakhstan, the Republic of Korea, the Russian Federation, and Chinese Taipei did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 28 August 2019, the Panel issued its Interim Report to the parties. On 9 September 2019, the parties submitted their written requests for review. In addition to its written requests, India also requested that the Panel hold an interim review meeting with the parties. The parties submitted written comments on each other's written requests for review on 16 September 2019. On the same day, the Panel held an interim review meeting with the parties. After the meeting, the Panel put written questions to India, to which India responded on 18 September 2019. The United States provided written comments on India's responses on 20 September 2019. The requests made at the interim review stage as well as the Panel's discussion and disposition of those request are set out in Annex A-2.

7 FINDINGS

7.1. Our findings, below, are structured as follows. We begin by outlining the burden of proof, burden of raising certain provisions (section 7.1), and standard of proof (section 7.2), as they are relevant to this dispute. Next, we ascertain whether Article 27 of the SCM Agreement still excludes India from the scope of application of Articles 3 and 4 of the SCM Agreement, and we find that it does not (section 7.3). We then assess whether the statement of available evidence provided by the United States as part of its request for consultations meets the standard of Article 4.2 of the SCM Agreement, and we find that it does meet that standard (section 7.4).

7.2. We therefore proceed to assess the United States' claims that certain measures under the EOU/EHTP/BTP Schemes, EPCG Scheme, SEZ Scheme, DFIS, and MEIS, are export contingent subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

7.3. We begin by providing a brief factual outline of the measures at issue (section 7.5). We then examine whether the measures at issue under the EOU/EHTP/BTP Schemes, EPCG Scheme, DFIS, and MEIS meet the conditions of footnote 1 of the SCM Agreement (section 7.6). Next, we assess whether the challenged measures constitute a financial contribution by the government (in the form of revenue foregone, in section 7.7, and in the form of a direct transfer of funds, in section 7.8), through which a benefit is conferred (section 7.9) and, therefore, a subsidy. Finally, we examine whether the subsidies that we have found to exist are export contingent and therefore inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement (section 7.10).

7.4. Before concluding, we explain how we have taken into account the special and differential provisions raised by India (section 7.11). We then set out our conclusions (section 8) and our recommendations, including the time period within which the measures we have found to be inconsistent with Articles 3.1(a) and 3.2 must be withdrawn (section 9).

7.1 Burden of proof

7.5. The DSU does not set forth express rules concerning burden of proof.[38] It has long been held, however, that WTO dispute settlement follows the "generally accepted canon of evidence in … most jurisdictions, that the burden of proof rests upon the party … who asserts the affirmative of a particular claim or defence".[39]

7.6. Applying this rule assumes an understanding of which party "asserts the affirmative of a particular claim or defence". In many instances, this is obvious. For example, a respondent invoking an exception under Article XX of the GATT 1994 is "assert[ing] the affirmative of a particular … defence", and therefore bears the burden of proving that the conditions of Article XX are met. Sometimes, however, the dividing line is less clear, as in cases involving provisions which, while potentially disqualifying a claim, are not considered to be exceptions / affirmative defences.[40] We now turn to this subject, which is relevant to two provisions at issue in this case, namely, footnote 1 and Article 27 of the SCM Agreement.[41]

7.1.1 Exceptions and excluding provisions

7.1.1.1 The distinction between exceptions and excluding provisions

7.7. WTO adjudicators have drawn a distinction between provisions that afford a "justification" for "measures that are found to be inconsistent with other provisions of" the WTO Agreements[42] (which we refer to as exceptions) and provisions that "limit[] the scope" of other provisions[43], without there being a violation in the first place (which we refer to as excluding provisions).[44]

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[38] The burden of proof identifies the party who bears the negative consequences of a situation where the factual foundation of a claim or defence has not been established to the necessary standard: "[w]hen the evidence is in equipoise, the party on whom the burden of proof rests loses". (L. P. Loren, "Fair Use: An Affirmative Defense" (2015) Vol. 90:685, *Washington Law Review*, p. 706). This is also referred to as the burden of persuasion (e.g. J. Pauwelyn, "Defenses and the Burden of Proof in International Law" (3 November 2016), version 11 July 2017, https://ssrn.com/abstract=2863962 (accessed 21 March 2019), p. 3), the ultimate burden of proof (B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, 1953), p. 334), and the legal burden (J. MacLennan, "Evidence, Standard and Burden of Proof and the Use of Experts in Procedure before the Luxembourg Courts", in F. Weiss, (ed.), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals*, p. 266).

The allocation of the ultimate burden of proof is different from "the rule that the party who asserts a fact … is responsible for providing proof thereof", which is referred to e.g. as the procedural burden of proof (B. Cheng, op. cit., p. 334) and the evidential burden (MacLennan, op. cit., p. 266). See also Appellate Body Report, *Japan – Apples*, para. 157 (describing the two as "distinct").

[39] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR: 1997:I, p. 335.

[40] We use the term "exceptions" as interchangeable with the phrase "affirmative defences". WTO adjudicators in the past have done the same. (See e.g. Appellate Body Report, *US – Wool Shirts and Blouses*, DSR: 1997:I, p. 337). The phrasing "affirmative defence" is used in common law jurisdictions. (See e.g. A. St. Eve and M. Zuckerman, "The Forgotten Pleading", (2013), Vol. 7, Issue 1, *The Federal Courts Law Review*, p. 160). ("A negative defense … asserts 'defects in the plaintiff's case' and the defendant has no burden to prove it. … Unlike a negative defense, an affirmative defense is one that admits the allegations in the complaint, but seeks to avoid liability, in whole or in part, by new allegations of excuse, justification, or other negating matter".)

[41] Footnote 1 of the SCM Agreement excludes certain measures from the scope of the definition of a "subsidy" for purposes of the SCM Agreement. Article 27.2 of the SCM Agreement provides that the prohibition of Article 3(1)(a) of the SCM Agreement shall not apply to certain Members, subject to compliance with certain conditions. Article 27.4 of the SCM Agreement provides that the provisions of Article 4 of the SCM Agreement shall not apply to export subsidies that are in conformity with Articles 27.2-27.5.

[42] E.g. Appellate Body Reports, *Brazil – Taxation*, para. 5.83.

[43] E.g. Appellate Body Reports, *Brazil – Taxation*, para. 5.84.

[44] The phrase "excluding provisions" is used by Grando, e.g. in M. Grando, "Allocating the Burden of Proof in WTO Disputes: A Critical Analysis" (2016), Vol. 9, No. 3, *Journal of International Economic Law*,

7.8. In other words, although the outcome of upholding an exception or an excluding provision is the same (i.e. the complaint fails), an exception presupposes a valid claim, to which it responds, whereas if an excluding provision applies, there is no valid claim under the provision that is excluded.

7.1.1.2 Burden of proof under excluding provisions

7.9. WTO adjudicators have often placed on complainants the burden of proof under excluding provisions.[45] Since excluding provisions do not presuppose a valid claim, but rather relate to the question of whether a valid claim has been established (necessarily by the complainant), we will do the same.

7.1.1.3 Burden of raising excluding provisions

7.10. A different[46] question from that of which party bears the burden of proof under an excluding provision is the question of which party bears the burden of raising an excluding provision.

7.11. In our view, it makes little sense to require complainants to anticipate all possible excluding provisions that might apply and then explain why, in fact, they do not apply.[47] A responding Member is best placed to know whether its measures fall under a particular excluding provision.

7.12. Therefore, we consider that the respondent bears the burden of raising excluding provisions.[48] As set out in the previous section, once the respondent has properly raised an excluding provision, the complainant will bear the burden of proof under the excluding provision, i.e. the burden of proving that the excluding provision does not apply.

7.2 Standard of proof

7.13. The standard of proof is the degree of proof that must be provided to satisfy one's burden of proof.

7.14. In WTO dispute settlement, a complainant must "establish a *prima facie* case of inconsistency with [the] provision [invoked] before the burden of showing consistency with that provision is taken on by the defending party". In this context, a "*prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[49]

7.3 Whether Article 27 of the SCM Agreement excludes India from the scope of application of Articles 3 and 4 of the SCM Agreement

7.15. The United States claims that the challenged measures are prohibited export subsidies in violation of Articles 3.1(a) and 3.2 of the SCM Agreement. Accordingly, it has sought the

p. 619. WTO adjudicators have used several terms to refer to these provisions, including "derogations", "exemptions", and "autonomous rights". (See, e.g. Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56, and *EC – Hormones*, para. 104). "Autonomous rights" appear to constitute a subcategory of excluding provisions, with the peculiar trait that they can give rise to an independent claim.

[45] E.g. Appellate Body Report, *Brazil – Aircraft*, para. 141. Often, but not always: see Appellate Body Report, *EC – Tariff Preferences*, para. 113-118. The Appellate Body has made somewhat conflicting statements on whether the nature of a provision as an exception or excluding provision determines the allocation of the burden of proof. (Compare Appellate Body Reports, *EC – Tariff Preferences*, para. 88 and *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56).

[46] We discuss this question under a subheading of a section on "burden of proof" only for practical convenience.

[47] Of course, if the excluding provision also provides an autonomous basis for a claim (as is the case e.g. of Article 3.3 of the SPS Agreement), and the complainant wants to bring a *claim* on that basis, altogether different considerations apply.

[48] This is without prejudice to the possibility – indeed, the need – for a panel to examine an excluding provision on its own motion, when a failure to do so would result in a failure to conduct an objective assessment of the applicability of the relevant covered agreements, contrary to Article 11 of the DSU.

[49] Appellate Body Report, *EC – Hormones*, para. 104.

establishment of a panel under Article 4.4 of the SCM Agreement. India, however, submits that following its graduation from Article 27.2(a) and Annex VII(b), the prohibition in Article 3.1(a) still does not apply to its subsidy schemes, as a result of Article 27.2(b). India submits that, as a result, Article 27.7 renders the provisions of Article 4 of the SCM Agreement inapplicable to this dispute.

7.16. India asked the Panel to issue a preliminary ruling that the dispute could not be subject to Article 4 of the SCM Agreement unless the United States demonstrated, or the Panel otherwise found, that Article 27 of the SCM Agreement did not apply to the challenged measures.[50] At the same time, India and the United States had opposing interpretations of Article 27 of the SCM Agreement, and India argued that this disagreement went to the essence of the dispute and could only be decided by the Panel as part of the full panel proceedings.[51] In a communication dated 22 January 2019, the Panel explained that, in the circumstances of this dispute, a ruling on the applicability of Article 4 of the SCM Agreement would require a ruling on the parties' interpretive disagreement over Article 27 of the SCM Agreement.[52]

7.17. Below, we first recall the relevant provisions of Article 27.2 and Annex VII of the SCM Agreement.[53] We then summarize the parties' main arguments, before analysing the merits of the disagreement between the parties over the proper interpretation of Article 27.2(b). We then draw the consequences of our conclusion under Article 27.2(b) for the applicability of Articles 3.1(a) and 4 of the SCM Agreement.

7.18. We conclude that India does not fall under Articles 27.2 and 27.7 any longer, because it has graduated from Annex VII(b) and Article 27.2(a) of the SCM Agreement[54], and because Article 27.2(b) expired on 1 January 2003. Therefore, we find that Articles 3 and 4 of the SCM Agreement apply in the present dispute.

7.3.1 Relevant provisions

7.19. Article 27 of the SCM Agreement sets out provisions on "Special and Differential Treatment of Developing Country Members". Articles 27.2 and 27.4-27.7 concern special and differential treatment in respect of prohibited export subsidies.

7.20. Article 27.2 of the SCM Agreement provides:

> The prohibition of paragraph 1(a) of Article 3 shall not apply to:
>
> (a) developing country Members referred to in Annex VII.
>
> (b) other developing country Members for *a period of eight years from the date of entry into force of the WTO Agreement*, subject to compliance with the provisions in paragraph 4.[55]

7.21. Annex VII of the SCM Agreement, titled "Developing country Members referred to in paragraph 2(a) of Article 27", provides:

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[50] India's first written submission, paras. 74-90.

[51] India's first written submission, para. 79; Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 5-6.

[52] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 3.1-3.13.

[53] According to India, the burden of raising Article 27 and the burden of proof under this provision fall on the United States. Article 27.2 "entitle[s]" certain developing countries "to the non-application of Article 3.1(a)" as long as they comply with the relevant provisions of Article 27 (Appellate Body Report, *Brazil – Aircraft*, paras. 139-141), i.e. Article 27.2 is an excluding provision. As set out in paras. 7.10-7.12 above, we consider that, under excluding provisions, the burden of raising rests on the respondent but the burden of proof is on the complainant. As regards raising, we note that, in any event, the United States did raise this provision. As regards proof, we place the burden on the United States.

[54] A point that is undisputed between the parties.

[55] Emphasis added.

> The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:
>
> (a) Least-developed countries designated as such by the United Nations which are Members of the WTO.
>
> (b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when [gross national product] per capita has reached $1,000 per annum: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.[56]

7.22. The WTO Secretariat annually publishes the gross national product (GNP) per capita of the Annex VII(b) developing country Members (Annex VII(b) Members) using the three most recent years for which data are available.[57] In 2017 and in 2018, the WTO Secretariat released the calculations for the three most recent years for which data are available. According to these Notes by the Secretariat, India's GNP per capita exceeded USD 1,000 per year for the periods 2013-2015 and 2014-2016.[58]

7.3.2 Main arguments of the parties and third parties

7.23. The parties agree that India has graduated from Annex VII(b) of the SCM Agreement.[59] It is also not in dispute that Article 27.2(a) no longer excludes India from the application of the prohibition of export subsidies set forth in Article 3.1(a). The parties, however, differ on the interpretation of Article 27.2(b), that is, the meaning of the phrase "eight years from the date of entry into force of the WTO Agreement".

7.24. India argues that the eight-year period set out in Article 27.2(b) did not start, for India, on the date of entry into force of the WTO Agreement. Rather, it commenced on the date of India's graduation from Annex VII(b), thus starting in 2017 and ending in 2025.[60] India argues that a mere literal interpretation of Article 27.2(b) would render Article VII(b) ineffective or inutile, and would run contrary to the object and purpose of the SCM Agreement. India argues that Annex VII(b) and Article 27.1 are integral to the overall object and purpose of the SCM Agreement. Further, India submits that the purpose of providing special and differential treatment through Article 27 of the SCM Agreement must not be undermined and that an interpretation of Article 27.2(b) based on the ordinary meaning of its text would result in inconsistencies with Annex VII(b), Article 27.4, and Article 27.5.[61] To avoid any contradictions with these provisions, Article 27.2(b) must be interpreted so that the eight-year period starts upon Annex VII(b) graduation. Moreover, India contends that a textual interpretation of Article 27.2(b) leaves the meaning of its terms ambiguous and obscure and would lead to absurd and unreasonable results.[62] According to India, this provision must therefore be interpreted by recourse to supplementary means of interpretation according to Article 32 of the Vienna Convention and in particular the negotiating history of Annex VII(b).[63] India argues that considering the negotiating history,

[56] Fn omitted.
[57] In the 2001 Decision of the Ministerial Conference on "Implementation-Related Issues and Concerns", Members decided that the threshold of GNP per capita of USD 1,000 per year is met when Annex VII(b) Members reach USD 1,000 in constant 1990 dollars for three consecutive years. (WTO, Ministerial Conference, Decision of 14 November 2001, WT/MIN(01)/17, para. 10.1).
[58] Committee on Subsidies and Countervailing Measures, Annex VII(b) of the Agreement on Subsidies and Countervailing Measures, G/SCM/110/Add.14 (11 July 2017); Committee on Subsidies and Countervailing Measures, Annex VII(b) of the Agreement on Subsidies and Countervailing Measures, G/SCM/110/Add.15 (20 April 2018).
[59] United States' first written submission, para. 26; India's first written submission, para. 119.
[60] India's first written submission, paras. 10 and 119.
[61] India's first written submission, paras. 155-160, 162, and 164; second written submission, paras. 14, 16, 18, 20, 23-26, and 30. See also India's request for review, para. 5, and Annex A-2, para. 2.1.
[62] India's second written submission, paras. 8 and 27.
[63] India's second written submission, para. 7.

Article 27.2(b) grants graduating Annex VII(b) Members an additional eight-year transition period.[64]

7.25. According to the United States, the eight-year period under Article 27.2(b) ended on 1 January 2003, when eight years had passed since the entry into force of the WTO Agreement on 1 January 1995. In the United States' view, India is therefore now subject to the prohibition of export subsidies pursuant to Article 3.1(a).[65] The United States argues that the ordinary meaning of the phrase "a period of eight years from the date of entry into force of the WTO Agreement" in Article 27.2(b) is clear. Other means of interpretation, as invoked by India, cannot override that treaty text.[66]

7.26. Egypt and Sri Lanka as third parties support India's position concerning the interpretation of Article 27.2(b). Egypt argues that an interpretation of Article 27.2(b) as proposed by the United States would be "unfair" and "unreasonable" for Annex VII(b) Members and would leave those Members "unprotected".[67] Sri Lanka argues that it would not be "equitable" to treat low-income developing countries (when their GNP per capita reaches USD 1,000 per year) less favourably than higher-income developing countries, which benefited from an eight-year period at the entry into force of the WTO Agreement, when their GNP per capita already exceeded USD 1,000 per year.[68]

7.27. Brazil, Canada, the European Union, Japan, and Thailand as third parties contend that the ordinary meaning of the text of Article 27.2(b) is clear and disallows India's interpretation.[69] These third parties also disagree with India's contextual arguments concerning Annex VII(b) and Articles 27.4 and 27.5.[70]

7.3.3 Analysis

7.28. The parties agree that India has reached a GNP per capita of USD 1,000 per year and that as of 2017 India had graduated under Annex VII(b) and Article 27.2(a) of the SCM Agreement. The question is whether Article 27.2(b) now applies to India, excluding the applicability of Article 3.1(a) (and as a consequence also Article 4) of the SCM Agreement for a further eight years after graduation, as India argues, or whether instead Article 27.2(b) expired for all Members on 1 January 2003, as the United States argues.

7.29. The interpretative question for us to resolve is whether, in the case of Members graduating from Annex VII(b), the eight-year period afforded by Article 27.2(b) to developing country Members must be counted "from the date of entry into force of the WTO Agreement", or from the date of graduation from Annex VII(b).

7.30. Below, after recalling certain rules of treaty interpretation, we consider, first, the terms of Article 27.2(b), and then India's arguments concerning context (specifically, Annex VII(b), Article 27.4, and Article 27.5), and object and purpose.

7.3.3.1 Treaty interpretation

7.31. Article 3.2 DSU provides that Members recognize that the WTO dispute settlement system serves among other objectives to clarify the existing provisions of the covered Agreements "in accordance with customary rules of interpretation of public international law".[71] The customary

[64] India's first written submission, paras. 166-179; second written submission, para. 33.
[65] United States' first written submission, paras. 24-26.
[66] United States' second written submission, paras. 55-58 and 62-63, and fn 48.
[67] Egypt's third-party statement at the meeting of the Panel, paras. 7 and 9.
[68] Sri Lanka's third-party statement at the meeting of the Panel, p. 2.
[69] Brazil's third-party submission, paras. 14 and 15; Canada's third-party submission, paras. 6 and 9; European Union's third-party submission, paras. 5 and 9; Japan's third-party submission, para. 11; and Thailand's third-party statement at the meeting of the Panel, paras. 6 and 8.
[70] Brazil's third-party submission, paras. 16-24; European Union's third-party submission, paras. 7 and 9.
[71] Article 27.2(b) is one of "the existing provisions of the covered Agreements" as the SCM Agreement is a covered Agreement in accordance with Article 1.1 and Appendix 1 to the DSU.

rules of interpretation of public international law are codified, in particular, in Articles 31 and 32 of the Vienna Convention.[72]

7.32. Article 31 of the Vienna Convention sets out the "General Rule of Interpretation". Pursuant to Article 31.1 of the Vienna Convention, WTO adjudicators must interpret the covered Agreements "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Articles 31.2 and 31.3, respectively, list items that form part of "context", and other items that "shall be taken into account, together with the context".

7.33. Article 31 of the Vienna Convention "is meant to assist an interpreter in ascertaining the ordinary meaning of treaty terms, reflecting the common intention of the parties to the treaty".[73] It is generally presumed that parties to a treaty were deliberate in the specific terms they used; interpretation must therefore be based "above all" on the text of the treaty.[74] From this follows also that a treaty interpreter must give meaning and effect to each term and not render redundant whole clauses or paragraphs.[75]

7.34. Moreover, the rules of treaty interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[76] Rather, "[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used".[77]

7.35. The ordinary meaning of treaty terms is not to be equated solely with dictionary meaning.[78] Instead, "[u]nder Article 31 of the Vienna Convention, the 'ordinary meaning' of treaty terms may be ascertained only in their context and in the light of the object and purpose of the treaty".[79] While it may help to organize an analysis to discuss text, context, and object and purpose in turn, it must be borne in mind that "interpretation pursuant to the customary rule codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components".[80]

7.36. Regarding the relationship between the plain textual meaning of treaty terms, on the one hand, and context, and object and purpose (and "possibly" the tools in Article 32 of the Vienna Convention), on the other, the Appellate Body has stated:

> While context is a necessary element of an interpretative analysis under Article 31 of the Vienna Convention, its role and importance in an interpretative exercise depends on the clarity of the plain textual meaning of the treaty terms. If the meaning of treaty terms is difficult to discern, determining the ordinary meaning under Article 31 may require more reliance on the context and the object and purpose of the treaty and possibly other elements considered "together with the context" and the tools mentioned in Article 32.[81]

7.37. Article 32 of the Vienna Convention provides for recourse to "[s]upplementary means of interpretation". Pursuant to Article 32, a treaty interpreter may resort to supplementary means of

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[72] Appellate Body Reports, *US − Gasoline*, DSR 1996:I, pp. 15-16; *Japan − Alcoholic Beverages II*, DSR 1996:I, p. 104.

[73] Appellate Body Report, *Peru − Agricultural Products*, para. 5.93.

[74] Appellate Body Report, *Japan − Alcoholic Beverages II*, DSR 1996:I, p. 105.

[75] See, e.g. Appellate Body Report, *US − Gasoline*, DSR 1996:I, p. 21. The principle of effectiveness in treaty interpretation is a corollary of the general rule of interpretation in the Vienna Convention. See also Appellate Body Report, *Korea − Dairy*, para. 81.

[76] Appellate Body Report, *India − Patents (US)*, para. 45.

[77] Appellate Body Report, *EC − Hormones*, para. 181.

[78] Appellate Body Report, *China − Publications and Audiovisual Products*, para. 348.

[79] Appellate Body Report, *China − Publications and Audiovisual Products*, para. 348. Object and purpose is that of the treaty as a whole. (Appellate Body Report, *EC − Chicken Cuts*, para. 238).

[80] Appellate Body Report, *China − Publications and Audiovisual Products*, para. 348.

[81] Appellate Body Report, *Peru − Agricultural Products*, para. 5.94. However, the holistic exercise under Article 31 cannot "be used to develop interpretations … that appear to subvert the common intention of the treaty parties as reflected in the text of [the provisions being interpreted]". (Ibid.)

interpretation either to confirm the meaning resulting from the application of Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to manifestly absurd or unreasonable results. Supplementary means of interpretation include "the preparatory work of the treaty and the circumstances of its conclusion"[82], but this listing is not exhaustive.[83]

7.38. The Appellate Body has repeatedly emphasized the "holistic" nature of the interpretive exercise under the rules codified in Articles 31 and 32 of the Vienna Convention, stressing that this "exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective".[84]

7.3.3.2 Interpretation of Article 27.2(b) based on ordinary meaning, context, and object and purpose

7.3.3.2.1 Article 27.2(b)

7.39. Based on the above rules of treaty interpretation, the starting point for our analysis in this case is the text of Article 27.2(b) of the SCM Agreement. Article 27.2(b) provides for a transition period of "eight years from the date of entry into force of the WTO Agreement", during which the prohibition in Article 3.1(a) "shall not apply". The WTO Agreement entered into force on 1 January 1995. Thus, "a period of eight years from the date of entry into force of the WTO Agreement" is the period running from 1 January 1995 to 1 January 2003. The text of Article 27.2(b) does not leave scope for ambiguity in respect of the end date of that transition period.[85]

7.40. India does not contest the ordinary meaning of the phrase in Article 27.2(b). Rather, it argues that in respect of Members graduating after the entry into force of the WTO Agreement, the Panel should depart from giving the terms in Article 27.2(b) their ordinary meaning and rely instead on supplementary means of interpretation pursuant to Article 32 of the Vienna Convention.[86] India justifies such departure from the text of Article 27.2(b) with arguments pertaining to context, and object and purpose of the SCM Agreement.[87] According to India, when Article 27.2(b) is read in conjunction with the context provided by Annex VII(b), Article 27.4, and Article 27.5, its interpretation "results in ambiguity or obscurity".[88] Further, according to India, the ordinary meaning of the phrase in Article 27.2(b) also runs counter to the special and differential treatment tenet of the object and purpose of the SCM Agreement.

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[82] Article 32 of the Vienna Convention.

[83] Appellate Body Report, *EC – Chicken Cuts*, para. 283. The reference to the circumstances of the conclusion of a treaty "permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated". (Appellate Body Report, *EC – Computer Equipment*, para. 86).

[84] Appellate Body Report, *US – Continued Zeroing*, para. 268. See also e.g. Appellate Body Reports, *Korea – Dairy*, para. 81; *Argentina – Footwear (EC)*, para. 81; *US – Upland Cotton*, para. 549; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 570.

[85] See also Appellate Body Report, *Brazil – Aircraft*, para. 139 ("[t]he ordinary meaning of the text of Article 27.2(b) is clear").

[86] India's first written submission, paras. 159, 164, and 166; second written submission, paras. 8, 10, 12, 19, 27, and 31; opening statement at the meeting of the Panel, paras. 15, 26, and 28; response to Panel question No. 18; and comments on the United States response to Panel question No. 21, first para. Similarly, Sri Lanka's third-party statement at the meeting of the Panel, pp. 2-3.

[87] The parties and certain third parties have also invoked the "Joint Proposal concerning the scope of Articles 27.2 and 27.4" (WTO, Negotiating Group on Rules, Amendment to Articles 27.2 and 27.4 of ASCM in relation to developing countries covered under Annex VII, Communication from the Plurinational State of Bolivia, Egypt, Honduras, India and Sri Lanka, TN/RL/GEN/177/Rev. 1 (9 March 2011), (Exhibit IND-7)) as supporting either India's or the United States' interpretative position (India's first written submission, para. 184; response to Panel question No. 20, pp. 6-8; United States' opening statement at the meeting of the Panel, para. 65; and Japan's third-party statement at the meeting of the Panel, para. 5). The Members sponsoring the Joint Proposal suggested adopting the following language as a footnote to Article 27.2(b): "[i]n the case of developing country Members included in Annex VII, the 8-year period shall commence from the year in which they graduate out of Annex VII". However, the Joint Proposal remained a *proposal* by a sub-group of Members to *amend* Articles 27.2(b) and 27.4, which has not been adopted by the WTO Membership. The purpose of treaty interpretation is to ascertain the common intention of the parties (Appellate Body Report, *EC – Computer Equipment*, para. 84), whereas unadopted negotiating proposals by some Members reflect the position of only those Members supporting the proposal.

[88] India's second written submission, para. 27.

7.41. For purposes of interpreting Article 27.2(b), we therefore turn, first, to the context provided by Annex VII(b), Article 27.4, and Article 27.5 of the SCM Agreement and, second, to the object and purpose of the SCM Agreement.

7.3.3.2.2 Annex VII(b)

7.42. India argues that a "literal interpretation" of Article 27.2(b) based on its ordinary meaning and resting on an eight-year transition period starting upon the entry into force of the WTO Agreement would:

a. render the mandatory language of Annex VII(b) ineffective[89]; and

b. treat graduating Annex VII(b) Members differently from other developing country Members.[90]

7.43. We address India's arguments in turn below.

7.44. Regarding India's first argument, India recalls that the text of Annex VII(b) mandates ("shall be subject") Article 27.2(b) to apply when Annex VII(b) Members reach the threshold of GNP per capita of USD 1,000 per year. India posits that the ordinary meaning of the terms in Article 27.2(b), limiting the transition period to eight years from the entry into force of the WTO Agreement, invalidates the mandatory language in Annex VII(b). After 1 January 2003, graduating Annex VII(b) Members would no longer be "subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27", contrary, in India's view, to what Annex VII(b) requires.

7.45. We consider that India's argument is not persuasive. India seems to conflate two distinct issues: the applicability of Article 27.2(b) and its content. Annex VII(b) regulates the *applicability* of Article 27.2(b) in respect of those developing country Members listed therein. By contrast, Article 27.2(b) sets out the *conditions* governing the entitlement to the non-application of Article 3.1(a).

7.46. The phrase in Annex VII(b) "shall be subject to the provisions" renders applicable[91] Article 27.2(b), without modifying the latter's content. The subclause "*which are applicable* to other developing country Members according to paragraph 2(b) of Article 27 *when* GNP per capita has reached $1,000 per annum" qualifies the provisions made applicable.[92] This phrase indicates that Annex VII(b) Members are subject to the *same* provisions applying to other developing country Members *at the time* the cross-reference in Annex VII(b) to Article 27.2(b) operates. We therefore consider that the text of Annex VII(b) does *not* support a reading that Article 27.2(b) is made applicable with a *modified starting date* for the eight-year transition period.

7.47. We also reject India's contention that using the ordinary meaning of Article 27.2(b) in case of Annex VII(b) Members graduating late would render Annex VII(b) ineffective or redundant. As set out above, Annex VII(b) provides for a simple cross-reference to Article 27.2(b). The expiry of the transition period in Article 27.2(b) does not render ineffective or redundant this cross-reference: the substance of the cross-reference is determined by the content of the provision referred to. Developing country Members in Annex VII(b), in the event of graduation before 1 January 2003, still enjoyed a transition period that in no case would have been less than the eight-year transition period until 1 January 2003 pursuant to Article 27.2(b). The possibility that Members graduating from Annex VII(b) no longer benefit from an additional transition period under Article 27.2(b) is inherent in the reference by Annex VII(b) to a provision that contains a time-limited transition period.

[89] India's first written submission, paras. 157-160; second written submission, para. 18; opening statement at the meeting of the Panel, para. 15; and response to Panel question No. 18, pp. 3-4.

[90] India's second written submission, paras. 16 and 18; opening statement at the meeting of the Panel, para. 15; and response to Panel question No. 18, pp. 2-3.

[91] The application of Article 27.2(b) is triggered by meeting the GNP per capita threshold.

[92] Emphases added.

7.48. In light of the above, rather than rendering Annex VII(b) ineffective, an eight-year transition period from the date of entry into force of the WTO Agreement is precisely what Annex VII(b) envisages by stipulating that the listed Members "shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27".

7.49. India's second argument relates to graduating Annex VII(b) Members not being granted the same full eight-year transition period to phase out their export subsidies that other developing country Members are afforded pursuant to Article 27.2(b). India submits that graduating Annex VII(b) Members would thus have less or no time to phase out their export subsidies, although Annex VII(b) seeks to grant additional special and differential treatment.[93] In the same vein, certain third parties contend that the less developed Annex VII(b) Members should not be treated less favourably than other more advanced developing countries which did not fall under Annex VII(b) in the first place and yet could avail themselves of an eight-year transition period.[94]

7.50. Article 27.2 and Annex VII provide for special and differential treatment and establish different degrees of flexibility in excluding developing country Members from the application of the prohibition of export subsidies under Article 3.1(a). The flexibilities differ between three categories of Members in respect of the period during which the prohibition in Article 3.1(a) "shall not apply", i.e. the transition period. First, for developing country Members in general, Article 27.2(b) stipulates a transition period of eight years from the entry into force of the WTO Agreement. During this period, the first sentence of Article 27.4 imposes a progressive phase-out obligation on developing country Members referred to in Article 27.2(b). Second, for least developed country Members, Article 27.2(a) in connection with Annex VII(a) provides that the prohibition in Article 3.1(a) shall not apply as long as the Members in question are designated as least developed countries by the United Nations. Third, for the developing country Members listed in Annex VII(b), Article 27.2(a) in connection with Annex VII(b) provides for a transition period that lasts as long as these Members remain below the relevant threshold, even *after* the eight-year period available to the first category of Members referred to above.

7.51. Under this scheme of different flexibilities, we consider that a literal interpretation of Article 27.2(b) in respect of graduating Annex VII(b) Members does not reduce the additional flexibilities afforded by Annex VII(b). First, such literal interpretation does not affect the additional, and more favourable, flexibility of a transition period that lasts as long as GNP remains below the relevant threshold, irrespective of a strict deadline, and without an additional phase-out obligation. Second, beyond this additional flexibility, Annex VII(b), through its express cross-reference to Article 27.2(b), ensures that graduating Members have at least the *same* flexibility as the other developing country Members, namely "a period of eight years from the date of entry into force of the WTO Agreement".

7.52. Based on the above, we consider that Annex VII(b) does not provide a basis for departing from the text of Article 27.2(b) in respect of graduating Annex VII(b) Members. In particular, a textual interpretation of Article 27.2(b) neither renders Annex VII(b) ineffective, nor results in an interpretation that is ambiguous, obscure, absurd, or unreasonable. To the contrary, it allows for a harmonious application of both provisions.

7.53. Members graduating from Annex VII(b) after 1 January 2003 are also not required to eliminate export subsidies without prior notice. Graduation does not come as a surprise "overnight".[95] In fact, in the 2001 Decision of the Ministerial Conference on "Implementation-Related Issues and Concerns", Members agreed that Annex VII(b) graduation would depend on reaching the threshold of GNP per capita of USD 1,000 per year in constant 1990 US dollars *for three consecutive years*.[96]

[93] India's first written submission, paras. 157-160; second written submission, para. 18.

[94] Egypt's third-party statement at the meeting of the Panel, paras. 6-7; Sri Lanka's third-party statement at the meeting of the Panel, pp. 2-3.

[95] India's first written submission, paras. 177 and 186-187.

[96] WTO, Ministerial Conference Decision of 14 November 2001, WT/MIN(01)/17, para. 10.1.

7.3.3.2.3 Article 27.4

7.54. India relies on the fact that the first sentence of Article 27.4 refers to an eight-year period without qualifying this period as commencing on the date of entry into force of the WTO Agreement. India argues that Article 27.4 therefore allows Members graduating from Annex VII(b) after the entry into force of the WTO Agreement to benefit from an eight-year transition period that begins when they graduate. It follows, according to India, that Article 27.4 requires interpreting Article 27.2(b) harmoniously in favour of an eight-year transition period upon Annex VII(b) graduation.[97] In India's view, Article 27.4 also leads to the conclusion that the text of Article 27.2(b) results in internal contradictions and is ambiguous and obscure, thus necessitating recourse to supplementary means of interpretation.

7.55. The first sentence of Article 27.4 provides:

> Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within *the* eight-year period, preferably in a progressive manner.[98]

7.56. We disagree with India's argument that the eight-year period in Article 27.4 does not start from the entry into force of the WTO Agreement and that the phrase "from the date of entry into force of the WTO Agreement" in Article 27.2(b) cannot be read into Article 27.4.[99] Rather, for the following reasons, we consider that the first sentence of Article 27.4 must be read as referring to the period of eight years from the date of entry into force of the WTO Agreement stipulated in Article 27.2(b).[100]

7.57. First, the first sentence of Article 27.4 expressly connects with Article 27.2(b) through the reference to "any developing country Member referred to in paragraph 2(b)". Second, having made this connection in respect of the same developing country Members, the first sentence of Article 27.4 then refers to phasing out export subsidies within "the eight-year period". The use of the definite article "the" demonstrates that Article 27.4 refers to a particular or already specified eight-year period. This period is defined in Article 27.2(b) to which Article 27.4 refers. Third, we find support for this reading of Article 27.4 in the fact that this provision serves to qualify the obligation on Members during the Article 27.2(b) transition period.[101] During this period, developing country Members are not, without more, entitled to the non-application of Article 3.1(a). The entitlement to the transition period in Article 27.2(b) is made "subject to compliance with the provisions in paragraph 4". Those Members shall (preferably in a progressive manner) phase out their export subsidies as provided in Article 27.4.

7.58. It follows that while Article 27.2(b) establishes an eight-year transition period from Article 3.1(a), the first sentence of Article 27.4 does not establish a separate and independent phase-out period. Rather, it imposes an additional phase-out obligation *during* the Article 27.2(b) period.[102] Article 27.2(b) and the first sentence of Article 27.4 refer to the same transition period of eight years starting on the date of entry into force of the WTO Agreement.

7.59. We therefore deny India's request to depart from the text of Article 27.2(b) because of Article 27.4. Instead, we conclude that the text of these provisions ensures the provisions operate harmoniously. For the same reason, we also reject India's proposition that, based on Article 27.4, the text of Article 27.2(b) can be characterized as ambiguous, obscure, absurd, or unreasonable.

7.3.3.2.4 Article 27.5

7.60. India argues that a textual interpretation of Article 27.2(b) would lead to inconsistency with Article 27.5 and render the latter inutile and ineffective. More specifically, India invokes an

[97] India's first written submission, para. 162; opening statement at the meeting of the Panel, para. 17.
[98] Emphasis added.
[99] India's second written submission, para. 20.
[100] See also United States' second written submission, paras. 37 and 60; Brazil's third-party submission, para. 21; European Union's third-party submission, paras. 3-9; and Canada's third-party statement at the meeting of the Panel, para. 4.
[101] Brazil's third-party submission, para. 20.
[102] Panel Report, *Brazil – Aircraft*, para. 7.55; Appellate Body Report, *Brazil – Aircraft*, para. 140.

"internal contradiction"[103] that arises, according to India, because of separate phase-out timelines between export subsidies for products that reach export competitiveness pursuant to Article 27.5 and all other export subsidies under Article 27.2(b).

7.61. India notes that under the second sentence of Article 27.5, an Annex VII Member has eight years to phase out export subsidies for products in which it has reached export competitiveness. India contrasts this with an interpretation of Article 27.2(b) which does not provide for an additional eight-year transition period after graduation from Annex VII(b). According to India, the result would be that, on graduating from Annex VII, a Member would be required to eliminate all export subsidies but at the same time would be allowed eight years to phase out export subsidies for products for which it has reached export competitiveness.[104]

7.62. We disagree with India's premise that the eight-year phase-out period in the second sentence of Article 27.5 survives graduation. The second sentence of Article 27.5 applies to developing country Members "referred to in Annex VII". On graduating, a Member ceases to be one "referred to in Annex VII", and the second sentence of Article 27.5 is no longer available to it.

7.63. In other words, Article 27.5 does not extend the transition period set forth in Article 27.2. Its phase-out timelines and requirements operate within the framework of that transition period, and in fact limit on a product-specific basis the scope of the exclusion from Article 3.1(a) granted in Articles 27.2(a) and (b). Article 27.5 therefore qualifies the scope of the special and differential treatment conferred by Article 27.2; it does not grant an additional or extended exclusion from Article 3.1(a).[105] This mechanism is similar to the operation of the phase-out requirement in the first sentence of Article 27.4.[106]

7.64. As a result, the alleged internal contradiction is based on a misreading of Article 27.5. We therefore conclude that interpreting Article 27.2(b) using the ordinary meaning of its terms does not, in light of Article 27.5, lead to ambiguous, obscure, absurd, or unreasonable results.

7.3.3.2.5 Object and purpose

7.65. India appears to argue that interpreting the terms of Article 27.2(b) according to their ordinary meaning would undermine the object and purpose of providing special and differential treatment and of recognizing the economic development needs of developing country Members.[107]

7.66. As set forth in Article 31.1 of the Vienna Convention, the object and purpose of a treaty, as a whole[108], is relevant in determining the meaning of its provisions.[109] The object and purpose of the SCM Agreement "is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions".[110] Part of this balance is to grant developing country Members special and differential treatment.[111] This emerges in particular from Article 27.1, which provides that "Members recognize that subsidies may play an important role in economic development programmes of developing country Members".[112]

[103] India's second written submission, paras. 22 and 25.
[104] India's first written submission, para. 164; second written submission, paras. 23-26; and opening statement at the meeting of the Panel, paras. 21-24.
[105] See also Brazil's third-party submission, paras. 23-24; and Japan's third-party statement at the meeting of the Panel, para. 10.
[106] The first sentence of Article 27.4 equally does not establish a phase-out period that is separate and independent from the transition period in Article 27.2(b). See para. 7.57 above.
[107] See, e.g. India's first written submission, paras. 151, 163, and 183; opening statement at the meeting of the Panel, paras. 6 and 16; and response to Panel question No. 18, p. 5.
[108] Appellate Body Report, *EC – Chicken Cuts*, para. 238.
[109] Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:I, fn 20.
[110] Appellate Body Report, *US – Softwood Lumber IV*, para. 64. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 301.
[111] Panel Report, *Indonesia – Autos*, para 5.194.
[112] The preamble to the WTO Agreement also recognizes "[the] need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".

7.67. Part VIII of the SCM Agreement, devoted to "Developing Country Members", consists of Article 27, entitled "Special and Differential Treatment of Developing Country Members". Article 27 "makes operational"[113] the principle of special and differential treatment in the context of the WTO rules on subsidies and countervailing measures. It "provide[s]"[114] special and differential treatment for developing country Members under certain specified conditions. Articles 27.2 to 27.7 and Annex VII, in particular, provide for special and differential treatment in respect of the prohibited export subsidy disciplines. It is therefore difficult to see how, in India's view, the text of Article 27.2(b) "would run contrary to the object and purpose of Part VIII of the SCM Agreement".[115] Rather, it reflects part of a delicate balance, struck by the drafters, between constraining certain types of subsidies on the one hand and providing special and differential treatment through clear and unambiguous time-bound flexibilities on the other hand. A literal interpretation of Article 27.2(b) is thus in line with, and gives effect to, the purpose of furthering special and differential treatment for developing country Members.

7.68. We therefore take the view that considering the object and purpose of the SCM Agreement does not require a departure from the ordinary meaning of Article 27.2(b).

7.3.3.2.6 Conclusion

7.69. Based on the above, we find that the terms of Article 27.2(b) in the context of the SCM Agreement and in light of its object and purpose do not lead to conclude otherwise than that the eight-year transition period in Article 27.2(b) runs from 1 January 1995. In fact, a reading of Article 27.2(b) as referring to eight years from 1 January 1995 sits harmoniously with its context and with the object and purpose of the SCM Agreement.

7.3.3.3 Supplementary means of interpretation

7.70. Article 32 of the Vienna Convention allows recourse to supplementary means of interpretation either "to confirm the meaning resulting from the application of article 31" of the Vienna Convention or, when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to manifestly absurd or unreasonable results, "to determine the meaning".

7.71. India argues that the plain text of Article 27.2(b), when viewed in light of Annex VII(b) and Articles 27.4 and 27.5, results in ambiguity, obscurity, absurdity, and unreasonableness.[116] India submits that the Panel must therefore depart from the text of Article 27.2(b) and rely on supplementary means of interpretation according to Article 32 of the Vienna Convention in order to read Article 27.2(b) as entitling graduating Annex VII(b) Members to an eight-year transition period upon their graduation.[117]

7.72. Above, we found that a textual interpretation of the terms in Article 27.2(b) does not leave their meaning ambiguous or obscure, or lead to manifestly absurd or unreasonable results. To the contrary, the meaning of Article 27.2(b) is clear and unambiguous and its textual interpretation does not result in internal contradictions with Annex VII(b), Article 27.4, or Article 27.5. On this basis, we disagree with India on the need in this case to resort to supplementary means of interpretation because of alleged ambiguity, obscurity, absurdity, and unreasonableness resulting from the interpretation according to Article 31 of the Vienna Convention.

7.73. Article 32 of the Vienna Convention also allows us to have recourse to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31. However, in light of the clear meaning of Article 27.2(b), we do not consider it necessary in this case to have recourse to supplementary means of interpretation.[118]

[113] Panel Report, *Canada – Aircraft (Article 21.5 – Brazil)*, fn 120.
[114] Appellate Body Report, *Brazil – Aircraft*, para. 140.
[115] India's second written submission, para. 10.
[116] India's first written submission, para. 166; second written submission, paras. 10, 27, and 30-31.
[117] India's second written submission, paras. 12, 27, and 31.
[118] See also Annex A-2, paras. 2.19-2.28.

7.3.3.4 Conclusion on Article 27.2 and Article 3.1(a) of the SCM Agreement

7.74. It is an undisputed fact that India has graduated from Annex VII(b). The text of Article 27.2(b), in its context and in light of the object and purpose of the SCM Agreement, leads us to conclude that the eight-year transition period from the date of entry into force of the WTO Agreement set forth in Article 27.2(b) has expired on 1 January 2003, also for Members graduating from Annex VII(b). Therefore, we find that Article 27 no longer excludes India from the application of Article 3.1(a) of the SCM Agreement.

7.3.3.5 Conclusion on Article 4 of the SCM Agreement

7.75. Article 27.7 of the SCM Agreement excludes from the application of Article 4 of the SCM Agreement "a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 to 5" of Article 27.

7.76. As set out above, India has graduated from Annex VII to the SCM Agreement, and the transition period in Article 27.2(b) has expired. Therefore, the exclusion set out in Article 27.7 does not operate and, as a result, Article 4 of the SCM Agreement applies to this dispute.

7.4 Statement of available evidence

7.77. India asked the Panel to rule that the statement of available evidence included in the United States' request for consultations does not meet the requirements of Article 4.2 of the SCM Agreement.[119] India argues that the statement fails to provide any evidence of the character of the measures as subsidies, and merely reproduces the list of legal instruments appearing in the request for consultations and subsequently in the panel request.

7.78. We discuss, first, the legal standard under Article 4.2 of the SCM Agreement (section 7.4.1) and, second, the application of that legal standard to the statement of available evidence, in light of the arguments of the parties (section 7.4.2). As set out below, we find that the statement of available evidence contained in the United States' request for consultations meets the standard set out in Article 4.2 of the SCM Agreement.

7.4.1 The applicable legal standard under Article 4.2 of the SCM Agreement

7.79. Article 4.2 of the SCM Agreement is a special or additional rule listed in Appendix 2 to the DSU, applying to disputes involving allegations of prohibited subsidies under Article 3 of the SCM Agreement. Pursuant to Article 1.2 of the DSU, such special or additional rules apply together with the DSU, except that, to the extent there is a conflict, the special or additional rules prevail.[120]

7.80. Article 4.2 of the SCM Agreement provides:

> A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

7.81. Thus, a complainant in a prohibited subsidies case must "indicate, in its request for consultations, the evidence that it has available to it, at that time, 'with regard to the existence and nature of the subsidy in question'".[121] This must be "available evidence of the character of the measure as a 'subsidy' … and not merely evidence of the existence of the measure".[122]

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[119] India's first written submission, paras. 16-18; see also DSB, Minutes of the meeting held on 28 May 2018, WT/DSB/M/413, para. 7.3, reporting India's concerns that the request for consultations failed to meet the requirements of the SCM Agreement, as well as of the DSU. The Panel declined the request for a ruling at preliminary stage. (Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 4.1-4.8).

[120] Appellate Body Report, *Guatemala – Cement I*, para. 65.

[121] Appellate Body Report, *US – FSC*, para. 161.

[122] Appellate Body Report, *US – FSC*, para. 161.

7.82. In *Australia – Automotive Leather II*, the panel interpreted the requirement for a "statement of available evidence" in Article 4.2 as meaning that the complainant must include in its request for consultations:

> [A]n expression in words of the facts at its disposal at the time it requests consultations in support of the conclusion that it has, in the words of Article 4.1, "reason to believe that a prohibited subsidy is being granted or maintained".[123]

7.83. Further, "the requirement is to provide a 'statement' of the evidence and not the evidence itself"[124], nor "disclosure of arguments".[125]

7.84. The Appellate Body has emphasized the importance of the requirement in Article 4.2 of the *SCM Agreement* to provide a statement of available evidence, given the "accelerated timeframes for disputes" under Article 4 and the "complex factual questions" that these disputes raise.[126] It has underlined that this requirement is "distinct from – and not satisfied by compliance with – the requirements of Article 4.4 of the DSU".[127] In other words, it is additional to "giving the reasons for the request for consultations and identifying the measure and the legal basis for the complaint under Article 4.4 of the DSU".[128]

7.85. At the same time, the statement "is the *starting point* for consultations, and for the emergence of more evidence concerning the measures by reason of the clarification of the 'situation'".[129] The statement "informs the beginning of the dispute settlement process", and "does not limit the scope of evidence and argument for the entire proceeding".[130] As a result, in assessing the sufficiency of the statement, which must be done "on a case by case basis"[131], it is "important to bear in mind that the requirement to submit a statement of available evidence applies in the earliest stages of WTO dispute settlement".[132]

7.4.2 Whether the statement of available evidence meets the requirements of Article 4.2 of the SCM Agreement

7.86. In the present case, the United States' statement of available evidence lists: all the legal instruments listed in the body of the request for consultations, and subsequently in the panel request[133]; and two publications of the Ministry of Commerce and Industry of India, namely (a) "Highlights of the Foreign Trade Policy 2015-2020 Mid Term Review

[123] Panel Report, *Australia – Automotive Leather II*, para. 9.19.
[124] Appellate Body Report, *US – Upland Cotton*, para. 308.
[125] Panel Report, *Australia – Automotive Leather II*, para. 9.18.
[126] Appellate Body Report, *US – FSC*, para. 160.
[127] Appellate Body Report, *US – FSC*, para. 161.
[128] Appellate Body Report, *US – FSC*, para. 161.
[129] Appellate Body Report, *US – Upland Cotton*, para. 308 (referring to Panel Report, *US – Upland Cotton*, para. 7.100). (emphasis added)
[130] Panel Report, *Australia – Automotive Leather II*, para. 9.29. See also ibid. para. 9.27. Also, Article 4.2 of the SCM Agreement "does not, on its face, require disclosure of arguments". (Ibid. para. 9.18).
[131] Appellate Body Report, *US – Upland Cotton*, para. 308.
[132] Appellate Body Report, *US – Upland Cotton*, para. 308 (referring to Panel Report, *Australia – Automotive Leather II*, para. 9.19).
[133] These are Instruments Nos. 1-27 in the panel request, discussed in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), section 2.3.1 and annex A. The numbering of the same legal instruments in the body of the two requests and in the statement of available evidence, while overlapping in part, is not the same. The Panel therefore refers to "Instruments", with the corresponding numbering, when referring to the panel request and to the body of the request for consultations; and to "Items", with the corresponding numbering, when referring to the statement of available evidence submitted together with the request for consultations.
A number of these Instruments/Items were also submitted as exhibits by the parties. For those that were not also submitted (or not submitted in their entirety) as exhibits, with a communication dated 15 July 2019, the Panel transmitted to the parties the electronic files it downloaded from the web pages listed in its Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), annex A, at the date of access stated therein. On 19 July 2019, the United States submitted versions of these documents as Exhibits USA-74 to USA-84. On 26 July 2019, India submitted a replacement version of Exhibit USA-84 (Exhibit IND-23).

(5 December 2017)" (the Highlights); and (b) an accompanying press release entitled "Release of the Mid-Term Review of Foreign Trade Policy 2015-2020 − Annual Incentives Increased by 2% amounting to over Rs 8,000 crore for Labour Intensive/MSME sectors (5 December 2017)" (the Press Release).[134]

7.87. India argues that this statement falls short of the requirements of Article 4.2 of the SCM Agreement.[135] Specifically, India argues that the statement (a) includes no evidence of the character of the measure as a subsidy[136]; (b) "reproduces a verbatim list" of the legal instruments cited in the request for consultations[137]; and (c) provides no "basis for the[] identified programmes/schemes providing a subsidy" because it does "not indicate any specific chapter or paragraph" of the cited legal instruments.[138] In addition, India considers that the lack of "substantive difference" between the request for consultations and the panel request is further evidence of the United States' failure to appreciate the substantive standard in Article 4.2 of the SCM Agreement.[139]

7.88. The United States responds that India confuses evidence with arguments.[140] Article 4.2 requires a statement of the former, not the latter.[141] The United States considers that it has demonstrated in its first written submission that the cited evidence "is indeed evidence regarding the existence and nature of the subsid[y] in question".[142] Specifically, the statement "identified twenty-five separate legal instruments that gave the United States reason to believe that there are five Indian export subsidy programs that are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement", and that "are the primary evidentiary basis for the U.S. claims".[143]

7.89. We now turn to consider the items in the statement of available evidence in light of the legal standard and the arguments of the parties.

7.90. Item No. 1 in the statement of available evidence consists of the Highlights of the Foreign Trade Policy (FTP) mid-term review, issued by the Government of India in December 2017.[144] This document describes some of the changes made to the FTP as part of the mid-term review, and refers in particular to the first, second, and third schemes[145] listed in the

[134] Request for consultations, p. 4 (statement of available evidence). SAE Item 1 and SAE Item 2 in Communication dated 15 July 2019 from the Panel to the parties relating to the keeping of the record of the Panel. The Panel located these documents at: https://www.eoimadrid.gov.in/archives/documents/whatsnews/fthl17-051217.pdf and http://pib.nic.in/newsite/PrintRelease.aspx?relid=174117, respectively (both accessed on 28 November 2018). The first of the two links has since stopped working, and the corresponding document can now be accessed at: https://www.eoimadrid.gov.in/pdf/fthl17-051217.pdf (accessed on 24 June 2019).
With a communication dated 15 July 2019, the Panel transmitted to the parties the electronic files it downloaded on 28 November 2018 from the first two web pages listed above. On 19 July 2019, the United States submitted these documents as Exhibits USA-85 and USA-86.

[135] India's first written submission, paras. 16-18. India also expressed concerns that the request for consultations failed to meet the requirements of the SCM Agreement (and of the DSU) at the DSB meeting at which the Panel was established. DSB, Minutes of the meeting held on 28 May 2018, WT/DSB/M/413, para. 7.3.

[136] India's first written submission, paras. 96 and 100. See also India's opening statement at the meeting of the Panel, paras. 33-34; and closing statement at the meeting of the Panel, para. 7.

[137] India's first written submission, paras. 95 and 97. See also India's response to Panel question No. 26, fourth para.

[138] India's first written submission, para. 101. See also India's responses to Panel question No. 26, fifth para., and No. 27, first para.

[139] India's first written submission, paras. 102-103. See also India's opening statement at the meeting of the Panel, para. 35.

[140] United States' second written submission, paras. 41-43.

[141] United States' second written submission, paras. 42-43 (referring to Panel Report, *Australia − Automotive Leather II*, para. 9.18).

[142] United States' second written submission, para. 41. See also, ibid. para. 44.

[143] United States' second written submission, para. 44.

[144] See fn 134 above.

[145] These are sometimes referred to as "programmes" and sometimes as "schemes". The two terms are used interchangeably in this context. In the body of this report, we have chosen to refer to them only as "schemes". We note however that in our Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), we used the term "programme". The same considerations also apply to the fourth and fifth schemes, discussed further below.

request for consultations, i.e. the EOU and Sector-Specific Schemes, MEIS, and the EPCG Scheme, respectively.

7.91. Regarding MEIS, the Highlights note that it "is a major export promotion scheme which seeks to promote export of notified goods manufactured/produced in India"; that "MEIS incentives are available at 2, 3, 4 and 5% of the [free on board] value of exports"; and that incentives in two textiles sub-sectors, as well as "for exports by MSMEs / labour intensive industries" have been increased, involving additional outlays of "Rs. 2743 Crore" and "Rs. 4567 Crore", respectively.[146] It further notes that the validity of scrips under MEIS has been extended by six months and the tax rate for their transfer reduced to zero[147]; and more generally that the "[s]cope and incentives as a percentage of exports under … MEIS … [have been] enhanced".[148] Regarding the EOU and Sector-Specific Schemes, MEIS and EPCG Scheme, the Highlights state that these are "continued".[149]

7.92. Item No. 2 in the statement of available evidence is a press release that accompanied the release of the FTP mid-term review. This press release explains, among other things, that "[t]he FTP will focus on exports from labour intensive and MSME sectors by way of increased incentives in order to increase employment opportunities"[150], and that "[w]hile restoring the benefits under the export promotion schemes of duty free imports under Advanced Authorisation, Export Promotion Capital Goods and 100 percent Export Oriented Units … the FTP review has focused on increasing the incentives for labour intensive MSME sectors".[151] It then goes on to describe, like the Highlights, the specific increases in the rate of incentives and the resulting additional outlays, as well as providing a breakdown by sector of some of the resulting incentives.[152]

7.93. Item No. 3 in the statement of available evidence is the FTP, which is the same as Instrument No. 1 in the request for consultations and in the panel request.[153]

7.94. Chapter 6 of Item No. 3 relates to the EOU and Sector-Specific Schemes. Section 6.00 of the FTP describes the units that may benefit from these schemes, as follows: "[u]nits undertaking to export their entire production of goods and services (except permissible sales in DTA [domestic tariff area])". Sections 6.01, 6.11, and 6.12 set forth exemptions from duties and taxes for import or procurement of goods, as well as other entitlements of units under the EOU and Sector-Specific Schemes.

7.95. Chapter 3 of Item No. 3 relates to MEIS. Section 3.02 of the FTP, on "Nature of Rewards", explains that "[d]uty credit scrips shall be granted as rewards under MEIS" and "shall be freely transferable", and goes on to describe the three types of uses to which these duty scrips can be put, i.e. payment of customs duties on certain goods, payment of excise on certain goods, and payment of certain other dues such as for shortfalls in export obligation. Section 3.04 of the FTP, on "Entitlement under MEIS", explains that "[e]xports of [certain goods to certain markets] shall be rewarded under MEIS"; that the "basis of calculation of reward" is "FOB value of exports"; and that certain "exports categories / sectors" are ineligible. The relevant goods and markets for purposes of Section 3.04 are set out in Item No. 8 of the statement of available evidence (Instrument No. 7 in the request for consultations and the panel request), as amended by Items No. 9-16 (Instruments No. 8-15 in the request for consultations and the panel request).

7.96. Chapter 5 of Item No. 3 relates to the EPCG Scheme. Section 5.01 of the FTP explains that this scheme: "allows import of capital goods … at zero customs duty"; allows for exemption from certain other taxes; and in some cases allows for advantages also in connection with the procurement of capital goods "from indigenous sources". Section 5.01 also provides that "[i]mport under EPCG Scheme shall be subject to an export obligation". Section 5.04 sets out the conditions

[146] Highlights, p. 4.
[147] Highlights, p. 5.
[148] Highlights, p. 12.
[149] Highlights, p. 13.
[150] Press Release, p. 1.
[151] Press Release, p. 1.
[152] Press Release, p. 2.
[153] See fn 133 above, and Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.27-2.36, 2.56-2.59, and 2.69-2.70.

applying to the fulfilment of this export obligation. As a general rule, it provides that the export obligation "shall be fulfilled by the authorisation holder through export of goods which are manufactured by him or his supporting manufacturer / services rendered by him, for which the EPCG authorization has been granted".[154] It further provides that the export obligation "shall be, over and above, the average level of exports achieved by the applicant in the preceding three licensing years for the same and similar products within the overall [export obligation] period", with some exceptions.[155]

7.97. Items Nos. 4-20, which correspond to Instruments Nos. 2-5, 7-15, and 17-20 in the request for consultations and in the panel request[156], set out details for the operation of the EOU and Sector-Specific Schemes, MEIS and EPCG Scheme, amendments to those schemes and, in the case of MEIS, the goods and markets of export that give rise to rewards under the scheme.

7.98. Items Nos. 21-26, which correspond to Instruments Nos. 21-26 in the request for consultations and in the panel request, relate to the fourth scheme listed in the request for consultations, i.e. the SEZ Scheme. In particular, Chapter VI of Item No. 21 (the Special Economic Zones Act (SEZ Act)) sets out "Special fiscal provisions for special economic zones", applying to developers and entrepreneurs for "authorised operations" under the Act.[157] It provides for exemptions from customs duties and other taxes that would otherwise be due under the 1962 Customs Act, the 1975 Customs Tariff Act, the 1944 Central Excise Act, the 1985 Central Excise Tariff Act, the 1956 Central Sales Tax Act, and other legislation.[158] It further provides that the 1961 Income Tax Act applies to developers and entrepreneurs for authorised operations "subject to … modifications" set out in Item No. 21, that is, it provides that special rules on income tax apply to Special Economic Zones[159]; these provisions are also reflected in Item No. 26, the 1961 Income Tax Act.

7.99. Item No. 22 (the Special Economic Zones Rules (SEZ Rules)) details the conditions subject to which entrepreneurs and developers are entitled to exemptions, drawbacks, and concessions. Among other conditions, it requires "positive net foreign exchange earning" as a condition for approving a Unit in an SEZ[160], and as a commitment that every developer and entrepreneur must undertake to be entitled to exemptions, drawbacks, and concessions.[161] In extreme summary, the positive net foreign exchange (NFE) earning requires the free on board (FOB) value of exports to exceed the cost insurance freight (CIF) value of imports during specified time periods; Item No. 22 provides a detailed definition of this requirement.[162]

7.100. Items Nos. 23 and 24 are amendments to Item No. 22. Item No. 25 provides that all goods or services imported by a developer or entrepreneur in an SEZ are exempt from the integrated tax that would otherwise be due on them under the 1975 Customs Tariff Act.

7.101. Item No. 27 relates to the fifth scheme listed in the request for consultations, i.e. DFIS. Specifically, it is the only legal instrument listed in the request for consultations as reflecting that scheme. It sets forth exemptions from or reductions to customs duties on the importation of certain goods, subject to certain conditions.[163]

7.102. The United States' request for consultations singled out nine conditions, as did, subsequently, the panel request. These nine conditions provide that the value of the imports

[154] Subsection 5.04(a) of the Foreign Trade Policy, (Exhibit USA-3).
[155] Subsection 5.04(b) of the FTP.
[156] See fn 133 above and Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.37, 2.60, 2.71 (for Instrument No. 2), 2.38-2.39, 2.61, 2.72 (for Instrument No. 3), 2.40, 2.62, 2.73 (for Instruments Nos. 4 and 5), 2.63 (for Instruments Nos. 7-15), 2.74 (for Instrument No. 17), 2.75 (for Instrument No. 18), 2.76 (for Instrument No. 19), and 2.77 (for Instrument No. 20).
[157] Subsection 26(1)(a) of the Special Economic Zones Act, (Exhibit USA-22).
[158] Section 26 of the SEZ Act.
[159] Section 27 and Second Schedule of the SEZ Act.
[160] Subsection 18(2)(i) of the Special Economic Zones Rules, (Exhibit USA-28).
[161] Rule 22(1)(i) of the SEZ Rules.
[162] Rule 53 of the SEZ Rules.
[163] Notification No. 50/2017, (Exhibit USA-36), p. 1.

benefiting from the duty exemptions or reductions is capped at a certain percentage (ranging from 1% to 25%, depending on the condition) of the value of exports during the preceding financial year.[164] Six of these nine conditions also require that the imported goods be used in the manufacture of goods for export.[165]

7.103. We now turn to the question whether the list of items just described is a "statement of available evidence with regard to the existence and nature of the subsidy in question", in light of India's arguments.[166] To recall, India's first argument is that the request for consultations includes no evidence of the character of the measure as a subsidy, as is required by Article 4.2 of the SCM Agreement.[167]

7.104. As set out above, the items listed in the statement of available evidence describe, at least: an exemption from taxes, or the granting by the government of freely transferable "scrips" to be used to satisfy certain liabilities; and conditions for obtaining these exemptions and scrips, which, in each case, include some requirement to export. Most of the listed items are legislation or implementing regulations promulgated by India.

7.105. In this way, the listed items evidence the possible existence of a foregoing of government revenue, and of the government's granting of instruments, called "scrips", that can be used to satisfy liabilities *vis-à-vis* the government. Further, since the listed items provide for (a) exemptions from otherwise applicable duties and taxes; and (b) transferable instruments that may be used to satisfy obligations to pay customs duties, excise, and other dues, they also evidence the possible existence of a benefit, and thus a possible subsidy within the meaning of Article 1 of the SCM Agreement.[168] This evidence therefore relates not only to the existence of the possible subsidy but also to its nature as a subsidy.

7.106. Moreover, because they set out conditions for benefiting from the tax exemptions or from the award of scrips that include requirements to export, the listed items also evidence the possible export contingency of the measures in question, within the meaning of Article 3.1(a) of the SCM Agreement. This evidence therefore relates also to the nature of the possible subsidy as a prohibited export subsidy.

7.107. As a result, we consider that the statement indicates available evidence both of the *existence* of the possible subsidies and of their *nature* as possible subsidies and, indeed, as possible export-contingent subsidies. We therefore disagree with India's position that the statement of available evidence relates to the existence of the measure but not to its character as a subsidy.[169]

7.108. We now turn to consider India's second argument, namely, that the statement is insufficient because it reproduces "verbatim" the list of legal instruments provided to satisfy the requirement to identify the measures under Article 4.4 of the DSU.[170]

7.109. As India argues, the requirements in Article 4.2 of the SCM Agreement are additional to those in Article 4.4 of the DSU, and not satisfied by compliance with the latter requirements.[171] In this case, 25 of the 27 items of evidence in the statement of available evidence are legal

[164] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.104-2.107.

[165] These are Conditions Nos. 10, 21, 28, 32, 33, and 101. (Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.104-2.107).

[166] India's objections to the statement of available evidence do not appear to relate to existence: see e.g. India's first written submission, para. 96 ("merely demonstrating the existence of a measure … does not satisfy the mandate to evidence 'character'").

[167] See para. 7.87 above; and India's first written submission, paras. 96 and 100.

[168] The Panel refers to a "possible" subsidy because whether the challenged measures are ultimately found to be a subsidy is a different and further enquiry.

[169] See para. 7.87 above; and India's first written submission, paras. 96 and 100.

[170] India's first written submission, para. 97. See also para. 7.87 above; and first written submission, para. 95.

[171] India's first written submission, para. 95; Appellate Body Report, *US – Upland Cotton*, para. 302.

instruments cited in the United States' request for consultations to identify the measures. The United States argues that these legal instruments "are the primary evidentiary basis for the U.S. claims"[172], and the Panel has ascertained, as set out above, that these legal instruments are evidence relating both to the existence and nature of the measures as subsidies.

7.110. This factual situation raises the question whether the near-identity between the request for consultations and the statement of available evidence included in it demonstrates, in itself, the insufficiency of the statement of available evidence.

7.111. Article 4.2 of the SCM Agreement requires a request for consultations to "include a statement of available evidence with regard to the existence and nature of the subsidy in question". As has been repeatedly found, this requirement is different from, and additional to, the requirement to identify the measures at issue and give an indication of the legal basis of the complaint, set out in Article 4.4 of the DSU. This however means that both sets of requirements must be satisfied; it does not necessarily mean that the same item cannot, in any case, serve both to identify the measure at issue and to provide evidence of the existence and nature of a subsidy. In this dispute, as noted above, the listed items appear to satisfy the requirements of Article 4.2 of the SCM Agreement.[173] The fact that the same items also serve to identify the challenged measures, in itself, does not render insufficient the statement of available evidence.

7.112. India's third argument is that the statement of available evidence is insufficient because it does "not indicate any specific chapter or paragraph which would result in a violation of the SCM Agreement", which is an "implicit failure to offer any … basis [for] the existence of a possible subsidy".[174] The United States responds that India confuses evidence with arguments.[175]

7.113. Pursuant to Article 4.2 of the SCM Agreement, the complainant must "state" the "evidence" it has available as to the existence and nature of the challenged subsidy. This did not require the complainant in this case to indicate the "specific chapter or paragraph" of the cited items of evidence. The complainant stated the evidence it was relying on, so as to meet the requirements of Article 4.2. Moreover, the body of the text of the request for consultations, which precedes and introduces the text of the statement of available evidence, provided sufficient information to put the respondent on notice as to which aspects of the legal instruments cited as evidence are relevant to this dispute.[176]

7.114. As examples of how the cited legal instruments fail to provide evidence of the existence and nature of the challenged subsidies, India refers to (a) the Income Tax Act (Item No. 26), (b) Items Nos. 21 to 24, and (c) Items Nos. 1 to 6.[177]

7.115. Regarding the Income Tax Act, India argues that "when read alone, [it does] not even vaguely indicate that [it] refer[s] to prohibited subsidies", and that the United States "has failed" "to demonstrate how the Indian Income Tax Act may be characterized as a subsidy".[178]

7.116. First, we disagree with India that the Income Tax Act must be "read alone". The 1961 Income Tax Act, which is listed in the statement of available evidence, appears in the context of a request for consultations where the same Income Tax Act is cited with reference to a specific scheme, namely, Special Economic Zones, and together with a number of related instruments.[179]

[172] United States' second written submission, para. 44.

[173] Perhaps unsurprisingly, given the largely *de jure* nature of the challenge.

[174] India's first written submission, para. 101. See also India's response to Panel question No. 27, first para. ("at the very least, the statement of available evidence must have included specific provisions within the legislation that are relevant to the characterization of the measure as a prohibited subsidy").

[175] United States' second written submission, paras. 41-43.

[176] As India acknowledges, the text of the request for consultations is almost identical to the text of the panel request. (India's first written submission, para. 102). With reference to the panel request, which is identical in relevant part to the request for consultations, see Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.41, 2.64, 2.78, 2.91, and 2.109.

[177] India's response to Panel question No. 26, fifth and sixth paras.

[178] India's response to Panel question No. 26, fifth para.

[179] Consultations request, p. 3.

Among these legal instruments, the SEZ Act, which establishes the scheme in question, provides that the Income Tax Act "shall apply … subject to the modifications specified in the Second Schedule".[180] Further, the Second Schedule lists the "Modifications to the Income-Tax Act, 1961", i.e. the provisions of the Income Tax Act that are added or modified by the SEZ Act.[181] Therefore, the 1961 Income Tax Act is far from having to be "read alone".

7.117. Second, regarding India's argument that the United States "has failed" "to demonstrate how the Indian Income Tax Act may be characterized as a subsidy"[182], we recall that the requirement is to provide a statement of the evidence, not "disclosure of arguments".[183] We note that the provisions on special economic zones in the 1961 Income Tax Act, identified in the Second Schedule of the SEZ Act, relate to tax exemptions and deductions, and some explicitly provide that the exemption or deduction in question relates to "export".[184] Thus, together with the other listed items, they give "reason to believe"[185] that a subsidy exists, has the character of a subsidy, and indeed has the character of a prohibited subsidy.[186]

7.118. Regarding Items Nos. 21 to 24, India argues that they do "not indicate that they refer to subsidies".[187] However, Items Nos. 21 to 24 provide for the establishment and operation of Special Economic Zones and set out, *inter alia*, special fiscal provisions for such zones; conditions under which participants are entitled to exemptions, drawbacks, and concessions; and rules on the NFE earnings requirement.[188] Thus, India's view that these Items do not "refer to subsidies" appears to be grounded in India's position on the merits of the present case, rather than in an assessment of Items Nos. 21 to 24 from the perspective of Article 4.2 of the SCM Agreement.

7.119. Regarding Items Nos. 1 to 6, India argues that "cited randomly with no reference to specific provisions within the legislation or the specific program being challenged also fail to meet the higher threshold in Article 4.2 of the SCM Agreement".[189] Once again, these items are neither "cited randomly" nor "with no reference to … the specific program being challenged". Instead, in the body of the request for consultations, Items Nos. 3 to 6 are listed with reference to the EOU and Sector-Specific Schemes, MEIS, and EPCG Scheme; and Items Nos. 3 and 5 contain a chapter expressly devoted to each of those schemes, setting out the bulk of the relevant provisions governing those schemes, including provisions giving reason to believe that India grants subsidies that are export contingent.[190]

7.120. Therefore, the Panel does not agree with India's arguments that, by listing these items, the complainant failed to state evidence of the existence of the challenged subsidies and of their nature as subsidies.

7.121. India's fourth and last argument is that "[a]dditionally … there is no substantive difference between the 'Request for Consultation' … and the Request for the Establishment of Panel".[191]

[180] Section 27 of the SEZ Act.

[181] Second Schedule of the SEZ Act. See also Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), para. 2.89 and fn 146.

[182] India's response to Panel question No. 26, fifth para.

[183] See para. 7.83 above.

[184] Income Tax Act, Section 10AA, accessed at the link set out in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), annex A, Instrument No. 26. See fn 133 above.

[185] See para. 7.82 above.

[186] See also paras. 7.104-7.106 above.

[187] India's response to Panel question No. 26, sixth para.

[188] See also paras. 7.98-7.100 above, and Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.83-2.86.

[189] India's response to Panel question No. 26, sixth para.

[190] See paras. 7.93-7.97 above. On Items Nos. 1 and 2, see paras. 7.90-7.92 above. Item No. 6 (on which see also para. 7.97 above), which corresponds to Instrument No. 4 in the request for consultations and in the panel request, is a one-page document setting forth changes to appendix 6-B to the FTP, which relates to the EOU/EHTP/BTP Schemes.

[191] India's first written submission, para. 102. See also para. 7.87 above.

According to India, this is evidence that the complainant also disregarded the difference in substantive standards between Article 4.2 of the SCM Agreement and Article 6.2 of the DSU.[192]

7.122. It is true that "precise and exact identity" between the request for consultations and the panel request is not required[193], and that there is often an evolution between the former and latter documents. However, nothing prevents complainants from presenting a panel request that is identical to their request for consultations, provided that each of these two documents meets the requirements set out in Articles 4.4 and 6.2 of the DSU and other applicable provisions.

7.123. Thus, to sum up, a review of the statement of available evidence indicates that the statement of available evidence is sufficient to meet the requirements of Article 4.2 of the SCM Agreement, because it "state[s] … available evidence with regard to the existence and nature of the subsidy in question"[194]; and India's arguments considered so far have not established otherwise.

7.124. In the context of the substantive meeting with the parties, the Panel asked the United States to articulate how each item in its statement of available evidence related to the existence of the alleged subsidy or its nature as a subsidy, and to point to the relevant provisions or paragraphs of the listed items.[195] The Panel then gave India the opportunity to comment on the United States' response at the hearing and in writing.

7.125. While the Panel has based its assessment of the sufficiency of the statement of available evidence on the statement itself, as contained in the United States' request for consultations, the Panel notes that the United States' response to the Panel's question, too, illustrates that the 25 legal instruments cited in the statement, themselves, provide evidence "with regard to the existence and nature of the subsidy in question"[196], because the language of those legal instruments gives reason to believe that a subsidy exists, has the character of a subsidy, and is export contingent.[197]

7.126. In its comments on the United States' response, India asserts, first, that the provisions cited by the United States support India's argument that the challenged schemes fall under footnote 1 of the SCM Agreement.[198] The Panel considers this to be a substantive argument regarding the merits of the dispute, and not an argument on the sufficiency of the statement of available evidence under Article 4.2 of the SCM Agreement.

7.127. Second, India argues that the United States has failed to engage with the nature of the legal instruments in question and, as an example, India writes that "the United States has not even acknowledged that [Item No. 12] notifies ITC codes that were not included in the harmonised list".[199] This comment bears no relevance on the assessment under Article 4.2 of the SCM Agreement. The document in question makes amendments to the list of goods the export of which gives rise to rewards under MEIS[200]; observing, or not, that these amendments relate to the Indian Tariff Code (ITC) classification of the products says nothing on the sufficiency of the statement of available evidence in this dispute.

7.128. Third, India argues that the United States has selectively or incorrectly quoted portions of the listed evidence. As an example, India refers to Item No. 22 (the SEZ Rules), for which the United States has listed, among others, Rule 9 of the SEZ Rules; India observes that Rule 9 pertains to exemptions provided to SEZ developers, and that the United States clarified in the course of the hearing that it is only challenging financial contributions provided to SEZ Units (not developers).[201] India's factual observation is correct; however, it does not render the statement of

[192] India's first written submission, paras. 102-103.
[193] Appellate Body Report, *Brazil – Aircraft*, para. 132.
[194] Article 4.2 of the SCM Agreement.
[195] Advance Panel question No. I, and Panel question No. 25.
[196] Article 4.2 of the SCM Agreement.
[197] United States' response to Panel question No. 25, appendix 1. The United States first provided appendix 1 in the course of the oral hearing.
[198] India's comments on the United States' response to Panel question No. 25, first para.
[199] India's comments on the United States' response to Panel question No. 25, second para.
[200] In fact, the United States notes this in its response to Panel question No. 25, appendix 1.
[201] India's comments on the United States' response to Panel question No. 25, third and fourth paras.

available evidence insufficient. The United States' listing of provisions from Item No. 22, in answer to the Panel's question, is prefaced with the phrase "[n]on-exhaustive excerpts of interest to a subsidy analysis include", and then lists the Rule referred to by India, together with other Rules whose substantive relevance to the United States' challenge India does not contest.[202] It is correct that in response to questioning from the Panel at the hearing and after the hearing, the United States clarified that it is not challenging financial contributions granted to SEZ developers.[203] This means that the United States included in its response to the Panel question a provision that it has ultimately chosen to exclude from its challenge; but it does not mean that the statement of available evidence was not sufficient under Article 4.2 of the SCM Agreement to sustain that portion of its challenge that the United States ultimately pursued.

7.129. Therefore, the exchanges with and between the parties in answer to Panel question No. 25 do not modify the Panel's preliminary conclusions in paragraphs 7.107 and 7.123 above, that the statement of available evidence included in the request for consultations was sufficient.

7.130. We therefore conclude that the statement of available evidence met the requirements of Article 4.2 of the SCM Agreement.

7.5 The measures at issue

7.131. Having found that Article 27 of the SCM Agreement no longer excludes the challenged measures from the application of Articles 3.1(a) and 4 of the SCM Agreement, and that the United States' statement of available evidence met the requirements of Article 4.2 of the SCM Agreement, we proceed to examine the United States' claims of inconsistency with Articles 3.1(a) and 3.2 of the SCM Agreement. As an introduction to that analysis, this section provides a brief description of each of the measures at issue.[204]

7.5.1 Export Oriented Units and Sector-Specific Schemes

7.132. The EOU/EHTP/BTP Schemes are three schemes for which India's FTP and Handbook of procedures (HBP) set forth common disciplines, including conditions for participating in the schemes and a range of "entitlements"[205] granted to participating enterprises ("EOU/EHTP/BTP Units", or "Units"). Two of these entitlements are at issue in this dispute. First, EOU/EHTP/BTP Units can import goods without payment of any customs duty.[206] This exemption from customs duties applies to "all types of goods"[207] required for the Units' activities, expressly including capital goods.[208] Second, EOU/EHTP/BTP Units can procure excisable goods[209] free of central excise duties.[210]

[202] United States' response to Panel question No. 25, appendix 1, pp. 46-47.
[203] United States' response to Panel questions Nos. 74-76, paras. 119-121.
[204] We also refer to our overview of the relevant legal instruments in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.27-2.40 (for the EOU/EHTP/BTP Schemes), 2.56-2.63 (for MEIS), 2.68-2.77 (for the EPCG Scheme), 2.83-2.89 (for the SEZ Scheme), and 2.101-2.107 (for DFIS).
[205] Sections 6.01, 6.11 and 6.12 of the FTP, (Exhibit USA-3). Exhibit USA-3 contains two versions of the FTP. The first part of Exhibit USA-3 contains excerpts from the FTP in force as of 5 December 2017; the second part of Exhibit USA-3 contains the full version of the Foreign Trade Policy *before* it was amended in December 2017, i.e. an outdated version of the FTP.
[206] Section 6.01(d)(ii) of the FTP. Importation includes importation from abroad and procurement from bonded warehouses in the Domestic Tariff Areas (DTA) in India or international exhibitions held in India. (Idem). The FTP defines "Domestic Tariff Area (DTA)" to mean the "area within India which is outside SEZs and EOU/EHTP/STP/BTP" (definition 9.16 in chapter 9 of the FTP).
[207] Section 6.01(d)(i) of the FTP.
[208] Section 6.01(d)(i) of the FTP. Section 6.04 of the Handbook of procedures, (Exhibit USA-5), sets forth a non-exhaustive list of "[g]oods permitted to be imported / procured from DTA" under the EOU/EHTP/BTP Schemes, which includes items such as raw materials, components, capital goods (including certain equipment and tools), and "[a]ny other items" upon approval. A definition of "[c]apital goods" is set forth in definition 9.08 of Chapter 9 of the FTP.
[209] On the current scope of "excisable goods", see para. 7.229 below.
[210] Section 6.01(d)(iii) of the FTP.

7.133. Units must commit "to export their entire production of goods and services"[211], subject to certain limited exceptions.[212] Further, each Unit must be a positive NFE earner[213], a requirement which is met when a Unit's total value of exports exceeds its total value of imports.[214]

7.134. The schemes set forth provisions to monitor compliance with the NFE requirement.[215] Failure to ensure positive NFE or to abide by other obligations under the schemes may result in sanctions, including penalties, penal action and the cancellation of the status of an enterprise as an EOU/EHTP/BTP Unit.[216]

7.135. The stated objectives of the EOU/EHTP/BTP Schemes are "to promote exports, enhance foreign exchange earnings, attract investment for export production and employment generation".[217]

7.5.2 Export Promotion Capital Goods Scheme

7.136. The EPCG Scheme exempts participants[218], upon authorisation, from paying customs duties[219] on the importation of capital goods.[220]

7.137. Importation under the EPCG Scheme is subject to two export obligations. First, over a six-year period, a scheme participant must achieve exports of the goods specified in the EPCG authorization equalling at least six times the duties, taxes, and cess[221] saved on capital goods.[222] This is referred to as the "specific export obligation".[223]

7.138. Second, with limited exceptions[224], a scheme participant must maintain exports of those same goods above the average level of its exports of the same or similar products during the three-year period preceding the EPCG authorization.[225] This is referred to as the "average export obligation".[226]

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[211] Section 6.00(a) of the FTP; see also Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D, para. (i).

[212] Section 6.08 of the FTP.

[213] Section 6.04 of the FTP; Section 6.10(a) of the HBP; Second Schedule of the SEZ Act; and Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D, para. (ii) and appendix 6E, para. 1.

[214] The details concerning the calculation of NFE, including the calculation formula and relevant definitions, are set out in Section 6.10(a) of the HBP, and are addressed in our discussion of export contingency (section 7.10.2).

[215] Section 6.20 of the FTP; Section 6.12 of the HBP; and Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6E, para. 2 and appendix 6F.

[216] Sections 6.05(c) and 6.18(b) of the FTP; Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D, paras. (ii) and (ix), appendix 6F, para. 3(ii), and appendix 6E, para. 7.

[217] Section 6.00(b) of the FTP.

[218] Participation is open to "manufacturer exporters with or without supporting manufacturer(s), merchant exporters tied to supporting manufacturer(s) and service providers". (Section 5.02(a) of the FTP).

[219] The Scheme also used to set forth exemptions from the Integrated Goods & Services Tax (IGST) and Compensation Cess. (Section 5.01(a) of the FTP; India's first written submission, para. 296). These exemptions appear to have expired on 31 March 2018 and are not part of our analysis and findings, see fn 373 below.

[220] Sections 5.01(a) and 5.04(a) of the FTP. Capital goods for purposes of the EPCG Scheme are, per Section 5.01(i) of the FTP, those defined as capital goods in Chapter 9 of the FTP and certain items specified in Section 5.01(a)(ii)-(iv).

Alternatively, if exporters pay for duties and other charges on import of capital goods upfront and in full in cash, they receive freely transferable duty credit scrips ("Post Export EPCG Duty Credit Scrips") remitting the basic customs duty. (Section 5.12 of the FTP). These scrips are not at issue in this dispute.

[221] In India, "cess" designates a tax that is levied to raise funds for a specific purpose. The Education Cess, for instance, collects funds to finance educational institutions. (United States' first written submission, fn 119).

[222] Section 5.01(c) of the FTP; Section 5.14(a) of the HBP.

[223] E.g. Section 5.09 of the FTP.

[224] Section 5.13 of the HBP.

[225] Section 5.04(b) of the FTP; Section 5.12 of the HBP; and India's responses to Panel questions Nos. 51 and 52.

[226] E.g. Section 5.09 of the FTP; India's response to Panel question No. 53.

7.139. The scheme provides an "incentive for early … fulfilment" of these export obligations: when "75% or more of the specific export obligation and 100% of Average Export Obligation till date" are met within half of the required period, the "remaining export obligation shall be condoned".[227]

7.140. As part of the process to apply for EPCG authorisation, applicants must provide a certification by a chartered engineer of the "nexus" between the capital goods to be imported and the manufacture of products for export[228], certifying that the capital goods in question are "required" to manufacture specified "export product(s)".[229]

7.141. Once authorisation is granted, participants' compliance with their export obligations is subject to regular monitoring.[230] Half of the specific export obligation must be fulfilled during the first four years[231], failing which an enterprise must pay customs duties corresponding to the unfulfilled export obligation.[232] Failure to meet the export obligations or to comply with any other applicable requirements may result in penal action.[233]

7.142. The stated objectives of the EPCG Scheme are to "facilitate import of capital goods for producing quality goods and services and enhance India's manufacturing competitiveness".[234]

7.5.3 Special Economic Zones Scheme

7.143. India's SEZ Act and SEZ Rules, as amended[235], are the two main legal instruments setting forth the framework for the SEZ Scheme. The SEZ Act "provide[s] for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto".[236] Among other things, the SEZ Act and SEZ Rules regulate the bodies charged with approving and administering SEZs, and set forth the procedures for establishing SEZs, provisions on the operation of SEZs, special fiscal provisions for SEZs, and the conditions applying to those special provisions.

7.144. India has submitted that an SEZ is a "distinct"[237] "geographical region which provides for more liberal economic measures to be applicable to the Units set up within it, as compared to the rest of India".[238] Further, India has pointed out that the SEZ Act defines the "domestic tariff area" (DTA) as the whole of India excluding SEZs, and that "export" for purposes of the SEZ Act includes not only "the taking of goods … out of India, from a[n SEZ]" and the supply of goods between different Units[239] within an SEZ, but also the supply of goods from the DTA to a Unit or developer[240] within an SEZ.[241]

7.145. Of the special fiscal provisions applying to SEZs[242], the following are at issue in this dispute:

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[227] Section 5.09 of the FTP.
[228] Section 5.03(a) of the HBP.
[229] Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 5A ("Format of Chartered Engineer Certificate for Nexus under EPCG Scheme"). Similarly, the authorization holder must submit a certificate from the customs authority or a chartered engineer confirming the installation of the imported capital good at the premises of the authorization holder. (Section 5.04(a) of the HBP).
[230] Section 5.15 of the HBP.
[231] Section 5.14(a) of the HBP.
[232] Section 5.14(c) of the HBP.
[233] Section 5.26 of the HBP.
[234] Section 5.00 of the FTP.
[235] SEZ Rules, (Exhibit USA-28), incorporating amendments to the SEZ Rules up to July 2010. Subsequent amendments were made to the SEZ Rules on 19 September 2018, (Exhibit USA-60), and on 8 March 2019.
[236] Preamble of the SEZ Act.
[237] India's first written submission, para. 321; request for review, para. 23.
[238] India's first written submission, para. 326; request for review, para. 23. See also Annex A-2, paras. 3.2-3.4.
[239] See para. 7.149 below, defining SEZ "Units".
[240] See para. 7.147 below, defining SEZ "developers".
[241] India's first written submission, para. 326; request for review, para. 23. Sections 2(i) and 2(m) of the SEZ Act. See also Annex A-2, paras. 3.2-3.4.
[242] Set forth in the SEZ Act, SEZ Rules and elsewhere: e.g. fn 244 below.

a. the exemption of "every Developer and … entrepreneur" from customs duties on imports into, and exports from, "a Special Economic Zone or a Unit"[243];

b. the exemption of "all goods … imported by a unit or a developer in the Special Economic Zone" from India's Integrated Goods and Services Tax (IGST)[244]; and

c. the deduction, from the corporate income tax base of an entrepreneur, of the export earnings of the entrepreneur's SEZ Unit.[245]

7.146. These provisions refer to "developers", "entrepreneurs", and "Units", which are the principal economic actors setting up, and operating within, SEZs.

7.147. A "developer" is a person or state government that has been granted a letter of approval to set up an SEZ[246]: developers set up SEZs and develop and maintain their infrastructure.[247]

7.148. An "entrepreneur" is a person who has been granted a letter of approval to set up a Unit and undertake the operations authorized by that letter of approval[248]: entrepreneurs thus set up Units, and manufacture goods and render services through the Unit.[249]

7.149. A "Unit" is defined, somewhat circularly, as "a Unit set up by an entrepreneur in a Special Economic Zone".[250] Units are central to the operation of SEZs, because the manufacturing of goods and rendering of services in SEZs (except those incidental to setting up the SEZ itself) take place within the Units.[251]

7.150. As will be elaborated further in discussing export contingency, Units are required in particular to achieve a positive NFE.[252] Under the SEZ Scheme, NFE is the difference between, on the one hand, FOB value of exports, plus a number of certain other eligible "supplies", and, on the other hand, CIF value of imports, plus the value of goods obtained from certain other sources.[253] Compliance with the positive NFE requirement is subject to monitoring[254], and a Unit's failure to meet the requirement makes the entrepreneur "liable for penal action" and leads to cancellation of the Unit's approval.[255]

7.151. Regarding the scheme's objectives, as noted at the outset, the preamble of the SEZ Act refers to "the promotion of exports and … matters connected therewith or incidental thereto".[256] At the same time, India emphasizes that "the objective of the SEZ Scheme cannot be reduced to the promotion of exports": instead, India explains that the SEZ Act aims to achieve the "overall

[243] *Chapeau* in Section 26(1), Sections 26(1)(a) (for imports) and 26(1)(b) (for exports) of the SEZ Act.
[244] Notification No. 15/2017, (Exhibit USA-27). The United States has described IGST as a multi-stage value added tax, with a rate ranging from 0.25% to 28%. (United States' first written submission, para. 116). India has not contested the United States' description of IGST. See also the Integrated Goods and Services Tax Act, (Exhibits USA-32 and IND-14).
[245] Second Schedule of the SEZ Act.
[246] Subsections 2(g), 3(2)-3(4) and 3(10) of the SEZ Act. Developers and co-developers develop and maintain the necessary infrastructure for an SEZ, but do not engage in any export activity. (India's response to Panel question No. 74).
[247] India's response to Panel question No. 74, p. 58.
[248] Subsections 2(j) and 15(9) of the SEZ Act.
[249] India's response to Panel question No. 75, p. 58.
[250] Subsection 2(zc) of the SEZ Act.
[251] India's responses to Panel questions Nos. 74-75, p. 58. The United States' challenge only relates to the tax exemptions and deductions in question as they relate to Units. Thus, it does not extend to benefits provided to *developers* to set up or maintain the SEZs. (United States' response to Panel question No. 74, para. 119.)
[252] Rule 53 of the SEZ Rules.
[253] Rule 53 of the SEZ Rules.
[254] Rules 22(3) and 54(1) and Form I of the SEZ Rules.
[255] Form G of the SEZ Rules, setting out the letter of approval to be issued pursuant to Rule 19 of the SEZ Rules.
[256] Preamble of the SEZ Act.

economic development of areas within its territorial control[, which] is crucial to the sovereign functions of a country".[257]

7.152. India refers, in particular, to Section 5 of the SEZ Act, which sets forth the considerations that must guide "[t]he Central Government" in discharging its functions under the Act. These considerations are: the "generation of additional economic activity", the "promotion of exports", the "promotion of investment", the "creation of employment opportunities", the "development of infrastructure facilities", and the "maintenance of sovereignty and integrity of India, the security of the State and friendly relations with foreign States".[258]

7.5.4 Duty-Free Imports for Exporters Scheme

7.153. We found that the panel request identified, as a measure, alleged export subsidies provided under Conditions 10, 21, 28, 32, 33, 36, 60, 61, and 101 of Notification No. 50/2017.[259] These are the caps on the rate of import duty set out in line items 104, 229, 288, 312, 313, 327, 430, 431, and 612, respectively, of Notification No. 50/2017.[260]

7.154. The United States refers to these as the duty-free imports for exporters scheme (DFIS).[261] According to India, this measure is not a cohesive scheme, but just "a grouping of individual duty stipulations".[262] Indeed, we note that the nine stipulations at issue are nine individual line items, with their respective Conditions, scattered among more than 600 other customs duty stipulations in Notification No. 50/2017, and they do not appear to coalesce into a cohesive scheme. Nonetheless, India, too, refers to this measure as DFIS[263], and we, too, will refer to the nine duty stipulations that we have found to fall within our terms of reference as "DFIS".

7.155. Each of these nine duty stipulations provides that the import duty for specified goods is capped at zero ("nil"), provided that the corresponding Condition is met.

7.156. The following table lists the challenged line item capping the import duty at zero, and the corresponding duty-exempt goods and Condition number.

[257] India's first written submission, para. 322.
[258] Section 5 of the SEZ Act.
[259] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), para. 2.109.
[260] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.104-2.107 and fns 165 and 171-173; Notification No. 50/2017, (Exhibit USA-36); Excerpts from Notification No. 50/2017, (Exhibit USA-38); and United States' first written submission, para. 146.
[261] E.g. United States' first written submission, para. 140; panel request, p. 3 ("duty-free imports for exporters program").
[262] India's first written submission, para. 382; second written submission, para. 191. See also e.g. Council for Leather Exporters Guidelines, (Exhibit IND-11).
[263] India's first written submission, para. 382; second written submission, para. 191.

Table 1: Line items and Conditions in Notification No. 50/2017 challenged by the United States[264]

Line item	Duty-exempt goods[265]	Condition
104	36 items, or groups of items, used in the processing of sea-food, such as breadcrumbs, flavouring oil, food colours, citric acid, and milk protein	10
229	27 items, or groups of items, for use in the manufacture of handicrafts, such as electric parts, hinges, animal hair materials for brushes, glass sheet, air and electric operated screw driver with hose and couplings, and moisture measuring tools	21
288	Lining and inter-lining materials for use in the manufacture of textile or leather garments	28
312	42 items, or groups of items, for use in the manufacture of leather or synthetic footwear or other leather products, such as buckles, buttons and snap fasteners, elastic tape, lining, adhesives, heels, and fittings	32
313	18 items, or groups of items, for use in the manufacture of handloom, cotton or man-made made-ups, such as lace, elastic tape, tassel, and sewing threads	33
327	Samples of hand knotted carpets	36
430[266]	125 items, or groups of items, for use in the manufacture of commodities in the pharmaceutical and biotechnology sector, such as cell cultivation devices, low temperature freezers, spectrophotometers, centrifuges, x-ray diffraction equipment, automated sampling devices, and gas generators	60(ii)
431	119 items, or groups of items, for research and development in the agro-chemical sector, such as analytical balances, anemometers, centrifuges, dry ice makers, health monitoring equipment, and incubators	61
612	21 items, or groups of items, for use in the manufacture of sports goods, such as butyl bladders for inflatable balls, cork bottoms, table tennis rubber, and stitching thread for inflatable balls or sports gloves	101

7.157. Conditions 10, 21, 28, 32, 33, and 101 require the duty-exempt goods to be imported for use in the manufacture of specified final products for export. Further, they require that the value of the duty-exempt imported goods not exceed a certain percentage, ranging from 1% to 5%, of the FOB value of exports of those same final products during the preceding financial year.

7.158. In contrast, Conditions 36, 60(ii), and 61 do not contain a requirement that duty-exempt goods be used for manufacture in export production. However, similar to the other six conditions just described, they do peg the value of qualifying imports to past exports. Specifically, Condition 36 requires that the total value of duty-exempt imports of samples of carpets not exceed 1% of the FOB value of carpets exported during the previous financial year; whereas Conditions 60(ii) and 61 require that the value of duty-exempt goods not exceed 25% and 1%, respectively, of the FOB value "of exports" during the preceding financial year.

[264] United States' first written submission, para. 146; Notification No. 50/2017, (Exhibit USA-36); and Excerpts from Notification No. 50/2017, (Exhibit USA-38).

[265] Enumerated in the respective line item or in the relevant List in the Annexure to Notification No. 50/2017, (Exhibit USA-36).

[266] Line item 430 includes two components, subject to Conditions 60(i) and 60(ii), respectively. The first exempts from duties goods imported for research and development purposes, subject to fulfilling Condition 60(i), which does not – unlike other conditions – limit the imports that can benefit from duty-free treatment to a certain percentage of past exports. The United States clarified that its challenge does not extend to this first component of line item 430 (United States' comments on India's response to Panel question No. 80, para. 158), which we therefore do not address.

7.159. All nine conditions also require the importer to produce a certificate from the competent export promotion council or, in the case of Conditions 60(ii) and 61, from the Joint Director General of Foreign Trade, stating (a) the value of relevant exports during the preceding financial year, and (b) the value of goods already imported under Notification No. 50/2017 during the current financial year.

7.160. Thus, for most of these duty stipulations, the competent export promotion council is given an important role, satisfying itself as to the accuracy of the data on past exports and on imports made under Notification No. 50/2017 and, on that basis, issuing the certificates that are necessary in order to benefit from zero customs duties under DFIS.[267] In at least one case, the competent export promotion council requires the manufacturer-exporter to certify that the imported items "will not be put to any other use or sold in the market except in the manufacture of Leather Garments for exports", and that it "understand[s] fully that any violation of … Notification … No. 50/2017 … shall be construed as malpractice" and results in liability "to penal and/or any other action" under applicable legislation.[268]

7.5.5 Merchandise Exports from India Scheme

7.161. MEIS provides a "reward" for "exports of notified goods/products … to notified markets".[269] This reward consists of "Duty Credit Scrips", which are paper-based notes that can be used to pay for (i) basic and additional customs duties on the importation of goods[270], (ii) central excise duties on domestically procured goods[271], and (iii) certain other charges and fees owed to the Government, such as basic and additional customs duties owed as a consequence of failing to fulfil one's export obligations under other schemes.[272] Scrips are "freely transferable".[273]

7.162. The value of the scrips that a recipient is entitled to is calculated by multiplying the FOB value of the recipient's exports of a particular ("notified") good to a particular ("notified") destination country market with the applicable "rate(s) of reward" assigned to that good and market.[274]

7.163. "Notified" goods and markets as well as the applicable reward rates are set out in Appendix 3B to the FTP.[275] This Appendix divides export destination countries into three "country groups".[276] It then lists the covered "notified" goods, indicating, for each notified good, the "MEIS reward rate" applying to exports of the good in question to each of the three country groups.[277] For each covered product, it therefore indicates three rates, the choice between the three being determined by the country to which the exports giving rise to the reward were made. Depending on the product and destination country, the reward rates range from 0% to 5%.

7.164. The stated objectives of MEIS are "to provide rewards to exporters to offset infrastructural inefficiencies and associated costs"[278], and specifically "to promote the manufacture and export of notified goods/products".[279]

[267] Notification No. 50/2017, (Exhibit USA-36), Conditions 10, 21, 28, 32, 33, 36, and 101; India's first written submission, para. 390; second written submission, paras. 191-194; opening statement at the meeting of the Panel, para. 110; and Council for Leather Exporters Guidelines, (Exhibit IND-11).

[268] Council for Leather Exporters Guidelines, (Exhibit IND-11), Annexure III, "Specimen of affidavit to be submitted by manufacturer-exporter of leather garments or merchant exporter tied-up with manufacturer exporter for import of lining and interlining materials in terms of serial No. 288 of Customs Notification (Tariff) No. 50/2017 dated 30.06.2017".

[269] Section 3.04 of the FTP.

[270] Section 3.02(i) of the FTP.

[271] Section 3.02(ii) of the FTP.

[272] Sections 3.02(iv) and 3.18 of the FTP.

[273] Section 3.02 of the FTP.

[274] Section 3.04 of the FTP.

[275] Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B.

[276] Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B, table 1.

[277] Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B, table 2.

[278] Section 3.00 of the FTP.

[279] Section 3.03 of the FTP.

7.6 Footnote 1 of the SCM Agreement

7.165. The United States challenges the five sets of measures described in the previous section as prohibited export subsidies under the SCM Agreement. India argues, however, that four of those sets of measures (i.e. those under the EOU/EHTP/BTP Schemes, the EPCG Scheme, DFIS, and MEIS) must be deemed not to be a subsidy, because they meet the conditions of footnote 1 of the SCM Agreement.[280]

7.166. We therefore begin by examining whether these four sets of challenged measures meet the conditions of footnote 1. We first set out the applicable legal standard (section 7.6.1); we then apply it, in turn, to each of the four sets of measures in question, namely, certain exemptions under the EOU/EHTP/BTP Schemes (section 7.6.2), the EPCG Scheme (section 7.6.3), and DFIS (section 7.6.4), and the provision of scrips under MEIS (section 7.6.5).

7.6.1 The applicable legal standard under footnote 1

7.167. Footnote 1 of the SCM Agreement, appended to Article 1, provides that certain measures "shall not be deemed to be a subsidy".

7.168. The footnote has two main parts. The first clause of the footnote directs the interpreter to read the remainder of the footnote "[i]n accordance with the provisions of" the Note to Article XVI of the GATT 1994[281] and of Annexes I to III of the SCM Agreement. The second part of the footnote describes the two groups of measures that "shall not be deemed to be a subsidy", provided they are also in accordance with the Note to Article XVI and Annexes I to III.

7.169. These two groups of measures are (a) "the *exemption* of an exported product from the duties or taxes borne by the like product when destined for domestic consumption"; and (b) "the *remission* of such duties or taxes in amounts *not in excess* of those which have accrued".[282] We understand the difference between these two groups of measures to be that, in the case of exemptions, the duty or tax liability never arises[283], whereas, in the case of remissions, the liability first arises, but is later remitted[284], including by returning the payment if one was already made.[285]

7.170. Thus, the description of these two groups of measures in footnote 1 contains four definitional elements, namely, there must be (1) an exemption or remission (2) of duties or taxes (3) on an exported product, (4) not in excess of the duties and taxes which have accrued.[286]

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[280] Regarding the remaining set of measures, i.e. the alleged subsidies under the SEZ Scheme, see fn 303 below.

[281] The language of footnote 1 includes the full text of the Note.

[282] Footnote 1 of the SCM Agreement. (emphasis added)

[283] The ordinary meaning of "exemption" includes "[t]he action of exempting, or the state of being exempted (see exempt v. 4) from a liability, obligation, penalty, law, or authority" and, in turn, the ordinary meaning of the verb "exempt" includes "[t]o grant to (a person, etc.) immunity or freedom *from* a liability to which others are subject: a. from (the payment of) a fine, tax, etc". (Oxford Dictionaries online, definition of "exemption", *n.*, meaning 2.a, https://www.oed.com/view/Entry/66070?redirectedFrom=exemption#eid (accessed 7 June 2019), and "exempt", *v.*, meaning 4.a, https://www.oed.com/view/Entry/66066?rskey=p32DCg&result=2&isAdvanced=false#eid (accessed 5 June 2019)).

[284] The ordinary meaning of "remission" includes "[r]elease from the obligation of a debt or payment", and "[t]he cancellation or reduction of a debt, payment, etc.". (Oxford Dictionaries online, definition of "remission", *n.*, meanings 3.a, 4.a., https://www.oed.com/view/Entry/162216?redirectedFrom=remission#eid (accessed 7 June 2019)).

[285] The Panel in *EU – PET (Pakistan)* did not find there to be a need, in that case, to precisely demarcate the line between the two categories of measures covered by the footnote, observing:

> Although the two situations described in footnote 1 may be related, we see no reason why the issues at stake in this dispute cannot be effectively resolved with particular reference to the second.

(Panel Report, *EU – PET (Pakistan)*, fn 93.)

As noted in fn 286 below, Annexes I(g), I(h), and I(i), together with the definitions in footnote 58, do not emphasize the distinction between the two categories of measures.

[286] In footnote 1, the "not in excess" language appears only in the clause relating to remissions, and it is indeed difficult to conceive of an exemption from more than what one would be liable for in the absence of the

7.171. Footnote 1 also provides that the footnote must be read in accordance with the Note to Article XVI of the GATT 1994 and Annexes I to III of the SCM Agreement. As has already been observed, "the words 'in accordance with' in footnote 1 may be understood as implying that footnote 1 is to be read 'in agreement', 'in conformity', or 'in harmony' with all of the provisions referred to therein".[287] That is, footnote 1, the *Ad* Note, and the Annexes must be read together.

7.172. The text of the Note to Article XVI is repeated in its entirety in footnote 1 itself. Therefore, the cross-reference to that provision does not add to the text of the footnote; however, it reminds the interpreter that Article XVI of the GATT 1994 forms part of the context of footnote 1.

7.173. Annex I contains the illustrative list of export subsidies. Items (g), (h), and (i) list, as export subsidies, the exemption, remission, deferral, or drawback of certain indirect taxes and import charges on exported products, in certain defined circumstances.[288] Because footnote 1 must be read in accordance with Annex I, a measure falling within the definition of any of items (g), (h), or (i) would not benefit from the shelter of footnote 1.

7.174. Thus, item (g) identifies as a prohibited export subsidy:

> The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.[289]

7.175. As a result, to meet the conditions of footnote 1, any exemption or remission of "indirect taxes" "in respect of the production and distribution of exported products" must not be "in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption", as it would otherwise not be "in accordance with" Annex I(g).

7.176. Turning to item (h), this identifies as a prohibited export subsidy the exemption, remission, or deferral of prior-stage cumulative indirect taxes on goods and services used in the production of exported products, when the same is in excess of the exemption, remission or deferral of "like … taxes" on goods and services used in the production of like products destined for domestic consumption. As a result, such an exemption would not benefit from the shelter of footnote 1, because it would not be "in accordance with" Annex I(h).

7.177. At the same time, Annex I(h) carves out from that prohibited export subsidy the situation in which the "exemption, remission or deferral" relates to "prior-stage cumulative indirect taxes … levied on *inputs that are consumed in the production* of the exported product (making normal allowance for waste)".[290] As a result, an exemption, remission, or deferral that complies with this condition, and is otherwise in accordance with footnote 1, is not deemed to be a subsidy.

7.178. Similarly, under footnote 1 read together with Annex I(i), for a "remission or drawback" (which "includes … exemption or deferral"[291]) of import charges to benefit from the shelter of footnote 1, such remission or drawback must not be "in excess of [import charges] levied on *imported inputs that are consumed in the production* of the exported product".[292]

7.179. Further, footnote 58, which is appended to each of Annexes I(g), I(h), and I(i), elaborates on the scope of the terms "remission", and "remission or drawback", as well as providing definitions for the types of duties and taxes referred to in Annexes I(g), I(h), and I(i). When

exemption. At the same time, Annexes I(g), I(h), and I(i), invoked by India in this dispute, set out clauses that refer to two or more of exemptions, remissions, deferrals and drawbacks, together; further footnote 58 explains that "'[r]emission' of taxes includes the refund or rebate of taxes", and "'[r]emission or drawback' includes the full or partial exemption or deferral of import charges"; in line with this, while noting the distinction between exemptions and remissions, we do not emphasize it further in this outline of the legal standard.

[287] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.105.

[288] Items (e) and (f), which have not been invoked in this case, relate instead to the exemption or remission of *direct* taxes and deductions from the base from which to calculate such taxes.

[289] Fn omitted.

[290] Annex I(h) of the SCM Agreement. (emphasis added)

[291] Footnote 58 of the SCM Agreement.

[292] Annex I(i) of the SCM Agreement. (emphasis added)

Annexes I(g), I(h), and I(i) are read together with footnote 58, each of these covers both remissions and exemptions.[293]

7.180. Thus, to summarize, when footnote 1 is read together with Annexes I(g), I(h), and I(i), each of these paragraphs of Annex I first identifies the nature of the remission or exemption at issue[294], and then sets forth a requirement that the remission or exemption not exceed the benchmark set out in the item in question.

7.181. Next, footnote 1 must also be read "in accordance with" Annex II to the SCM Agreement. Annex II sets forth "Guidelines on Consumption of Inputs in the Production Process". As Annex II itself recalls, both items (h) and (i) in Annex I refer to "inputs that are consumed in the production of the exported product"[295], and the Guidelines in Annex II relate to the examination, for that purpose, of "whether inputs are consumed in the production of the exported product".[296]

7.182. Part II of these Guidelines is expressly directed at this examination "as part of a countervailing duty investigation".[297] This, however, does not make Annex II irrelevant outside the context of countervailing duty investigations. While some of the provisions in this Annex (such as those envisaging that the investigating authority carry out "certain practical tests") are not directly applicable outside the context of countervailing duty investigations, Annex II helps inform the understanding of footnote 1 also beyond the context of countervailing duty investigations.

7.183. Footnote 61, appended to Annex II, defines "inputs that are consumed in the production of the exported product", providing that:

> Inputs consumed in the production process are *inputs physically incorporated*, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.[298]

7.184. Annex II(II)(3) provides further guidance on the interpretation of this phrase, by stipulating that:

> Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are *physically present in the product exported*. The Members note that an input need not be present in the final product in the same form in which it entered the production process.[299]

7.185. Finally, footnote 1 refers to Annex III to the SCM Agreement. Annex III sets forth guidelines for the examination of "substitution drawback systems", which are a particular type of drawback system envisaged in Annex I(i). While the present dispute does not concern the issue of substitution drawback systems, Annex III, too, informs the understanding of footnote 1 of the SCM Agreement.[300]

7.186. In reading footnote 1 together with the provisions of the Annexes that are directly relevant in this case, we therefore identify four steps for our analysis of whether the measures in question meet the conditions of footnote 1. We summarize these steps in the table below.

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[293] In light of footnote 58, Annex I(g) includes the exemption, remission, refund, or rebate of indirect taxes; Annex I(h) includes the exemption, remission, deferral, refund, or rebate of prior-stage cumulative indirect taxes; and Annex I(i) includes the remission, drawback, exemption, or deferral of import charges.

[294] It does so through elements that are parallel to those we have identified as elements 1 to 3 in para. 7.170 above. In particular, each of Annexes I(g), I(h), and I(i) identifies the type of duties or taxes concerned (which we have referred to as element 2) and clarifies the required relationship to the exported product (which we have referred to as element 3).

[295] Annex II(I)(2) of the SCM Agreement.

[296] *Chapeau* of Annex II(II) of the SCM Agreement.

[297] *Chapeau* of Annex II(II) of the SCM Agreement.

[298] Emphasis added.

[299] Emphasis added.

[300] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.111 and fn 246.

Table 2: Steps in the Panel's analysis under footnote 1 and Annexes I(g), I(h), and I(i)

	Footnote 1	Annex I(g)	Annex I(h)	Annex I(i)
(1)	Exemption or remission	Exemption or remission, including (footnote 58) refund or rebate	Exemption, remission, or deferral, including (footnote 58) refund or rebate	Remission or drawback, including (footnote 58) full or partial exemption or deferral
(2)	of duties or taxes	of indirect taxes (defined in footnote 58)	of prior-stage cumulative indirect taxes (defined in footnote 58)	of import charges (defined in footnote 58)
(3)	on an exported product	in respect of the production and distribution of exported products	on inputs that are consumed in the production of the exported product (defined in footnote 61; see also Annex II)	on imported inputs that are consumed in the production of the exported product (defined in footnote 61; see also Annex II)
(4)	not in excess of the duties and taxes which have accrued	not in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption	(not in excess of those) levied on those inputs[301]	not in excess of those levied on those inputs (or on substitute inputs in case of substitution drawback, on which see Annex III)[302]

7.187. As with any framework for analysis, we are mindful that these steps are not isolated from each other, and that each measure must be viewed as a whole in assessing its consistency with footnote 1.

7.188. With this in mind, we now turn to examine whether the four measures at issue meet the conditions of footnote 1, read together with the relevant Annexes to the SCM Agreement. To recall, if they do, they are "not … deemed to be a subsidy".[303]

7.6.2 Whether the Export Oriented Units and Sector-Specific Schemes meet the conditions of footnote 1

7.189. India argues that the exemptions from customs and excise duties under the EOU/EHTP/BTP Schemes meet the conditions of footnote 1 of the SCM Agreement.[304] Specifically,

[301] Annex II(I)(2) describes this requirement as not "in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product".

[302] Annex II(I)(2) describes this requirement as not "in excess of those actually levied on inputs that are consumed in the production of the exported product".

[303] Thus, when all the relevant conditions are met, footnote 1 excludes a measure from the definition of a subsidy, and therefore from the application of the prohibition on export subsidies in Article 3 of the SCM Agreement. It therefore acts, *vis-à-vis* Article 3, as an excluding provision. We have discussed excluding provisions in paras. 7.7-7.12 above. We allocate the burdens under footnote 1 accordingly.

We note that for the SEZ Scheme, neither party has raised footnote 1 of the SCM Agreement. For this scheme, India chose not to address at all the United States' arguments on the existence of a subsidy under Article 1 (on the basis that the United States had not established export contingency), and did not raise footnote 1 of the SCM Agreement in this context. India's first written submission, para. 329; second written submission, paras. 187-189. In response to a question from the Panel, India confirmed its choice not to address the question of the existence of a subsidy; in response to another question, India "accept[ed] its burden of raising footnote 1." India's responses to Panel questions Nos. 64 and 90. In these circumstances, the Panel does not consider it appropriate to examine the applicability of footnote 1 to the SEZ Scheme.

[304] We limit our examination to the exemptions from customs and excise duties under the EOU/EHTP/BTP Schemes. In its first and second written submissions, the United States only articulated a challenge with respect to these exemptions. (United States' first written submission, paras. 38, 40-41, 44, and 46; second written submission, paras. 79 and 92). It did not articulate a challenge in respect of the exemptions from IGST and compensation cess, despite mentioning compensation cess in its introductory overview of the measures. (United States' first written submission, para. 37). Only after its second written submission did the United States refer also to the exemptions from IGST and compensation cess in its arguments on the merits. (United States' opening statement at the meeting of the Panel, para. 10; response to Panel question No. 48, paras. 75 and 77-78).

according to India, the exemption from customs duties meets the conditions of footnote 1 read together with Annex I(i)[305] or, alternatively, with Annex I(g).[306] And the exemption from central excise duties meets the conditions of footnote 1 read together with Annex I(h).[307] We examine these in turn.

7.6.2.1 Whether the customs duty exemption meets the conditions of footnote 1 read together with Annex I(i)

7.190. We begin by examining whether the exemption from customs duties meets the conditions of footnote 1 read together with and Annex I(i) of the SCM Agreement.

7.191. We recall our discussion of the legal standard under footnote 1 and the relevant Annexes in the previous section. In accordance with that discussion, to ascertain whether the challenged customs duty exemption under the EOU/EHTP/BPT Schemes is not "deemed to be a subsidy" by virtue of footnote 1 together with Annex I(i), we will examine whether the exemption constitutes:

(1) a remission, drawback, exemption or deferral;

(2) of import charges;

(3) on imported inputs that are consumed in the production of the exported product;

(4) not in excess of those levied on those inputs.[308]

7.192. It is not disputed that the customs duty exemption under the EOU/EHTP/BTP Schemes constitutes (1) an exemption or remission[309] (2) of import charges.[310]

We note that the Panel's Working Procedures and timetable envisaged a single substantive meeting, after the filing of the first and second written submissions; and, as a result of this, the Panel's Working Procedures required the parties to present the facts of the case and their arguments in their first written submission. (Working Procedures (Annex A-1), para. 3(1)(a)). We further note that the United States requested, and insisted on, proceedings with a single substantive meeting, or even with no substantive meeting at all, despite India's opposition; and throughout the proceedings, the United States insisted that the Panel hold a single substantive meeting. Considering all these circumstances together, we see no reason to allow a departure from the requirement in the Panel's Working Procedures that each party articulate its *prima facie case* in the first written submission, by allowing the United States to pursue new elements of the challenged measures at the stage of the single substantive meeting, after the filing of both the first and second written submissions. Further, pursuant to the revised FTP which came into force on 5 December 2017, the exemption from IGST and compensation cess only applied through the end of March 2018. (Section 6.01(d)(ii) of the FTP). For these reasons, we will not consider further the United States' arguments concerning the exemptions from IGST and compensation cess.

[305] India's first written submission, paras. 197-202 and 210-211; second written submission, para. 79; and opening statement at the meeting of the Panel, para. 57.

[306] India's first written submission, paras. 206-209.

[307] India's first written submission, paras. 203-205; second written submission, para. 79; and opening statement at the meeting of the Panel, para. 57.

[308] Schemes meeting the first three conditions, but allowing for excess remission, have been found to be a subsidy only to the extent of the excess remission. (Appellate Body Report, *EU – PET (Pakistan)*, para. 5.134).

[309] In answering a question from the Panel, India described the schemes as providing for the remission of, rather than exemption from, duties or taxes. (India's response to Panel question No. 46, first and second para.). The Panel recalls its understanding that in the case of an exemption, the duty or tax liability does not arise, whereas in the case of a remission, the liability first arises, but is later remitted, including by returning the payment if one was already made. (See para. 7.169 above). Under the challenged schemes, India itself has explained that importation is duty-free, and liability for the customs duties only arises if ultimately the goods are sold in the domestic tariff area. (See e.g. India's second written submission, para. 75). Therefore, the Panel considers that the schemes are properly characterized as providing for the *exemption* from duties, rather than for the remission of duties.

[310] The exemption is set forth in Section 6.01(d)(ii) of the HBP. The United States described the exemption and the relevant import charges in its first written submission, paras. 37-40 and its response to Panel question No. 48, para. 76. India's reliance on footnote 1 and Annex I(i) is premised on the position that the relevant aspect of the EOU/EHTP/BTP Schemes sets out exemptions from import charges. (India's first

7.193. Regarding the third element set out above, India argues that the customs duty exemption for goods imported under the EOU/EHTP/BTP Schemes is only available for "approved activities", which are limited to the production of goods (or services) for export. Therefore, according to India, the exemption is limited to inputs consumed in the production of exported products and thus meets the conditions of footnote 1 read together with Annex I(i).[311] India adds that in the limited circumstances in which sales to the domestic tariff area are permitted, such sales "are subject to payment of duties as well as reversal of customs duties", which are "aggregated on the basis of [Standard Input Output Norms] or other norms established by the Norms Committee, to ensure that the amounts to be reversed are the amounts that were actually due".[312]

7.194. However, the United States argues that the schemes do not meet the third element set out above. According to the United States, the EOU/EHTP/BTP Schemes are not at all designed to ensure, and do not ensure, that the duty-free treatment is afforded only to inputs "consumed in the export production process", as required by footnote 1 with Annex I(i).[313]

7.195. The United States articulates a number of ways in which, in its view, the EOU/EHTP/BTP Schemes fail to limit the import duty exemption to inputs consumed in the production of exported products. In particular, first, the United States argues that the schemes make the exemption available for the importation of goods whose very nature means that they do not constitute inputs consumed in the production of products. According to the United States, this is the case of capital goods[314] and of certain other goods named in the applicable legal instruments.[315] Second (and related to the previous point), the United States points out that the schemes also make the exemption available for the importation of "any other items", with no requirement that such items be inputs consumed in the production of exported products.[316] Third, the schemes also exempt from customs duties the importation of "certain specified goods for creating a central facility"; according to the United States, this means that those goods are not intended (and not required) to be consumed in the production of exported products.[317] We examine these arguments, and India's response, in turn.[318]

written submission, paras. 197-202 and 210-211; second written submission, paras. 69-79; and opening statement at the meeting of the Panel, paras. 51-57).

[311] India's first written submission, para. 198; second written submission, para. 73; and responses to Panel questions Nos. 43, 44, and 45, pp. 34-36.

[312] India's second written submission, para. 75. See also e.g. opening statement at the meeting of the Panel, paras. 53-57.

[313] United States' second written submission, para. 82. See also ibid. paras. 67, 81-86, and 59; opening statement at the meeting of the Panel, paras. 48 and 49; closing statement at the meeting of the Panel, para. 3; response to Panel question No. 40, para. 57; and comments on India's response to Panel question No. 43, para. 94.

[314] United States' second written submission, paras. 83-86; response to Panel question No. 40, para. 57.

[315] United States' response to Panel question No. 40, para. 57. See also response to Panel question No. 39, para. 56.

[316] United States' response to Panel question No. 40, para. 58; comments on India's response to Panel question No. 43, para. 98.

[317] United States' second written submission, para. 89; response to Panel question No. 40, para. 59; comments on India's response to Panel question No. 43, para. 97; and Section 6.01(f) of the FTP.

The United States also argues that the requirement, in the schemes, that imported goods shall be "utilized" for export production "is not equivalent to requiring them to be 'consumed in' the exported product". (United States' response to Panel question No. 40, paras. 61 and 63; second written submission, paras. 82-86; comments on India's response to Panel question No. 43, para. 95; and Section 6.01(d)(i) of the FTP). We do not consider that WTO law prescribes the specific terminology that Members must use in implementing their WTO obligations in domestic legal instruments. Therefore, we do not consider that the use of the word "utilized" in the challenged schemes, in itself, demonstrates an inconsistency with footnote 1 read together with Annex I(i).

[318] We note that India also argues that the United States has failed to establish the fourth element, that is, the existence and degree of an excess exemption. However, the United States explains that this response from India misses the point, because "[b]efore reaching the question of whether a remission was in excess of the import charges levied, one must first determine whether, as part of the drawback scheme, imported inputs were consumed in the production of an exported product". (United States' second written submission, para. 82). We agree with the United States that the question whether the duty-exempt goods are at all inputs consumed in the production of the exported product (third element) is one that precedes the question of *excess* remission (fourth element). We find, below, that the third element is not met.

7.6.2.1.1 The nature of certain goods covered by the exemptions

7.196. The parties disagree on whether a number of goods whose importation is exempt from customs duties under the EOU/EHTP/BTP Schemes are inputs consumed in the production of an exported product, in accordance with footnote 1 read together with Annex I(i).

7.197. The FTP provides that EOU/EHTP/BTP Units may import without payment of customs duties "all types of goods, including capital goods, required for its activities"[319], and sets forth the following definition of capital goods:

> "Capital Goods" means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological up-gradation or expansion. It includes packaging machinery and equipment, refrigeration equipment, power generating sets, machine tools, equipment and instruments for testing, research and development, quality and pollution control.[320]

7.198. The HBP contains a more detailed, non-exhaustive listing of goods "permitted to be imported" (or procured from the domestic tariff area).[321] This list includes a large number of items that the HBP itself labels as "capital goods", including for example diesel generator sets, captive power plants, modular office furniture, and many others[322], as well as "[r]aw materials for making capital goods for use within unit".[323] In addition, the list includes "other[]" items such as, for example, prototypes, drawings, and office equipment including multi-line telephone systems, fax machines, and servers.[324]

7.199. The SCM Agreement, at footnote 61, defines inputs consumed in the production process as comprising three categories of goods, as follows:

> Inputs consumed in the production process *are* [1] inputs physically incorporated, [2] energy, fuels and oil used in the production process and [3] catalysts which are consumed in the course of their use to obtain the exported product.[325]

7.200. The structure of the sentence, with the phrase "inputs consumed in the production process", followed by the verb "are", followed in turn by the three categories of goods, conveys that the three listed categories *exhaust* the scope of "inputs consumed in the production process".

7.201. As regards "inputs physically incorporated", Annex II(II)(3) further provides that "[i]nvestigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported", even in a different form.

7.202. As defined in the legislation governing the EOU/EHTP/BTP Schemes, capital goods are "plant, machinery, equipment or accessories", which are "required for manufacture or production, either directly or indirectly".[326] These include, according to the same legislation, packaging

[319] Section 6.01(d)(i) of the FTP.
[320] Section 9.08 of the FTP.
[321] Section 6.04 of the HBP.
[322] Section 6.04(b) of the HBP. There is some divergence on whether certain goods are capital goods. For example, the HBP lists office furniture as a capital good, whereas the United States has submitted that office furniture is not a capital good. (Section 6.04(b) of the HBP; United States' response to Panel question No. 39, para. 56). This divergent characterization extends to other items benefiting from duty exemptions, such as security systems, projectors, and data transmission cables. (Section 6.04(b) of the HBP; United States' responses to Panel questions Nos. 39-40, paras. 56-57). For purposes of WTO law, however, the relevant question is not whether the goods are capital goods, but whether they are inputs consumed in the production of the exported product.
[323] Section 6.04(c) of the HBP.
[324] Section 6.04(d) of the HBP.
[325] Emphasis added.
[326] See paras. 7.197-7.198 above. This definition is consistent with a widely shared notion of capital goods as tangible and durable assets, such as buildings, machinery, equipment, vehicles and tools, used to produce goods or services. For example, dictionary definitions include "the buildings, machines, and equipment

machinery, power generating sets, testing equipment, fork lifts, and many others. By their very nature, these goods are not "physically incorporated" in the goods or services they are used to produce, as envisaged in footnote 61, nor are they "physically present", even in a different form, in the final product, as envisaged in Annex II(II)(3). Capital goods also do not fall under any of the other listed categories in footnote 61, because they are not energy, fuels, oil, or catalysts.

7.203. Similarly, certain other items expressly listed in Section 6.04 of the HBP are not energy, fuels, oil, or catalysts, and are also not of a nature as to be "physically incorporated" in the product they are used to produce.[327]

7.204. On this basis, we reach the preliminary conclusion that capital goods as defined in the FTP, and certain other goods the importation of which is free of customs duties under the EOU/EHTP/BTP Schemes, are not "inputs consumed in the production of the exported product", for purposes of Annex I(i). India however makes a number of contrary arguments, which we now turn to consider.

7.205. Regarding capital goods, India argues that they fall within the definition of inputs consumed in the production of the exported product, within the meaning of Annex I(i).[328]

7.206. First, India argues that imported capital goods are inputs within the meaning of Annex I(i) because they "contribute to the cost of the final exported product".[329] India notes that a duty drawback scheme is meant to offset the cost impact of import duties on inputs incorporated in exported products. According to India, since capital goods contribute to the final cost of the exported product, capital goods must therefore fall within the meaning of inputs covered by Annex I(i) with footnotes 1 and 61.

7.207. However, footnote 1 with Annex I(i) only allows for the exemption from customs duties on "inputs that are consumed in the production of the exported product". Contributing to a product's cost is not the same as being "consumed" in the production of that product. Indeed, under the definition provided by footnote 61, whether goods are "consumed" does not depend on whether they contribute to the cost of the final product.

7.208. Second, India notes that the EOU/EHTP/BTP Schemes set forth depreciation rates for computers, computer peripherals, and other capital goods. According to India, this shows that the schemes "calculate[] the manner in which capital goods are 'physically incorporated' in the production process of exported products".[330]

7.209. Depreciation is an accounting method for allocating the cost of a tangible asset over its useful life and accounts for the asset's decline in value.[331] Depreciation rules reflect the notion that capital goods are durable assets for repeated use in the production of other goods. The value of

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that are used to produce products or provide services", and "economic goods (e.g. railways, ships, machinery, buildings) destined for use in production (as opposed to *consumers' goods*)". (Cambridge dictionary online, definition of "capital goods", https://dictionary.cambridge.org/us/dictionary/english/capital-goods (accessed 1 February 2019); Oxford English Dictionary online, definition of "capital goods" in capital, *adj*. and *n*., S3, http://www.oed.com/view/Entry/27450?redirectedFrom=capital+goods#eid216882892 (accessed 16 April 2019) (emphasis original)).

[327] E.g. "[r]aw materials for making capital goods for use within unit", and prototypes. See para. 7.198 above.

[328] India's first written submission, para. 199; second written submission, paras. 49-55.

[329] India's first written submission, para. 199.

[330] India's first written submission, para. 201. See also ibid. para. 200; second written submission, paras. 53-54 and 78; and Section 6.37 of the HBP.

[331] Depreciation is defined as "the amount by which something, such as a piece of equipment, is reduced in value in a company's financial accounts, over the period of time it has been in use. The loss in value reduces a company's profits, and the amount of tax it must pay", and "fall in the market value of an (*esp.* durable) asset, brought about by age, wear and tear, etc.; a conventional allowance made for this in balance sheets, etc.". (Cambridge dictionary online, definition of "depreciation", https://dictionary.cambridge.org/us/dictionary/english/depreciation (accessed 1 February 2019); Oxford dictionary online, definition of "depreciation" https://www.oed.com/view/Entry/50423?redirectedFrom=depreciation#eid (accessed 11 June 2019)).

capital goods decreases during their life cycle as reflected in the depreciation rates.[332] However, the fact that a good depreciates in value does not mean that it is "physically incorporated" into another product, nor does the existence of depreciation *rules* evidence *physical incorporation*. In fact, the very reason why depreciation rules are necessary is precisely that capital goods are not consumed in the production process − i.e. the opposite of India's argument. We therefore reject India's arguments based on the use of depreciation rules.

7.210. Third, India notes that footnote 61 of the SCM Agreement, which defines inputs consumed in the production process, includes in that definition catalysts, which undergo no permanent chemical change. According to India, it would therefore be "counter-intuitive" not to include in the same definition capital goods, which depreciate over time and use.[333]

7.211. However, as noted above, footnote 61 sets forth an exhaustive definition of inputs consumed in the production process, and not merely an illustrative list of such inputs. In setting forth the three categories of goods that are "inputs consumed in the production process", the drafters explicitly chose to list catalysts *in addition to* inputs that are physically incorporated[334], and *not* capital goods.[335, 336] Thus, the fact that catalysts are listed in footnote 61 does not overcome the fact that capital goods are not.

7.212. Fourth, India argues that to establish that the duty-exempt goods are not inputs consumed in the production of the exported product, the United States must provide "a technical, data-driven analysis", in accordance with Annex II of the SCM Agreement.[337] India has also argued that to satisfy this burden, the United States must carry out a countervailing duty investigation.[338] India presents this as a cross-cutting argument, pertaining to the legal interpretation of footnote 1 and Annex II[339], and therefore valid also for the EPCG Scheme, MEIS, and DFIS.[340]

7.213. Annex II sets out "guidelines on consumption of inputs in the production process", for purposes of Annexes I(h) and I(i). As set out at paragraphs 7.181-7.184, footnote 1 must be read "in accordance with" Annex II.

7.214. However, India errs in the manner in which it seeks to rely on Annex II. First, the issue before us is whether the goods that can be imported duty-free under the EOU/EHTP/BTP Schemes are of a kind that can even qualify as inputs consumed in the production of an exported product. That is, we are faced with the threshold question of whether footnote 1 applies to the schemes at issue, and in particular with what we have described as the third element in the test under

[332] For example, the depreciation rates for "other capital goods" in the EOU/EHTP/BTP Schemes are: 4% for every quarter in first year, 3% for every quarter in second and third year, 2.5% for every quarter in fourth and fifth year, 2% for every quarter thereafter. (Section 6.37(b) of the HBP).

[333] India's second written submission, para. 54.

[334] We note that contrary to India's argument, nothing in footnote 61 suggests that catalysts are considered to be "physically incorporated" in the exported product.

[335] The Tokyo Round precursors to Annexes I(i) and I(h) of the SCM Agreement referred to "goods that are physically incorporated". During the Uruguay Round negotiations, proposals were made to replace the "physical incorporation test" and include goods, inputs or "auxiliary materials" not physically incorporated, such as capital goods, energy, and fuel. Ultimately, the drafters replaced the references in the Illustrative List to goods "physically incorporated" with "inputs that are consumed in the production of the exported product", and introduced footnote 61 to define "inputs consumed in the production process" as including not only physically incorporated inputs but also energy, fuels, oil, and catalysts. They did not however include capital goods in this definition.

[336] In their arguments, India and the United States also point to the discussions among WTO Members on the definition of "inputs consumed in the production process", including concerning the treatment of capital goods. (India's second written submission, fns 7 and 52; United States' opening statement at the meeting of the Panel, paras. 43-46). These discussions took place as part of the work on Implementation-Related Issues and Concerns as well as in the context of the Negotiating Group on Rules. These discussions, however, evidence the different points of view of various Members, and not the common understanding of WTO Members concerning the inclusion of capital goods in the definition of "inputs consumed in the production process".

[337] India's second written submission, para. 72. See also India's first written submission, paras. 131-134 and 201; second written submission, para. 39; opening statement at the meeting of the Panel, paras. 46-47; and comments on the United States' response to Panel question No. 36, fifth para.

[338] E.g. India's second written submission, para. 39; comments on the United States' response to Panel question No. 36, fifth para.

[339] E.g. India's first written submission, paras. 131-134.

[340] Our observations in paras. 7.213-7.215 also apply to these three other schemes.

footnote 1. Instead, the "quantitative analysis of the amounts and prices of the inputs consumed"[341] proposed by India *presupposes* (through the reference to "inputs consumed") the existence of a scheme that meets the first three elements of the test under footnote 1, and it asks: is there excess remission and, if so, in what amount (fourth element)?

7.215. Second, Annex II(II) does not stand for the proposition, put forward by India, that "any contention regarding whether or in what quantity inputs are 'consumed' … in a duty drawback … scheme is to be examined by an investigating authority".[342] It is true that Part II of Annex II is expressly addressed to "investigating authorities" "as part of a countervailing duty investigation".[343] This provision could apply, therefore, in the context of a countervailing duty investigation conducted pursuant to Part V of the SCM Agreement. However, this does not mean that a complainant is obliged to carry out a countervailing duty investigation before it can challenge a measure that might fall under Annex II. While footnote 35 of the SCM Agreement makes it clear that the provisions of Part II and III "may" be invoked in parallel with the provisions of Part V, there is no suggestion that Parts II and V *must* always be invoked in parallel.

7.216. Therefore, India has not rebutted the United States' showing that the EOU/EHTP/BTP Schemes exempt from customs duties inputs that are not consumed in the production of the exported products, namely, capital goods and certain other goods listed in Section 6.04 of the HBP that, like capital goods, are not energy, fuels and oil, catalysts, or inputs physically incorporated in the exported product. Therefore, this duty exemption does not meet the conditions of footnote 1 read together with Annex I(i) to the SCM Agreement.

7.6.2.1.2 "Any other items"

7.217. In addition, we recall that the schemes also allow the exemption from customs duties, upon application, for the importation of "[a]ny other item[]" not expressly listed in Section 6.04 of the HBP.[344] The United States argues that this too evidences that the duty exemption is not limited to inputs consumed in the production of exported products.[345] India responds that the competent authority has the discretion to dismiss applications and the United States had not demonstrated that it would not use that discretion to dismiss applications not meeting the requirements of footnote 1.[346]

7.218. We have found that the FTP and HBP expressly provide for the duty-free importation of items that do not qualify as inputs consumed in the production of an exported product, and we are therefore not persuaded by India's response. We also note that the letter of permission relied on by India provides that "[i]mport/local purchase of all items except those listed in prohibited list for import/export will be permitted".[347] As a result, we are not persuaded that under the challenged schemes, the competent authority would dismiss applications that are not compliant with footnote 1. Therefore, the schemes fail to meet the conditions of footnote 1 and Annex I(i) also to the extent that the competent authority approves the duty-free importation of other items that are not inputs consumed in the production of the exported product.

7.6.2.1.3 Goods imported "for creating a central facility"

7.219. The EOU/EHTP/BTP Schemes, under Section 6.01(f) of the FTP, also exempt from customs duties the importation of "certain specified goods for creating a central facility". According to the

[341] India's second written submission, para. 39.
[342] India's second written submission, para. 39.
[343] *Chapeau* of Annex II(II) of the SCM Agreement.
[344] Section 6.04(f) of the HBP.
[345] United States' response to Panel question No. 40, para. 58; comments on India's response to Panel question No. 43, para. 98.
[346] India's comments on United States' response to Panel question No. 40, first para. (referring to Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D "Format for Letter of Permission").
[347] Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D "Format for Letter of Permission". India submitted copies of issued letters of permission for illustration. (Letter dated 16 March 2017 from the GOI to an enterprise to be set up as EOU, (Exhibit IND-21)). These copies contain the same clause as foreseen in the template letter. Neither the template, nor the actual letters indicate that "any other items" under Section 6.04(f) may not pertain to goods other than "imported inputs that are consumed in the production of the exported product".

United States, this provides further evidence that the schemes exempt from customs duties goods other than inputs consumed in the production of an exported product, and that therefore they do not meet the conditions of footnote 1 read together with Annex I(i).[348]

7.220. We recall however that the United States only challenges the exemptions under Section 6.01(d), and not the exemption set forth in Section 6.01(f).[349] We therefore do not consider this argument to be relevant to our analysis of the challenged exemptions.

7.6.2.2 Whether the customs duty exemption meets the conditions of footnote 1 read together with Annex I(g)

7.221. We now examine whether the challenged customs duty exemption under the EOU/EHTP/BTP Schemes meets the conditions of footnote 1 read together with Annex I(g).[350] As set out above, we do so by ascertaining whether this measure constitutes (1) an exemption or remission (2) of indirect taxes (3) in respect of the production and distribution of exported products, (4) not in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.[351]

7.222. Annex I(g) applies to exemptions or remissions of "indirect taxes". Footnote 58, appended to Annex I(g), defines the term "indirect taxes" to "mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes *other than* direct taxes and *import charges*".[352] Footnote 58 also defines the term "import charges" as "tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports". Since customs duties thus fall within the definition of "import charges", footnote 58 makes it clear that the customs duties from which the EOU/EHTP/BTP Schemes provide an exemption do not constitute "indirect taxes" within the meaning of Annex I(g). Accordingly, the customs duty exemption provided by the EOU/EHTP/BTP Schemes does not meet the conditions of footnote 1 read together with Annex I(g).

7.6.2.3 Whether the central excise duty exemption meets the conditions of footnote 1 read together with Annex I(h)

7.223. We now examine whether the exemption from central excise duties under the EOU/EHTP/BTP Schemes meets the conditions of footnote 1 read together with Annex I(h). We do so by ascertaining whether this measure constitutes (1) an exemption, remission or deferral (2) of prior-stage cumulative indirect taxes (3) on inputs that are consumed in the production of the exported product, (4) levied on those inputs.[353]

7.224. The United States does not contest that the central excise duty exemption meets the first element set out above, i.e. it involves an exemption.[354]

7.225. Turning to the second element set out above, the exemption must pertain to "prior-stage cumulative indirect taxes". Excise is expressly included in the definition of "indirect taxes" in footnote 58 of the SCM Agreement. Footnote 58 further defines "prior stage" indirect taxes as taxes "levied on goods or services used directly or indirectly in making the product", and "cumulative" indirect taxes as "multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production".

7.226. India explained, and the United States did not contest, that Indian central excise duties are an indirect tax within the meaning of footnote 58 and, absent any subsequent crediting

[348] United States' second written submission, para. 89; response to Panel question No. 40, paras. 59-60; and comments on India's response to Panel question No. 43, para. 97.
[349] United States' first written submission, paras. 38 and 40 and fns 57 and 61; second written submission, para. 79 and fn 82.
[350] India's first written submission, paras. 206-209.
[351] See para. 7.186 above.
[352] Emphasis added.
[353] See para. 7.186 above.
[354] United States' second written submission, paras. 79-90.

mechanism under India's Central Excise Tax Act, fall within the meaning of prior-stage cumulative taxes.[355] On this basis, we assume that the second element set out above is met.

7.227. We now turn to the third element in our analysis of footnote 1 read together with Annex I(h), i.e. whether the central excise duty exemption is granted on "inputs that are consumed in the production of the exported product".

7.228. The United States argues that the exemption from central excise duty is not limited to inputs consumed in the production of the exported product, for the same reasons applying, *mutatis mutandis*, to the exemption from customs duty.[356] To recall, the United States argued that certain goods benefiting from the exemptions are of such a nature that they cannot be inputs consumed in the production of an exported product[357], that the exemptions are also available to acquire goods for creating a central facility[358], and that the EOU/EHTP/BTP Schemes do not require the duty-exempt goods to be consumed as inputs in the production of the exported product.[359]

7.229. We begin with the nature of the duty-exempt goods. We have found, above, that the goods eligible for customs duty exemptions under the EOU/EHTP/BTP Schemes include goods that are not capable of constituting inputs consumed in the production of an exported product within the meaning of Annex I.[360] We note, however, that the exemption "from duty of excise", at issue here, applies to the procurement of "excisable goods".[361] The 1944 Central Excise Tax defines excisable goods as those listed in its Fourth Schedule, and salt.[362] The goods listed in the Fourth Schedule are tobacco products ranging from unmanufactured tobacco to cigarettes, tobacco substitutes, and mineral products including petroleum oils, oils obtained from bituminous minerals, and gaseous hydrocarbons.[363] The United States has not established that any of these goods is of a nature that makes it incapable of being an input consumed in the production of the exported product, either as an input that is "physically incorporated" in the exported product or as "energy, fuels and oil used in the production process".[364]

7.230. Next, the United States argues that goods for creating a central facility are not inputs consumed in the production of an exported product. While we agree with the United States' factual proposition, we note that the exemption the United States is challenging is not the one on goods acquired for creating a central facility.[365]

7.231. Finally, the United States argues more generally that the EOU/EHTP/BTP Schemes do not limit the central excise duty exemption to inputs consumed in the production of an exported product. The Schemes do not set out such a requirement expressly. In the context of the customs duty exemptions, we have rejected the equivalent US argument, noting, in particular, that the Schemes require the "imported" goods to be "utilized for export production" and that the fact that the Schemes use this wording, rather than the wording "inputs consumed", does not in itself establish that the Schemes do not meet the conditions of footnote 1.[366] However, the relevant language applicable to the exemption from central excise duties differs from that applying to customs duties. While the FTP requires goods "*imported*" free of customs duties to "be utilized for

[355] India's first written submission, para. 204.
[356] United States' second written submission, paras. 87-90. See para. 7.195 and fn 317 above.
[357] See para. 7.195 and sections 7.6.2.1.1 and 7.6.2.1.2 above.
[358] See para. 7.195 and section 7.6.2.1.3 above.
[359] See fn 317 above.
[360] Sections 7.6.2.1.1 and 7.6.2.1.2 above.
[361] Section 6.01(d)(iii) of the FTP. The FTP defines "[e]xcisable goods" to mean "any goods produced or manufactured in India and subject to duty of excise under Central Excise and Salt Act 1944 (1 of 1944)". (Definition 9.19 in chapter 9 of the FTP).
[362] Central Excise Act (1944) as amended, (Exhibit USA-88), Section 2(d).
[363] Central Excise Act (1944) as amended, (Exhibit USA-88), Fourth Schedule. The Central Excise Tariff Act (1985) and its First Schedule, submitted as Exhibits USA-62 and USA-63, have been repealed. (India's communication dated 19 July 2019; see also comments on the United States' response to Panel question No. 42.)
[364] Footnote 61 of the SCM Agreement.
[365] Section 7.6.2.1.3 above.
[366] See fn 317 above.

export production"[367], the FTP does not set forth such a requirement for goods procured domestically without payment of central excise duties.

7.232. India argues that the goods exempted from central excise duty are necessarily inputs consumed in the production of *exported* products as a result of the requirement for Units to export their entire production.[368] However, as India itself recognizes, Units are allowed to sell on the *domestic* market, albeit subject to a number of limiting conditions.[369] India points out that pursuant to Sections 6.08(a)(i) and (v) of the FTP, to the extent that Units are allowed to sell on the domestic market, such sales are "subject to payment of duties as well as reversal of customs duties".[370]

7.233. In that regard, we note that pursuant to Sections 6.08(a)(i) and (v) of the FTP, domestic market sales by EOU/EHTP/BTP Units are subject to "payment of excise duty, if applicable".[371] As a result of these provisions, if the product being sold domestically is subject to central excise duties (e.g. cigarettes), then indeed the effect of the central excise duty exemption on goods acquired to produce it (e.g. tobacco) is undone through the payment of excise duty on the product sold domestically (in our example, through the payment of excise duty on the cigarettes). However, if the product being sold domestically is *not* subject to central excise duties (e.g. computers), then the domestic sale in question is not itself subject to payment of excise duty within the meaning of Sections 6.08(a)(i) and (v).

7.234. However, during the interim review, India clarified that pursuant to Section 6.08(a)(vi) of the FTP, even when the finished good being sold in the DTA is not itself subject to excise duty, that sale triggers the obligation on the part of EOU/EHTP/BTP Units to pay the excise duty initially foregone on any inputs used to produce the good in question.[372]

7.235. Therefore, the United States has not established that the exemption from the central excise duty is not limited to inputs consumed in the production of an exported product, and that, for this reason, it does not meet the conditions of footnote 1 read together with Annex I(h).

7.6.2.4 Conclusion

7.236. We find that the exemption from customs duties under the EOU/EHTP/BTP Schemes does not meet the conditions set out in footnote 1 read together with Annexes I(g), I(h), and I(i). We also find that the United States has not established that the exemption from central excise duty under the EOU/EHTP/BTP Schemes does not meet the conditions of footnote 1 read together with Annex I(h).

7.6.3 Whether the customs duty exemption under the Export Promotion Capital Goods Scheme meets the conditions of footnote 1

7.237. India argues that the exemption from customs duties[373] on the importation of capital goods, under the EPCG Scheme, meets the conditions of footnote 1 read together with Annex I(i).[374] In this section, we examine whether this is the case.

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[367] Section 6.01(d)(i) of the FTP. (emphasis added)

[368] E.g. India's first written submission, para. 198, and second written submission, para. 73.

[369] Section 6.08 of the FTP; see also e.g. India's second written submission, para. 75.

[370] India's second written submission, para. 75, referring to Section 6.08(a)(v) of the FTP.

[371] Sections 6.08(a)(i) and (v) of the FTP. This is different from the language used in the same provisions for customs duties, i.e. "reversal of duties of Customs".

[372] Section 6.08(a)(vi) of the FTP. See India's opening statement at the interim review meeting, para. 21; and responses to Panel questions Nos. 95-101. See also Annex A-2, paras. 5.12-5.20.

[373] We limit our review to the exemption from customs duties. In its first and second written submissions, the United States did not articulate a challenge with respect to exemptions from IGST and compensation cess under the EPCG Scheme (United States' first written submission, paras. 72, 73 and 76-77; second written submission, paras. 125 and 131-132), although India did present arguments on those exemptions. (India's first written submission, paras. 299-303; second written submission, para. 133). Only after its second written submission did the United States refer also to the exemptions from IGST and compensation cess in its arguments on the merits. (United States' opening statement at the meeting of the Panel, para. 20; response to Panel question No. 50, paras. 81 and 83-84).

7.238. We recall our discussion of the legal standard under footnote 1 read together with Annex I(i) in section 7.6.1. As summarized in paragraphs 7.186 and 7.191 above, for the challenged customs duty exemption not to be "deemed to be a subsidy" by virtue of footnote 1 together with Annex I(i), it must constitute (1) a remission, drawback, exemption or deferral (2) of import charges (3) on imported inputs that are consumed in the production of the exported product, (4) not in excess of those levied on those inputs.

7.239. The parties do not dispute that the EPCG Scheme provides for an exemption from customs duties on importation, thus meeting the first two elements set out above.

7.240. Regarding the third element, the United States contends that the customs duty exemption does not relate to the importation of inputs that are consumed in the production of the exported product.[375] The United States provides two arguments as a basis for this contention. First, the duty-exempt goods are capital goods, and therefore incapable of serving as "inputs consumed" in the production of the exported product.[376] Second, although beneficiaries are subject to an export obligation[377], they are not required to use the imported goods in connection with the manufacture of exported products.[378]

7.241. Regarding the capital goods issue, India repeats the arguments already considered when examining the EOU/EHTP/BTP Schemes.[379] India also refers to Members' work on Implementation-Related Issues and Concerns as evidence of a political will to include capital goods among inputs consumed in the production process.[380] As for the United States' second argument, India responds that "the requirement to use the imported capital goods only in the production of exported products is verified during the application process".[381]

7.242. The FTP provides that the customs duty exemption at issue applies to the importation of "capital goods".[382] The FTP provides that, for the purpose of the EPCG Scheme, "capital goods" include: capital goods as defined in Chapter 9 of the FTP[383], i.e. the same definition applying under the EOU/EHTP/BTP Schemes, discussed above; "[c]omputer systems and software which are a part of the Capital Goods being imported"[384]; "[s]pares, moulds, dies, jigs, fixtures, tools & refractories"[385]; and "[c]atalysts for initial charge plus one subsequent charge".[386]

For the same reasons set out with reference to the EOU/EHTP/BTP Schemes in fn 304 above, we will not consider further the United States' arguments concerning the exemptions from IGST and compensation cess. (Regarding the expiry of these exemptions under the EPCG Scheme at the end of March 2018, see Section 5.01(a) of the FTP).

[374] India's first written submission, paras. 304-308 and 311; second written submission, paras. 132 and 134-137. India suggested that the exemption from customs duties also meets the conditions of footnote 1 read together with Annex I(g) (India's first written submission, para. 300); in that regard, we refer to our findings above, at para. 7.222, that customs duties are not "indirect taxes" and that Annex I(g) thus does not apply.

[375] United States' second written submission, paras. 118-123. See also ibid. paras. 65-71 and 76.

[376] United States' second written submission, para. 119.

[377] See paras. 7.137-7.138 above, and paras. 7.502-7.504 and 7.506 below.

[378] United States' first written submission, paras. 122-123.

[379] India's first written submission, paras. 306 and 308; second written submission, para. 134.

[380] India's first written submission, para. 307 (referring to WTO, General Council Decision on Implementation-Related Issues and Concerns of 15 December 2000, and the report thereon of the Chairman of the Committee on Subsidies and Countervailing Measures of 3 August 2001, WT/L/384, (Exhibit IND-9); and WTO, Committee on Subsidies and Countervailing Measures, "Chairman's Report on the Implementation-Related Issues referred to the Committee on Subsidies and Countervailing Measures in the 15 December 2000 Decision of the General Council", G/SCM/34 (3 August 2001), (Exhibit IND-10)).

[381] India's second written submission, paras. 135-136 (referring to, among others, Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 5A). We note that, indeed, applicants must provide a certificate by a chartered engineer that "the Capital Good(s) proposed to be imported … is/are required for use … for manufacture of the export product(s)". (Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 5A).

[382] Section 5.01 of the FTP.

[383] Section 5.01(a)(i) of the FTP.

[384] Section 5.01(a)(ii) of the FTP.

[385] Section 5.01(a)(iii) of the FTP.

[386] Section 5.01(a)(iv) of the FTP.

7.243. We refer to our discussion in paragraphs 7.196-7.217 above. With the exception of the last item in the definition of capital goods for purposes of the EPCG Scheme, i.e. "catalysts"[387], the goods that can be imported duty-free under the EPCG Scheme, therefore, are not energy, fuels and oil, catalysts, or inputs physically incorporated in the exported product. Instead, they are machines, tools, and equipment (as well as components thereof or software therefor) that may be used to produce goods but are not physically incorporated in the goods produced. Therefore, they are not inputs "consumed" in the production of the exported product and, as a result, the exemption from customs duties under the EPCG Scheme does not meet the conditions of footnote 1 read together with Annex I(i).

7.244. India relies on the same rebuttal arguments that we have considered, and dismissed, in paragraphs 7.206-7.207 and 7.210-7.215 above. The same considerations set out there apply to the present scheme, whose scope of application is in part identical[388] to that of the EOU/EHTP/BTP Schemes, and in part includes goods of a similar nature, i.e. goods that are not physically incorporated in the product for whose manufacture they are used, as well as not being energy, fuels and oil, or catalysts.

7.245. In addition to repeating those arguments, India relies on Members' work on Implementation-Related Issues and Concerns as evidence of a political will to include capital goods among inputs consumed in the production process.[389]

7.246. The Panel notes that Members decided, in 2000, that the Committee on Subsidies and Countervailing Measures (SCM Committee) would "examine as an important part of its work the issue[] … of the definition of 'inputs consumed in the production process', taking into account the particular needs of developing-country Members".[390] In the report that India itself relies upon, the chairperson of the SCM Committee noted the divergent views of Members on the matter, and observed that "[s]ome Members ha[d] noted that footnote 61 was specifically negotiated to exclude capital goods and therefore could not lend itself to interpretation as including such goods".[391] The Panel does not view this as showing that footnote 61 includes capital goods.

7.247. We therefore find that the customs duty exemption under the EPCG Scheme does not meet the conditions of footnote 1 read together with Annex I(i), because it provides for the importation of goods that are not "inputs consumed" in the production of the exported product.

7.6.4 Whether the customs duty exemptions under the Duty-Free Imports for Exporters Scheme meet the conditions of footnote 1

7.248. India argues that the DFIS exemptions from customs duties meet the conditions of footnote 1 read together with Annex I(i) and, therefore, are not subsidies.[392]

7.249. For the DFIS exemptions not to be "deemed to be a subsidy" by virtue of footnote 1 read together with Annex I(i), they must constitute (1) a remission, drawback, exemption or deferral (2) of import charges (3) on imported inputs that are consumed in the production of the exported product, (4) not in excess of those levied on those inputs.[393]

[387] Footnote 61 of the SCM Agreement includes in the definition of "inputs consumed in the production process" "catalysts which are consumed in the course of their use to obtain the exported product". Neither party has addressed the question whether the catalysts that can be imported duty-free under the EPCG Scheme meet the definition of catalysts in footnote 61 and, in any event, we do not understand the United States' challenge to extend to catalysts. (See e.g. United States' second written submission, paras. 84, 116, and 119 ("capital equipment")). Therefore, we do not include catalysts in the scope of our finding, below, that the duty exemption at issue does not pertain to inputs "consumed" in the production of the exported product because of the nature of the goods in question.

[388] For capital goods as defined in Section 9.08 of the FTP. See also Section 5.01(a)(i) of the FTP.

[389] See para. 7.241 above.

[390] General Council decision WT/L/384, (Exhibit IND-9), para. 6.3 (referred to in India's first written submission, fn 254).

[391] SCM Committee decision G/SCM/34, (Exhibit IND-10), p. 2. See also ibid. paras. 14 and 11-31, and India's first written submission, para. 307 and fn 255.

[392] India's first written submission, paras. 388-394; second written submission, paras. 199-202.

[393] See para. 7.186 above.

7.250. We begin with the first two elements set out above, namely, the existence of an (1) exemption or remission (2) from import charges. As set out in section 7.5.4 above, DFIS caps at zero the customs duties on importation of certain specified goods, provided the requirements in the applicable Condition are met. More precisely, through DFIS, "the Central Government … exempts [the specified goods] … from so much of the duty of customs leviable thereon under the [First Schedule of the 1975 Customs Tariff Act] as in excess of [zero]".[394] Further, as clarified by footnote 58 of the SCM Agreement, "duties … levied on imports" are "import charges" for purposes of Annex I(i). Therefore, DFIS meets the first two conditions in footnote 1 read together with Annex I(i), i.e. it constitutes an exemption from import charges.

7.251. Regarding the third element in the analysis under footnote 1 read together with Annex I(i), the United States argues, first, that the DFIS exemptions cover the importation of certain goods that, by their nature, cannot be consumed in the production process.[395] In this regard, the parties rely on the arguments already considered when discussing the EOU/EHTP/BTP and EPCG Schemes.[396]

7.252. Second, the United States argues that DFIS does not require the use of the imported goods as inputs in the production of exported products.[397] According to India, however, the criteria in the measure, enforced by the competent bodies, ensure the duty exemption is limited to inputs consumed in the production process.[398]

7.6.4.1 The nature of certain goods covered by the exemptions

7.253. The United States asserts that all the goods that can be imported duty free under Conditions 60(ii) (line item 430)[399] and 61 (line item 431)[400] are capital goods consisting of equipment, machinery and tools. The United States argues that, even assuming these goods are used in the production of the exported product, they are not physically incorporated into it.[401] India agrees that, as a matter of fact, all the goods falling under Conditions 60(ii) and 61 "may be qualified as capital goods".[402] However, India considers that, as a matter of law, capital goods used in the production of an exported product are "inputs … consumed" in the production of the exported product within the meaning of Annex I(i).[403]

7.254. The parties rely on their arguments concerning the issue of capital goods which we have already considered when examining the EOU/EHTP/BTP and EPCG Schemes.[404] As we have

[394] Notification No. 50/2017, (Exhibit USA-36), p. 1 ("from so much… as is in excess of … the standard rate specified in the corresponding entry in column (4)", which, for the duty stipulations comprising DFIS, is "nil" (nothing), i.e. zero).

[395] United States' second written submission, para. 167; opening statement at the meeting of the Panel, para. 57; response to Panel question No. 80, para. 133 and appendix 2; and response to Panel question No. 81, para. 135.

[396] For the United States, see previous footnote. For India, see second written submission, paras. 201-202; comments to the United States' response to Panel question No. 79.

[397] United States' second written submission, para. 166; opening statement at the meeting of the Panel, paras. 36-39, and 57; responses to Panel questions Nos. 79, 81 and 82; and comments on India's responses to Panel question No. 82.

[398] E.g. India's first written submission, para. 390; second written submission, paras. 191-194.

[399] These are the goods in Lists 21 and 22 of Notification No. 50/2017, (Exhibit USA-36), i.e. 125 items for use in the manufacture of commodities in the pharmaceutical and biotechnology sector, such as, for example, cell cultivation devices, low temperature freezers, spectrophotometers, centrifuges, x-ray diffraction equipment, automated sampling devices, and gas generators.

We recall that the United States only challenges the duty-free treatment provided under Condition 60(ii), and not under Condition 60(i). (See fn 266 above).

[400] These are the goods in List 23 of Notification No. 50/2017, (Exhibit USA-36), i.e. 119 items for research and development purposes in the agro-chemical sector, such as, for example, analytical balances, anemometers, centrifuges, dry ice makers, health monitoring equipment, and incubators.

[401] United States' response to Panel question No. 80, para. 132 and Appendix 2.

[402] India's response to Panel question No. 80. In the same response, India argues that the relevant duty exemption is not export contingent, a point we consider in para. 7.541 below.

[403] United States' second written submission, para. 167; India's first written submission, paras. 388 and 390; and response to Panel question No. 80, first para.

[404] United States' opening statement at the meeting of the Panel, para. 57; comments on India's response to Panel question No. 80, para. 157; India's second written submission, para. 201; response to Panel question No. 80, third para.; and comments on the United States' response to Panel question No. 80.

explained in that context, equipment, machinery and tools that are used in the production of a product but are not "physically incorporated", i.e. physically present, even in a different form, in the final product[405], are not "inputs … consumed" within the meaning of Annex I(i).[406] Therefore, the duty exemptions available under Conditions 60(ii) and 61 do not meet the conditions of footnote 1. Specifically, they do not meet the third element in our analysis, namely, that the duty-exempt goods must be "inputs … consumed" in the production of the exported product.

7.255. The United States also argues that six of the 27 items (or groups of items) that can be imported duty-free under Condition 21 (line item 229) constitute tools that are not "inputs … consumed" within the meaning of Annex I(i).[407] India, too, factually describes five of these six items as "capital goods", but repeats that capital goods are inputs consumed in the production of the exported product.[408] As already explained, "inputs … consumed" within the meaning of Annex I(i) are inputs "physically incorporated", "energy, fuels and oil", or "catalysts". The tools in question fall in none of these categories. Therefore, to the extent that it exempts from customs duties the importation of these six items, the duty exemption under Condition 21 does not meet the conditions of footnote 1.

7.256. Further, the United States argues that one of the 36 items that can be imported duty-free under Condition 10 (line item 104)[409], namely, food tenderizers for use in processing seafood products for export, may also not qualify as an input consumed in the production of the seafood products in question.[410] The evidence submitted by the United States indicates that at least one type of tenderizer involves a tool for mechanical tenderization, which would therefore not be physically incorporated into the processed seafood product, and is also not "energy, fuels and oil", or a "catalyst[]".[411] Therefore, to the extent that it exempts from customs duties the importation of such tenderizers, the duty exemption under Condition 10 does not meet the conditions of footnote 1.

7.6.4.2 Whether the imported goods must be used as inputs consumed in the production of an exported product

7.257. The United States argues that DFIS does not require that the imported goods be used as inputs in the production of exported products.[412] In response to questioning from the Panel, the United States "recognize[d] that [unlike Conditions 60 and 61, already disposed of above,[413]] other conditions contain language regarding the processing/manufacturing of the imported good in the exported product".[414] Indeed, six of the challenged Conditions, namely, Conditions 10, 21, 28, 32, 33, and 101, expressly require the duty-exempt goods to be imported for use in the manufacture of specified final products for export.[415]

[405] And are not "energy, fuels and oil", or "catalysts". Footnote 61 of the SCM Agreement.
[406] See paras. 7.199-7.216 above.
[407] United States' response to Panel question No. 80, Appendix 2. These are: air and electric operated screw driver with hose and couplings; tool bits, for motorizer and screw driver; glue applicator; moisture measuring tool; air operated guns and tools for inserting fasteners for brands, flexi points, pins, staples, nails and hinges; and power operated mitre saw.
[408] India's response to Panel question No. 80. The item left out of India's listing of capital goods, as compared to the United States', is "tool bits, for motorizer and screw driver". In the view of the Panel, on the face of the evidence, these "tools bits", when used for the manufacture of handicrafts (as required by Condition 21), are also not "physically incorporated" into the production of the exported product (i.e. the handicraft).
[409] These goods are in List 1 of Notification No. 50/2017, (Exhibit USA-36).
[410] United States' response to Panel question No. 80. India has been silent with regard specifically to this item.
[411] A "food tenderizer" does not always involve a tool or device for mechanical tenderization, as there may also be other ways of tenderizing food, such thermal or enzymatic tenderization. See https://www.foodsharkmarfa.com/best-meat-tenderizers/ (accessed 8 May 2019) referred to in the United States' response to Panel question No. 80, Appendix 2, p. 59, fn 208 (Exhibit USA-90).
[412] United States' second written submission, para. 166; opening statement at the meeting of the Panel, para. 57.
[413] See para. 7.254 above.
[414] United States' response to Panel question No. 79, para. 126.
[415] Notification No. 50/2017, (Exhibit USA-36), Conditions 10(a), 21(a), 28(a), 32(a), 33(a), and 101(a).

7.258. The United States argues that, despite the requirement in certain Conditions that the exemption should only apply in respect of inputs used in the manufacture of final products for export, the exemption or remission[416] of import charges is "disconnected" from the charges actually levied on imported inputs consumed in the production of the exported product.[417] According to the United States, this is because "the amount of duty exemption … is uniform across broad categories of exports based on the FOB value of exports"[418], which shows that the exemption is rather a "reward contingent upon the exporter's export performance".[419]

7.259. India counters that the challenged duty stipulations *exempt* inputs from customs duties, and that therefore "the value of this exemption is necessarily not in excess of those [duties] levied on the inputs".[420] As for the pegging of the duty exemption to the value of exports during the previous year[421], India asserts that this, too, serves to ensure that the duty exemptions afforded under DFIS do not exceed the value of the duty liability on inputs consumed in the production of the exported product.[422] India also argues that the existence of this ceiling on duty exemptions, which is based on the value of past exports, does not otherwise affect the operation of DFIS.[423] And, finally, India notes that the United States' argument that DFIS rewards export performance is misplaced, because the question under Article 1 and footnote 1 of the SCM Agreement is whether there is a subsidy, and not (yet) whether the subsidy is export contingent.[424]

7.260. We begin with Conditions 10, 21, 28, 32, 33, and 101.[425] One element of each of these Conditions requires that the duty-exempt goods themselves be used in the production of the exported product, as summarized in the table below.

Table 3: Link to production of exported products in Conditions 10, 21, 28, 32, 33, and 101

Condition	Link to production of exported product[426]
10	"If,- (a) the goods are imported by an exporter of sea-food products for use in processing sea-food products for export …"
21	"If,- (a) the goods are imported,- … for use in the manufacture of handicrafts for export …"
28	"If, (a) the goods are imported, … for use in the manufacture of textile garments or leather garments for export …"
32	"If (a) The goods are imported … for use in manufacture of [leather footwear or synthetic footwear or other leather products] for export …"
33	"If,- (a) the goods are imported … for use in the manufacture of [handloom made ups or cotton made-ups or man-made made ups] for export …"
101	"If,- (a) the goods are imported … for use in the manufacture of sports goods for export …"

[416] The United States refers to the duty stipulations comprising DFIS in several different ways, namely as remissions, drawbacks and exemptions. We consider them to be an exemption: see paras. 7.169 and 7.250 above, and fn 429 below.
[417] E.g. United States' responses to Panel questions Nos. 79 and 82, paras. 127-129 and 141.
[418] United States' response to Panel question No. 79, para. 129.
[419] United States' response to Panel question No. 79, para. 129. See also United States' second written submission, para. 163; opening statement at the meeting of the Panel, para. 57.
[420] India's comments on the United States' response to Panel question No. 82.
[421] See paras. 7.157-7.159 above.
[422] India's first written submission, para. 390; second written submission, paras. 191-198.
[423] India's response to Panel question No. 82.
[424] India's second written submission, para. 197.
[425] To recall, Conditions 10, 21, 28, 32, 33, and 101 expressly require that the use of the duty-exempt goods be limited to the manufacture of the specified exported products; Condition 36, which we discuss separately below, does not. As for Conditions 60(ii) and 61, we have exhaustively addressed these in para. 7.254 above.
[426] Notification No. 50/2017, (Exhibit USA-36) and Excerpts from Notification No. 50/2017, (Exhibit USA-38).

7.261. On the face of the measure, each iteration of this first element appears to correspond to the condition, in footnote 1 read together with Annex I(i), that a duty exemption be limited to duties on inputs consumed in the production of the exported product.[427]

7.262. A second element of each of these Conditions, which we refer to as the "backward-looking element", requires that the value of the duty-exempt imported goods not exceed a certain percentage, ranging from 1% to 5%, of the FOB value of exports of those same final products during the preceding financial year.[428]

7.263. These two elements are cumulative, i.e. they both limit the amount of the exemption from customs duties that is available to an importer. On the face of the measure, if the backward-looking element entitles a recipient to import duty-free inputs that are worth 5, but the recipient imports inputs that are worth 1, the theoretical entitlement to import 5 is of no avail (i.e. it does not expand the scope of the duty-free entitlement): only 1 will be duty-exempt.[429]

7.264. The United States' arguments, to the effect that the duty exemption is "disconnected" from the duties actually levied on imported inputs, look exclusively at the backward-looking element. Those arguments ignore the first element discussed above, i.e. the requirement that the imported goods be used in the manufacture of the specified products for export.[430]

7.265. In light of this requirement, the United States has not shown to this Panel that the six duty stipulations at issue do not meet the conditions of footnote 1. The Panel will therefore not examine these six duty stipulations under Article 3 of the SCM Agreement.[431]

7.266. Last, we turn to Condition 36, which provides for the duty-free importation of carpet samples by exporters of carpets. There is nothing limiting this duty exemption to inputs consumed in the production of the exported product, and indeed carpet samples are neither inputs physically incorporated in the exported product, nor energy, fuels, oil, or catalysts. Therefore, Condition 36 is not excluded from the definition of a subsidy by virtue of footnote 1.

7.6.4.3 Conclusion

7.267. Based on the arguments and evidence before us, we find that Conditions 60(ii), 61, and 36, in their entirety, and Conditions 10 and 21, for one and six items respectively[432], do not accord with footnote 1. For all other items under Conditions 10 and 21, and for Conditions 28, 32, 33, and 101, the United States has not demonstrated that the challenged duty stipulations fail to meet the conditions of footnote 1.

[427] As set out in the table, these six conditions in Notification No. 50/2017 require "use" in the manufacture or processing. As seen in paras. 7.255-7.256 above, for six items under Condition 21, and one item under Condition 10, "use" is not consumption, as is instead necessary under footnote 1 read together with Annex I(i). For the remaining items under Conditions 10 and 21, and for all items under the other Conditions listed in this table, however, our review of the listed items leads us to conclude that the only way in which they can be "used" in the manufacture or processing of the products concerned is by being consumed, within the meaning of Annex I(i). By way of example, this is the case of "breadcrumbs" used in processing of seafood (under Condition 10), and table tennis rubber for use in the manufacture of sports goods (under Condition 101). The United States has not argued otherwise.

[428] Notification No. 50/2017, (Exhibit USA-36); Excerpts from Notification No. 50/2017, (Exhibit USA-38).

[429] As India points out, the scheme provides for a duty exemption. And as we have seen earlier, a duty exemption operates *ex ante*, i.e. it entails that the duty liability never arises. Therefore, as India puts it, "the value of this exemption is necessarily not in excess of those [duties] levied on the inputs". (India's comments on the United States' response to Panel question No. 82; and para. 7.169 above).

[430] This despite the fact that in response to a question from the Panel, the United States concedes that all Conditions (except for Conditions 60 and 61, which are not at issue here) "contain language regarding the processing/manufacturing of the imported good in the exported product" (United States' response to Panel question No. 79, para. 126).

[431] Except for one item under Condition 10 and six items under Condition 21. See paras. 7.255-7.256 and fn 426 above.

[432] See fns 407 and 408, and para. 7.256 above.

7.6.5 Whether the Merchandise Exports from India Scheme meets the conditions of footnote 1

7.268. India contends that MEIS scrips are refunds for past payments of indirect taxes, consistent with the conditions of footnote 1 read together with Annexes I(g) and I(h)[433]; or, alternatively, that their use results in the remission of import charges, consistent with footnote 1 read together with Annex I(i).[434]

7.6.5.1 Whether MEIS scrips meet the conditions of footnote 1 read together with Annexes I(g) and I(h)

7.269. We begin by assessing whether MEIS scrips meet the conditions of footnote 1 read together with Annexes I(g) and I(h).

7.270. We recall our discussion of the legal standard under footnote 1 and the relevant Annexes in section 7.6.1 above. In accordance with that discussion, whether MEIS scrips are not "deemed to be a subsidy" by virtue of footnote 1 read together with Annexes I(g) and I(h), respectively, depends on whether MEIS scrips meet the following four cumulative elements:

Under Annex I(g) –

(1) They constitute an exemption or remission, including a refund or rebate;

(2) of indirect taxes;

(3) in respect of the production and distribution of exported products;

(4) not in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

Under Annex I(h) –

(1) They constitute an exemption, remission, or deferral, including a refund or rebate;

(2) of prior-stage cumulative indirect taxes;

(3) on inputs that are consumed in the production of the exported product;

(4) not in excess of those levied on those inputs.

7.271. As we will see below, the parties disagree that even the first of these four elements is met.

7.272. Pursuant to the FTP Chapter on MEIS, India grants "Duty Credit Scrips" as a reward for exports.[435] The value of scrips that a recipient is entitled to is determined by multiplying the FOB value of exports of "notified" goods to "notified" markets by the "rates of reward" assigned to those goods and markets.[436] The recipient of the scrips can then use them to offset certain

[433] India's first written submission, paras. 231-236 and 263-278; second written submission, paras. 96-98 and 104-113; opening statement at the meeting of the Panel, paras. 65-73; responses to Panel questions No. 57, No. 60, and No. 62; and comments on the United States' response to Panel question No. 55.

[434] India's second written submission, paras. 114-118; opening statement at the meeting of the Panel, para. 76.

[435] Sections 3.02 and 3.04 of the FTP.

[436] Section 3.04 of the FTP. "[N]otified" goods and markets are set out in Appendix 3B. Appendix 3B groups export destination countries into three "country groups". Appendix 3B then lists, over 332 pages, the "MEIS-Reward Rate" for each covered product; specifically, for each covered product, it lists three rates, the choice between the three being determined by the country to which the exports giving rise to the reward were made. (Public Notice 2/2015 2020, (Exhibit USA-11), Appendix 3B, tables 1 and 2).

liabilities *vis-à-vis* the government, including customs and excise duties[437]; in addition, the scrips are "freely transferable".[438]

7.273. Although the value of the scrips is a fixed percentage of exports, India argues that the scrips in fact are a mechanism chosen by India to refund two categories of indirect taxes, namely: indirect taxes in respect of the production and distribution of the exported products, in accordance with footnote 1 and Annex I(g); and prior-stage cumulative indirect taxes on inputs consumed in the production of the exported products, in accordance with footnote 1 and Annex I(h).[439]

7.274. India explains that the value of these taxes necessarily represents a percentage of the value of the exports in question: in India's words, these taxes are thus "embedded" in the value of the exports.[440]

7.275. The Panel asked India to explain how it determined the different reward rates, and to provide the evidence supporting its answer.[441] India responded that it sets the rates at a level that "approximate[s] but [is] less than" the taxes to be refunded.[442] According to India, relying on a uniform but low rate allows it to avoid the "administratively cumbersome" task of "calculat[ing] the precise refund for every product and every export".[443]

7.276. As an "example", India provided a table that, according to India, contains "actual information" for exporter "ABC" on "the total cost of embedded indirect taxes on electricity, freight and fuel" per metric ton of its exports under Harmonised System code 73259100 during financial year 2016-2017.[444] The table states the alleged cost incurred by exporter "ABC" for specified taxes on electricity, fuel and freight, and concludes by stating that these taxes amounted to 6.10% of the FOB value of the corresponding exports.[445] India then points out that the value of scrips that ABC would have been eligible for under the applicable MEIS reward rates would have been 3% of the value of exports, i.e. less than 6.10%.[446]

7.277. According to the United States, the record evidence belies the argument that scrips are a refund of indirect taxes already paid, and this argument is "a fiction".[447] The United States argues that there is no connection between taxes actually paid and the value of scrips[448]; that the FTP expressly describes scrips as a reward for exports, and bases the rate of reward on the product exported and the country it was exported to;[449] that India does not even ask scrip recipients for information that would allow it to determine the amount of indirect taxes paid on exported products;[450] that the taxes to be refunded under footnote 1 and Annex I(g) and (h) are actual taxes, not averages or estimates (and that in any event under MEIS India does not even estimate taxes already paid)[451]; and that "one happenstance example" in which the applicable MEIS reward

[437] Sections 3.02 and 3.18 of the FTP. For a fuller description, see para. 7.161 above.

[438] Section 3.02 of the FTP.

[439] India's first written submission, paras. 231, 232, 268, 273, and 275; second written submission, para. 105; and opening statement at the meeting of the Panel, para. 73. According to India, the taxes so refunded include taxes on electricity and fuel, stamp duty, entry tax, road tax, and others. (India's first written submission, paras. 231, 232, 268, and 269; second written submission, paras. 105 and 106; and response to Panel question No. 57).

[440] India's first written submission, paras. 232, 235, and 277; second written submission, paras. 105-106 and 109; opening statement at the meeting of the Panel, paras. 65-66; and response to Panel question No. 60.

[441] Panel question No. 60 after the substantive meeting with the parties. The Panel also asked this question orally during the substantive meeting.

[442] India's response to Panel question No. 60, first para.

[443] India's response to Panel question No. 60, fifth para. See also e.g. India's first written submission, paras. 232 and 279.

[444] India's response to Panel question No. 60, third para.

[445] India's response to Panel question No. 60, table.

[446] India's response to Panel question No. 60, fourth and fifth paras.

[447] E.g. United States' second written submission, paras. 108-109; comments on India's response to Panel questions Nos. 56 and 60, paras. 122 and 133-134.

[448] E.g. United States' second written submission, para. 109; comments on India's response to Panel questions Nos. 56 and 60, paras. 122 and 133-134.

[449] E.g. United States' comments on India's response to Panel question No. 60, para. 133.

[450] E.g. United States' opening statement at the meeting of the Panel, paras. 51-53. See also United States' comment on India's response to Panel question No. 60, para. 133.

[451] E.g. United States' response to Panel question No. 37, paras. 50-53.

rate is lower than the ratio between indirect taxes paid and value of exports does not show that MEIS scrips are actually a tax refund.[452]

7.278. Therefore, regardless of whether the type of taxes referred to by India are relevant indirect taxes, the parties disagree on whether, in awarding MEIS scrips, India is at all providing a "remission"[453] of such taxes. According to India, the award of scrips is a *remission of indirect taxes* on products exported in the past; but according to the United States, it is merely a *reward* for past exports, and India is "refram[ing] these rewards *post hoc* as reimbursed indirect taxes".[454]

7.279. To recall, the scrips in question are "rewards under MEIS"[455], and Section 3.04 of the FTP describes the trigger for, and the basis for calculating, such rewards. Pursuant to Section 3.04, the basis for calculating the reward is the FOB value of exports of "notified" goods to notified markets, which must then be multiplied by the applicable rate of reward set out in Appendix 3B.

7.280. Appendix 3B sets forth the notified markets, dividing them into three groups; it then sets out the notified goods, indicating, for each notified good, the MEIS reward rate applying to exports of the good in question to each of the three country groups.[456] Depending on the product and destination country, the reward rates range from 0% to 5%. We thus learn, for example, that for exports of butter, the MEIS reward rate is 2% if the butter is exported to country group B, and 0% if the butter is exported to country groups A and C; on the other hand, the rate of reward for desiccated coconut is 5% for export to any of the three country groups.[457]

7.281. India has not pointed to anything in the FTP, in Appendix 3B, or in any other evidence on the record, indicating that indirect taxes paid in connection with the exported product were the basis for the award of MEIS scrips, nor has the Panel found any such indication in its review of the evidence.[458] Instead, the legal instruments providing for MEIS very plainly establish that the value of scrips is determined by multiplying past exports by the percentage set forth in Appendix 3B for the particular product-country combination.

7.282. Nor is there any record evidence that the rates set out in Appendix 3B were in fact determined on the basis of indirect taxes actually paid. To the contrary, the Panel notes that the scheme envisages different rates for the same product, depending on the country to which the product was exported.[459] It would be difficult to see why MEIS differentiates among destination markets if it served as the basis for refunding previously accrued indirect taxes.

7.283. In a similar vein, the Panel notes that in its Highlights of the Foreign Trade Policy 2015-2020, Mid Term Review, India explained that it increased the rate of reward for ready-made garments and made-ups from 2% to 4%, and that it granted an "[a]cross the board increase of 2% in existing MEIS incentive for export by MSMEs / labour intensive industries".[460] Nothing in that document or elsewhere links the increase in the MEIS rates to the level of indirect taxes paid on the exported products and, in the absence of any such link, it is again difficult to reconcile this decision to increase reward rates with the characterization of MEIS scrips as remitting or refunding indirect taxes.

[452] United States' comments on India's response to Panel question No. 60, para. 139.

[453] We refer to our discussion on the notions of "exemption" and "remission" in para. 7.169 above. Here India argues that the taxes are first paid, and then refunded or rebated in the form of MEIS scrips; therefore, the question is whether there is a remission (which, according to footnote 58, includes a "refund or rebate"), not whether there is an exemption.

[454] United States' second written submission, para. 109.

[455] Section 3.02 of the FTP.

[456] Public Notice 2/2015 2020, (Exhibit USA-11), Appendix 3B, tables 1 and 2.

[457] Public Notice 2/2015 2020, (Exhibit USA-11), Appendix 3B, table 2, HS codes 040510 and 08011100.

[458] As the United States points out, India does not even seek information on indirect taxes paid, as part of the application process for MEIS scrips. (United States' opening statement at the meeting of the Panel, para. 52). See also Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix ANF-3A ("Application Form for Merchandise Exports from India Scheme (MEIS)").

[459] Appendix 3B, table 2, contains, for the "MEIS reward rate" for each notified product, three columns, one for the rate applicable to each of the three country groups. For a number of goods, the rates do indeed differ by country of export. (Public Notice 2/2015 2020, (Exhibit USA-11), Appendix 3B, table 2.)

[460] Excerpt from Highlights of the Foreign Trade Policy Review, 2015-2020, mid-term review (December 2017), (Exhibit USA-20), also in Highlights of the Foreign Trade Policy Review, 2015-2020, mid-term review (December 2017), (Exhibit USA-85), p. 4.

7.284. As noted earlier, the Panel asked India to explain, with supporting evidence, how it determined "the different reward rates". In response, India provided a table that it described as setting forth the indirect tax expenses of exporter "ABC", during financial year 2016-2017, on a particular exported product.[461]

7.285. The Panel notes that although it explicitly requested, in its question, "evidence supporting [India's] answer", India entirely failed to provide any evidence supporting (a) the allegations of fact in the table or even (b) the relevance of exporter ABC's alleged costs to MEIS. In any event, even accepting the information on ABC provided by India, this information merely establishes that, for ABC, in financial year 2016-2017 and for the product in question, the level of indirect taxes at issue was higher than the level of the MEIS reward rate. It does not establish that MEIS serves to remit those taxes.

7.286. The characterization of MEIS in the underlying domestic legal instruments, while alone not dispositive, further confirms the conclusion that MEIS does not remit indirect taxes. For example, the FTP provides that "[d]uty credit scrips shall be granted as rewards under MEIS"[462], and that "[e]xports of notified goods/products … to notified markets … shall be rewarded under MEIS".[463] The HBP speaks of an "application for claiming rewards under MEIS on exports".[464] And Appendix 3B refers throughout to "reward rates". Nowhere does any of these legal instruments refer to any notion of MEIS remitting indirect taxes.

7.287. India refers to Section 3.00 of the FTP, according to which the objective of the two schemes in Chapter 3 of the FTP, which include MEIS, is "to offset infrastructural inefficiencies and associated costs". India argues that these inefficiencies and costs include the indirect taxes that, according to India, MEIS refunds.[465] However, first, we note that the complete text of the description of the MEIS objective in the FTP reads as follows:

> Exports from India Schemes
>
> 3.00 Objective
>
> The objective of schemes under this chapter is <u>to provide rewards to exporters</u> <u>to offset infrastructural inefficiencies</u> and associated costs.
>
> …
>
> Merchandise Exports from India Scheme (MEIS)
>
> 3.03 Objective
>
> Objective of … MEIS is to <u>promote the manufacture and export of notified goods/products</u>.

7.288. Thus, even when we consider, as directed by India, the stated objectives of the scheme, we see that the emphasis is on "rewarding", or "promoting", exports, and nothing is said about refunding taxes already paid. Moreover, the language excerpted by India refers to offsetting "infrastructural inefficiencies", which are not the same as "indirect taxes". We are therefore unable to agree with India that the reference to "offset[ting] infrastructural inefficiencies" in Section 3.00 of the FTP should lead us to conclude that, despite the text, structure and design of MEIS, this scheme's underlying objective is in fact to refund indirect taxes connected to the exported products.

7.289. Based on the foregoing, we find that MEIS does not "remit" or "refund" indirect taxes and therefore does not meet the first of the conditions set out in footnote 1 read together with Annex I(g) or I(h).

[461] India's response to Panel question No. 60.
[462] Section 3.02 of the FTP.
[463] Section 3.04 of the FTP.
[464] Section 3.01(b) of the HBP.
[465] India's first written submission, para. 231.

7.6.5.2 Whether MEIS scrips meet the conditions of footnote 1 read together with Annex I(i)

7.290. We now turn to India's arguments in respect of footnote 1 and Annex I(i). As an alternative to its arguments under footnote 1 and Annexes I(g) and I(h), India argues that when MEIS scrips are used to pay for customs duties on importation, or to regularize a default in an export obligation, this "results in" a remission of import charges that meets the conditions of footnote 1 read together with Annex I(i).[466]

7.291. To ascertain whether a measure must "not be deemed to be a subsidy" by virtue of footnote 1 read together with Annex I(i), we examine whether it constitutes (1) a remission or drawback, including full or partial exemption or deferral, (2) of import charges (3) on imported inputs that are consumed in the production of the exported product, (4) not in excess of those levied on those inputs.[467]

7.292. Even assuming that MEIS scrips, when used to pay for customs duties[468], do operate as remitting import charges, MEIS scrips fail the third of the four elements set out above, namely, that the import charges must be on imported inputs consumed in the production of exported products.

7.293. MEIS in no way limits the import charges that may be paid for with scrips to import charges on inputs consumed in the production of the exported product. Instead, the FTP provides expressly that scrips may be used to pay for import charges on the "import of inputs *or* *goods*, including capital goods".[469] Therefore, MEIS does not meet, at least, the third condition of footnote 1 read together with Annex I(i). Indeed, India elsewhere acknowledges that "the use of the MEIS scrips … does not require the import of inputs to be consumed in the production of an exported product".[470]

7.6.5.3 Conclusion

7.294. Therefore, we find that MEIS scrips do not meet the conditions set out in footnote 1 read together with Annexes I(g), I(h), and I(i).

7.7 Revenue foregone under Article 1.1(a)(1)(ii)

7.295. This section addresses the United States' argument that, under four of the challenged schemes, India provides a financial contribution by foregoing government revenue that is otherwise due, within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. More specifically, in respect of the EOU/EHTP/BTP Schemes, the EPCG Scheme, the SEZ Scheme, and DFIS[471], the

[466] India's second written submission, paras. 114-119.
[467] See paras. 7.186 and 7.191 above.
[468] Sections 3.02(i), 3.02(iv) and 3.18(a) of the FTP expressly provide that MEIS scrips can be used to pay for customs duties. In addition, also regarding payments for shortfalls in export obligations pursuant to Section 3.18(b) of the FTP, India appears to argue that paying for such shortfalls ultimately results in paying customs duties on goods imported under the schemes at issue and therefore "results in a remission of these import charges". (India's second written submission, para. 117) See also India's response to Panel question No. 61. A shortfall in an export obligation is the difference between a participant's actual export performance for a year and its applicable export obligation.
[469] Section 3.02(i) of the FTP. (emphasis and underlining added)
[470] India's response to Panel question No. 59: "[t]he refund (by way of scrips) can be used for the specified uses listed in Paragraph 3.02 of the FTP. The use of the MEIS scrips (refund of taxes already paid on exported products) does not require the import of inputs to be consumed in the production of an exported product." Moreover, "[s]ince the scrip is only received upon the export of the product (post facto), the scrip can only [be] used for payment of duties on subsequently imported/procured inputs, and the award of the scrip can never be tied to the subsequently imported/procured inputs". (India's second written submission, para. 107).
[471] As set out earlier, we refer to the nine duty stipulations that we have found to fall within our terms of reference as "DFIS". However, in what remains of our analysis, our references to DFIS are limited to Conditions 60(ii), 61, and 36, in their entirety, and Conditions 10 and 21, for one and six items respectively. (See paras. 7.154 and 7.267 above).

United States alleges that India foregoes government revenue because each of these schemes provides certain exemptions or deductions from taxes and customs duties.[472]

7.296. We first describe the legal standard under Article 1.1(a)(1)(ii) of the SCM Agreement and then apply it to the four schemes at issue.

7.7.1 The applicable legal standard under Article 1.1(a)(1)(ii)

7.297. Article 1.1(a)(1)(ii) of the SCM Agreement provides that a financial contribution in the form of revenue foregone exists if "government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)".

7.298. The words "foregone", "not collected" and "otherwise due" indicate that "the government has given up an entitlement to raise revenue that it could 'otherwise' have raised".[473] This entitlement cannot be one that is "abstract", because "[a] Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes".[474] Therefore, to ascertain whether there is foregoing of revenue otherwise due, there must be "some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'".[475]

7.299. As an analytical tool to apply this legal standard, WTO adjudicators have articulated a "three-step test".[476]

7.300. The first step is to identify the tax treatment that applies to the alleged subsidy recipients, i.e. the tax treatment that is being challenged.[477]

7.301. The second step is to identify the treatment that will serve as the benchmark for comparison. Given that "Members, in principle, have the sovereign authority to determine their own rules of taxation"[478], the benchmark for comparison "must be the tax rules applied by the Member in question"[479] to "situations which it is legitimate to compare".[480]

7.302. We note that the measures in relation to which this test was first articulated related to the taxation of *income*. As a result as part of this second step of the test, adjudicators have typically referred to the need to identify "comparable *income* of comparably situated taxpayers".[481] Not all

[472] The parties do not dispute that the alleged foregoing of revenue is "by a government" within the meaning of Article 1.1(a)(1), which includes any organ of a Member at any level of government. As will be seen below, the duties and taxes that are allegedly foregone are owed to the "government" within the meaning of this provision, and the measures pursuant to which such duties and taxes are allegedly foregone are legislative and administrative instruments adopted by the "government". Therefore, to the extent it is established that there is revenue foregone, we are satisfied that such foregoing of revenue is "by a government".

[473] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 806; *US – FSC*, para. 90.

[474] Appellate Body Report, *US – FSC*, para. 90.

[475] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 806 (quoting Appellate Body Report, *US – FSC*, para. 90).

[476] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, paras. 812-814; *Brazil – Taxation*, paras. 5.162 and 5.196; and Panel Report, *US – Tax Incentives*, paras. 7.48-7.51.

[477] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 812. We note that footnote 58 of the SCM Agreement distinguishes customs duties and other import charges from taxes. However, when speaking of "tax treatment", we use the term "tax" in a broader sense that also encompasses customs duties.

[478] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 808.

[479] Appellate Body Reports, *US – FSC*, para. 90; *US – Large Civil Aircraft (2nd complaint)*, para. 813.

[480] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 809 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 90). For example, "if the measure at issue involves income earned in sales transactions, it might not be appropriate to compare the treatment of this income with employment income"; and "if the measure at issue is concerned with the taxation of foreign-source income in the hands of a domestic corporation, it might not be appropriate to compare the measure with the fiscal treatment of such income in the hands of a foreign corporation". (Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 90 and 92).

[481] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 813 (emphasis added); *Brazil – Taxation*, para. 5.163 (emphasis added). More precisely, in *US – Large Civil Aircraft (2nd complaint)*, the tax in relation to which the Appellate Body thus articulated the legal test was a tax imposed on the "gross receipts of all businesses operating in Washington", where gross receipts "refer[red] to the gross proceeds of

instances of revenue foregone, however, involve the taxation of income. For example, tax may be levied (or foregone) on the importation of a good, without reference to the taxpayers' income. In such an example, the relevant fiscal situation will not be "income" but the importation of goods. Therefore, in identifying the fiscal treatment which it is legitimate to compare, we consider it important not to refer mechanically to "income", and instead to keep in mind the nature of the measure at issue in each case.

7.303. To identify the tax treatment afforded by the Member in question to "fiscal situations which it is legitimate to compare"[482], we are required "to develop an understanding of the tax structure and principles that best explains that Member's tax regime, and to provide a reasoned basis for identifying [the benchmark]".[483] At the same time, we note that the rules of taxation of a Member are not part of the applicable law in WTO dispute settlement, and that therefore a panel is necessarily limited in its analysis to the facts properly before it.

7.304. The third step is to compare the challenged tax treatment with the benchmark tax treatment. This comparison allows a panel to determine whether, in light of the responding Member's treatment of the fiscal situations which it is legitimate to compare, the government is foregoing revenue otherwise due.[484]

7.305. The requirement to compare "the challenged treatment … to an objectively identifiable benchmark … does not presuppose … that such a comparison should necessarily be made between the group of the entities that allegedly benefits from a subsidy, on the one hand, and the group of *all* the other entities, on the other hand".[485] Thus, the fact that some taxpayers in the benchmark group do not pay "the full amount of the relevant tax … would not necessarily mean that there is no revenue foregone with respect to the taxpayers benefiting from a subsidy".[486]

7.306. The Appellate Body has held that, as part of this three-step test, adjudicators must "consider[] … the objective reasons behind" the challenged tax treatment.[487] This observation was first made in *US – Large Civil Aircraft (2nd complaint)*, in the context of a measure which lowered the tax rate previously applied, and in connection to which the respondent argued that the underlying aim was to counteract certain alleged distortions in the tax system and thus "approximate", for the entities concerned, "the average effective tax rate".[488] The Appellate Body considered this alleged reason behind the tax treatment, and found that it appeared "to be more in the nature of an *ex post* explanation" and "the Panel record [did] not support [it]".[489]

7.307. In *US – Tax Incentives*, the panel looked into the reasons for the challenged tax treatment and found that there was "no evidence" that the resulting difference in tax treatment was "reflective of any organizing principle of the [Business and occupation] tax system"; instead, the "express reason" for the different tax treatment was to "incentiviz[e] the maintenance and growth

sales, the gross income of a business, or the value of products, depending upon which is applicable". (Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 7.47).

[482] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 809.

[483] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 813. Moreover, in identifying this benchmark (like with other questions of legal characterization), a panel is not bound by the arguments raised by the respondent whose tax regime is at issue. (Appellate Body Reports, *Brazil – Taxation*, para. 5.171).

[484] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 814.

[485] Appellate Body Reports, *Brazil – Taxation*, para. 5.209. (emphasis original)

[486] Appellate Body Reports, *Brazil – Taxation*, para. 5.209.

[487] Specifically, the Appellate Body has noted that the first step in the three-step analysis also "entail[s] consideration of the objective reasons behind that treatment", and that these reasons must then be taken into account as part of the third step in the analysis, when comparing the challenged treatment with the benchmark treatment. (Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, paras. 812 and 814; *Brazil – Taxation*, para. 5.162 and fn 542. See also Panel Reports, *US – Tax Incentives*, e.g. paras. 7.49, 7.51, 7.61-7.63, 7.79-7.82, 7.87, 7.94, 7.102, 7.107, 7.115, and 7.131, and *Brazil – Taxation*, paras. 7.394-7.395, 7.401, 7.407-7.413, 7.486-7.487, and 7.841).

[488] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 819 and 829 (the alleged distortion was so-called "pyramiding": ibid. para. 829).

[489] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 829 and 830, respectively.

of Washington State's aerospace industry".[490] Consideration of these reasons therefore did not detract from a finding that the respondent was foregoing revenue otherwise due.[491]

7.308. Similarly, the panel in *Brazil – Taxation* considered the reasons for the challenged tax treatment. For example, with respect to one set of challenged schemes, the panel found that "the alleged reasons relate[d] to the objectives of setting up and developing technology-based industries in Brazil, and giving access to [information technology] products to the population".[492] The panel therefore concluded that these alleged reasons did not "impact"[493] its findings of revenue foregone.

7.309. Thus, in summary, adjudicators before us have looked into whether "objective reasons" behind the challenged treatment explained that treatment other than as revenue foregone.

7.310. India considers that for measures that do not "fall within the ambit of … footnote 1", the three-step test is the appropriate framework to analyse revenue foregone.[494] However, for the EOU/EHTP/BTP Schemes, EPCG Scheme, and DFIS[495], India makes the cross-cutting argument that, since the challenged measures fall under footnote 1, the appropriate framework for analysis is not a three-step test under Article 1.1(a)(1)(ii), as set out above. Instead, India argues that the Panel must compare the duties or taxes accrued with the duty or tax exemption.[496] This is the comparison carried out to determine whether there is revenue foregone under measures that do fall within the scope of footnote 1: with exemption or remission schemes falling under footnote 1, only the excess remission is a financial contribution.[497] But to the extent we examine them below, we have found that the challenged measures fall *outside* the scope of footnote 1.[498] Therefore, "excess" remission under footnote 1 is not the applicable legal standard.

7.7.2 Whether India foregoes revenue otherwise due under the Export Oriented Units and Sector-Specific Schemes

7.311. The United States argues that EOU/EHTP/BTP Units are exempt from the payment of customs duties that would otherwise be due in the absence of the measure, and that, this way, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii).[499]

7.312. India, on the other hand, argues that the EOU/EHTP/BTP Schemes fall under footnote 1 of the SCM Agreement, and that therefore "the appropriate comparison analysis is … a comparison of duties that accrued as opposed to those that were exempted".[500] In paragraph 7.310 above, however, we have already rejected India's argument in this regard, because we are examining whether the challenged measures under the EOU/EHTP/BTP Schemes are a subsidy precisely to the extent that we have already found them to fall outside the scope of footnote 1.

7.313. We therefore examine whether India foregoes revenue otherwise due under the EOU/EHTP/BTP Schemes, using the analytical framework discussed in the previous section.

[490] Panel Report, *US – Tax Incentives*, para. 7.79. See also e.g. paras. 7.80-7.82 and 7.87.
[491] Panel Report, *US – Tax Incentives*, para. 7.79. See also e.g. paras. 7.80-7.82 and 7.87.
[492] Panel Reports, *Brazil – Taxation*, para. 7.487.
[493] Panel Reports, *Brazil – Taxation*, para. 7.487.
[494] India's response to Panel question No. 35, last para.
[495] India makes the same argument also with regard to MEIS. However, the United States has chosen to challenge the alleged subsidies under MEIS as a direct transfer of funds, and we find that they are indeed a direct transfer of funds. (See section 7.8 below).
[496] See paras. 7.312, 7.329, and 7.405 below.
[497] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.134.
[498] See paras. 7.236, 7.247, and 7.267 above.
[499] United States' first written submission, paras. 40-41; second written submission, para. 92; and response to Panel question No. 48, paras. 76 and 79.
[500] India's first written submission, paras. 212-213; second written submission, para. 80 (referring to Appellate Body Report, *EU – PET (Pakistan)*, para. 5.79); responses to Panel questions No. 35, pp. 23-28, No. 36, pp. 28-31 and No. 47, p. 38; and comments on the United States' responses to Panel question No. 48, p. 16.

7.7.2.1 First step: Applicable treatment

7.314. We begin by identifying the tax treatment that allegedly constitutes a financial contribution. Section 6.01(d) of the FTP provides, in relevant part:

> (i) An EOU/EHTP/STP/BTP unit may import and/or procure, from DTA or bonded warehouses in DTA/international exhibition held in India, all types of goods, including capital goods, required for its activities, provided they are not prohibited items of import in the ITC (HS) subject to conditions given at para (ii) & (iii) below. …
>
> (ii) The imports and/ or procurement from bonded warehouse in DTA or from international exhibition held in India shall be without payment of duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 and additional duty, if any, leviable thereon under Section 3(1), 3(3) and 3(5) of the said Customs Tariff Act. …

7.315. Thus, for Units under the EOU/EHTP/BTP Schemes, the importation or purchase of goods is not subject to payment of the customs duties that would otherwise be leviable on those same transactions under the 1975 Customs Tariff Act.

7.316. Before turning to the second step in the analysis, we consider the "objective reasons" behind this tax treatment.[501] The underlying legislation states that the objectives of the EOU/EHTP/BTP Schemes "are to promote exports, enhance foreign exchange earnings, and attract investment for export production and employment generation".[502] With regard to the objective of promoting exports, we also note that the EOU/EHTP/BTP Schemes impose on participants an export obligation and a NFE requirement.[503] These elements of the schemes further confirm that the promotion of export performance is the central reason behind the tax treatment at issue.[504]

7.7.2.2 Second step: Benchmark for comparison

7.317. As a second step, we identify the benchmark for comparison, i.e. the "fiscal situations which it is legitimate to compare".[505] We recall that the challenged tax treatment consists of customs duties (not) levied on the importation of goods. The fiscal situation which it is legitimate to compare, therefore, must be identified within India's regime for customs duties on the importation and domestic procurement of goods.[506]

7.318. In respect of import duties, Section 12 of India's 1962 Customs Act provides:

> Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.[507]

7.319. In accordance with Section 12 of the 1962 Customs Act, the First Schedule of India's 1975 Customs Tariff Act[508] sets forth the rate of import duty for the listed products. India's national tariff schedule therefore sets forth the applicable import duties that, in accordance with Section 12

[501] See para. 7.316 and fn 487 above.
[502] Section 6.00(b) of the FTP.
[503] See paras. 7.133 above, and 7.490 below.
[504] Sections 6.00(a), 6.01(d)(i), 6.04, and 6.08 of the FTP.
[505] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 90; see also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 809. On this "second step", see paras. 7.301-7.303 above.
[506] See e.g. Panel Report, *US – Tax Incentives*, para. 7.118.
[507] Customs Act (1962) as amended, Section 12 to Section 15, (Exhibit USA-8).
[508] Excerpt from Customs Tariff Act (1975) as amended, First Schedule, (Exhibit USA-89). The United States in footnote 259 of its first written submission referred to http://www.cbic.gov.in/htdocs-cbec/customs/cst1718-020218/cst1718-0202-idx (accessed 8 January 2019) which provides India's Customs Tariff Act (1975) and separately lists the chapters of its First Schedule. In response to a request to this effect from the Panel, the United States submitted the first twenty pages of the First Schedule as Exhibit USA-89. See also India's applied tariffs, https://www.wto.org/english/thewto_e/countries_e/india_e.htm.

of the 1962 Customs Act, apply except as otherwise provided. Moreover, Sections 3(1), 3(3), and 3(5) of the 1975 Customs Tariff Act provide for the possibility of imposing additional duties on imports equal to the level of excise duty, sales tax, local taxes and other charges applicable on like domestic goods.

7.320. Taxpayers subject to duties under the 1962 Customs Act and 1975 Customs Tariff Act are importers of (any) goods into India. Taxpayers under the EOU/EHTP/BTP Schemes are, equally, importers of "all types of goods" (subject to certain exclusions) into India.[509] Moreover, customs duties are an indirect charge imposed on the goods themselves upon their importation, rather than a direct tax that would vary, for example, based on taxpayers' income. Therefore, for the purpose of an analysis of India's customs duties on importation, taxpayers subject to duties under the 1962 and 1975 Acts, and taxpayers exempt from those duties under the EOU/EHTP/BTP Schemes, are comparably situated.

7.321. We have asked both parties to identify the normative benchmark against which the customs duty treatment under the EOU/EHTP/BTP Schemes must be assessed. The parties have not identified other elements of India's tax rules as forming part of the relevant normative benchmark.[510]

7.322. We therefore consider that the tax structure and principles outlined in paragraphs 7.318-7.320 provide the basis for identifying the treatment of comparable fiscal situations, i.e. of the importation of goods into India by comparably situated taxpayers. The express wording of the relevant statutes contemplates rates of customs duties applicable to "goods imported into … India" ("[e]xcept as otherwise provided"). We also note that the EOU/EHTP/BTP Schemes explicitly refer to the 1975 Customs Tariff Act as setting out the customs duty liability from which EOU/EHTP/BTP Units are exempt[511], which provides a further indication that the tax treatment under the 1975 Customs Tariff Act is the relevant benchmark for us to identify under the second step in the analysis.[512]

7.323. We therefore consider that the customs duty liability and rates set out under Sections 3(1), 3(3), and 3(5) and the First Schedule of the 1975 Customs Tariff Act are the appropriate benchmark for comparison.

7.7.2.3 Third step: Comparison of the applicable treatment with the benchmark

7.324. We now turn to comparing the tax treatment identified under the first step in the analysis with the benchmark identified in the second step in the analysis.[513]

7.325. As set out above, the 1975 Customs Tariff Act (at its First Schedule and Sections 3(1), 3(3), and 3(5)), in accordance with the 1962 Customs Act, provides that the importation of goods into India is subject to the customs duties set out thereunder. By contrast, under Section 6.01(d) of the FTP, EOU/EHTP/BTP Units may import goods into India "without payment of duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 and additional duty, if any, leviable thereon under Section 3(1), 3(3) and 3(5) of the said Customs Tariff Act". Therefore, the 1975 Customs Tariff Act entitles India to collect the specified customs duties on the importation of goods, and under the challenged EOU/EHTP/BTP Schemes India foregoes that revenue in case of the importation of the same goods by participating Units.

[509] Section 6.01(d) of the FTP.

[510] United States' response to Panel question No. 48, para. 76; India's response to Panel question No. 47, p. 38.

[511] Section 6.01(d)(ii) of the FTP.

[512] As we will see below, other schemes, too, provide for certain exemptions from customs duties. India has not argued that, taken together, these schemes indicate that the rules set out in the Customs Act (1962) and Customs Tariff Act (1975) are not the relevant benchmark. Based on the evidence before us, outside these and possibly other schemes providing for certain exemptions, the applicable customs duties are those provided for under the Customs Act (1962) and Customs Tariff Act (1975). The evidence before us does not lead us to conclude that India's choice to provide for exemptions under a number of schemes disqualifies the duties under the 1962 and 1975 Acts as a legitimately comparable benchmark. See also e.g. Panel Report, *US − Tax Incentives*, para. 7.125.

[513] Appellate Body Reports, *US − Large Civil Aircraft (2nd complaint)*, para. 814; *Brazil − Taxation*, para. 5.162; and Panel Report, *US − Tax Incentives*, para. 7.51.

7.326. We recall that the objective reason behind this different treatment is the promotion of exports and investments.[514] Consideration of this reason does not suggest that the different tax treatment can be explained as treating different fiscal situations differently, rather than as the foregoing of revenue otherwise due.

7.327. We therefore conclude that by exempting the importation of goods by EOU/EHTP/BTP Units from customs duties, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), and therefore provides a financial contribution.

7.7.3 Whether India foregoes revenue otherwise due under the Export Promotion Capital Goods Scheme

7.328. The United States argues that the EPCG scheme exempts a participant from the payment of customs duties otherwise due on the importation of capital goods used for export pre-production, production, and post-production.[515] According to the United States, comparably situated enterprises importing the same capital goods must pay customs duties according to India's national tariff schedule. The United States refers to the Indian customs legislation to show that enterprises participating in the EPCG scheme receive an exemption from the payment of customs duties that comparably situated enterprises in India must instead pay.[516] The United States contends that therefore India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii).[517]

7.329. According to India, the customs duty exemption falls within the scope of footnote 1 and Annexes I(g), I(h), and I(i), and therefore the appropriate comparison is not between comparably situated enterprises, but rather between duties accrued and duties from which EPCG participants were exempted.[518]

7.330. However, in paragraph 7.310 above, we have already rejected India's argument in this regard, because we have already found that the duty exemption under the EPCG Scheme falls outside the scope of footnote 1. We therefore proceed with our analysis using the framework discussed in paragraphs 7.297-7.308.

7.7.3.1 First step: Applicable treatment

7.331. We begin by identifying the tax treatment that allegedly constitutes a financial contribution. Section 5.01(a) of the FTP provides that the "EPCG Scheme allows import of capital goods … for pre-production, production and post-production *at zero customs duty*".[519] That is, the importation of capital goods under the EPCG Scheme is subject to a customs duty rate of zero.

7.332. Before turning to the second step in the analysis, we consider the "objective reasons" behind this duty treatment.[520] The underlying legislation states that the objectives of the EPCG Scheme are "to facilitate import of capital goods for producing quality goods and services and enhance India's *manufacturing competitiveness*".[521] Elsewhere, India has stated that "[t]he objective of the EPCG Scheme is to facilitate import of capital goods for producing quality goods and services to enhance India's *export competitiveness*".[522] Moreover, the scheme imposes an export obligation, which also indicates that the promotion of export performance is the objective

[514] See para. 7.316 above.
[515] United States' first written submission, para. 72.
[516] United States' first written submission, fn 130; response to Panel question No. 50, paras. 81-82.
[517] United States' first written submission, para. 73.
[518] India's first written submission, paras. 309-310; second written submission, para. 138 (referring to Appellate Body Report, *EU – PET (Pakistan)*, para. 5.79); responses to Panel questions No. 35, pp. 23-28, No. 36, pp. 28-31, and No. 49, p. 39; and comments on the United States' responses to Panel question No. 50, p. 17.
[519] Emphasis added.
[520] See para. 7.306 and fn 487 above.
[521] Section 5.00 of the FTP. (emphasis added)
[522] MIS [Management Information System] Report on Export Promotion Schemes, (Exhibit USA-55), Foreword and Chapter II, p. 10; Ministry of Commerce and Industry Department of Commerce, Annual Report, 2017-2018, (Exhibit USA-56), p. 64. (emphasis added)

reason for the duty treatment at issue[523], and a further indication of this comes from the reference to "export promotion" in the name of the scheme.[524]

7.7.3.2 Second step: Benchmark for comparison

7.333. As a second step, we identify the benchmark for comparison, i.e. the fiscal situation which it is legitimate to compare. We recall that the challenged tax treatment consists of the customs duty treatment of imported goods. The fiscal situation that it is legitimate to compare, therefore, must be identified within India's regime for customs duties on the importation of goods.[525]

7.334. In paragraphs 7.318-7.319 above, we described the relevant customs rules that apply to the importation into India of goods, including capital goods, under the 1962 Customs Act and the 1975 Customs Tariff Act. The 1962 Customs Act provides that the "duties of customs" at the rates set forth under the 1975 Customs Tariff Act "shall be levied … on goods imported into India". The First Schedule of the 1975 Customs Tariff Act lists the rates of duty applicable on importation, by tariff heading and subheading, as required by the 1962 Customs Act.

7.335. Taxpayers exempt from duties on capital goods under the EPCG Scheme are importers of capital goods into India. Taxpayers subject to duties on the importation of those same goods under the 1962 Customs Act and 1975 Customs Tariff Act are, equally, importers of capital goods into India. Moreover, customs duties are an indirect charge imposed on the goods themselves upon their importation or exportation, rather than a direct tax that would vary, for example, based on taxpayers' income. Therefore, for the purpose of an analysis of India's customs duties on the importation of capital goods, taxpayers subject to duties under the 1962 and 1975 Acts, and taxpayers exempt from those duties under the EPCG Scheme, are comparably situated.

7.336. We have asked both parties to identify the normative benchmark against which the tax treatment under the EPCG Scheme must be assessed. The parties have not identified other elements of India's tax rules as forming part of the relevant normative benchmark.[526]

7.337. We therefore consider that the customs duty liability and rates set forth under the 1962 Customs Act and the 1975 Customs Tariff Act are an appropriate benchmark for assessing whether India foregoes revenue under the EPCG Scheme.[527]

7.7.3.3 Third step: Comparison of the applicable treatment with the benchmark

7.338. We now compare the tax treatment identified under the first step in the analysis with the benchmark identified in the second step in the analysis.

7.339. As set out above, the 1975 Customs Tariff Act, in accordance with the 1962 Customs Act, provides that the importation of all goods (including capital goods) into India is subject to the customs duties set out thereunder. By contrast, under Section 5.01 of the FTP, EPCG participants can import capital goods into India "at zero customs duty". Therefore, the 1975 Customs Tariff Act entitles India to collect the specified customs duties on the importation of capital goods, whereas under the challenged EPCG Scheme India foregoes that revenue in case of the importation of the same goods by participants in the scheme.

7.340. We recall that the reason for this different treatment is the promotion of manufacturing and export competitiveness.[528] Consideration of this reason does not suggest that the different tax treatment is explained by differences in the underlying fiscal situation, and therefore does not detract from our finding that India is foregoing revenue otherwise due.

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[523] Sections 5.01(c) and 5.04(b) of the FTP.
[524] Heading of Chapter 5 of the FTP.
[525] See e.g. Panel Report, *US – Tax Incentives*, para. 7.118.
[526] United States' response to Panel question No. 50, paras. 81 and 82; India's response to Panel question No. 49, p. 39.
[527] See also fn 512 above.
[528] See para. 7.332 above.

7.341. We therefore conclude that, by exempting from customs duties the importation of capital goods under the EPCG Scheme, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), and thus provides a financial contribution.

7.7.4 Whether India foregoes revenue otherwise due under the Special Economic Zones Scheme

7.342. To recall, the US challenge in respect of the SEZ Scheme extends to[529]:

a. The exemption from customs duties on imports and exports[530];

b. The exemption from IGST[531]; and

c. The deduction of export earnings from the income on which income tax is levied.[532]

7.343. The United States argues that SEZ Units benefit from exemptions from or reductions in duties and taxes that would otherwise be due in the absence of the measure.[533] According to the United States, enterprises that do not participate in the SEZ Scheme must generally pay these duties and taxes. The United States refers to the Indian customs and tax legislation to show that enterprises participating in the SEZ Scheme receive an exemption from, or reduction of, the payment of customs duties and taxes that comparably situated enterprises in India must pay.[534] The United States contends that therefore the challenged exemptions and deductions under the SEZ Scheme constitute financial contributions in the form of "government revenue that is otherwise due [that] is foregone or not collected" within the meaning of Article 1.1(a)(1)(ii).[535]

7.344. India argues that the United States has failed to establish that the challenged aspects of the SEZ Scheme are export contingent.[536] India therefore asks the Panel not to consider whether the challenged measures under the SEZ Scheme constitute subsidies within the meaning of Article 1 of the SCM Agreement.[537]

7.345. Using the three-step framework for analysis discussed above, we will examine, in turn, the exemption from customs duties, the exemption from IGST, and the deduction from corporate income tax.

7.7.4.1 The exemption from customs duties on imports and exports

7.7.4.1.1 First step: Applicable treatment

7.346. We begin by identifying the challenged tax treatment through which India allegedly foregoes revenue otherwise due, as well as considering the objective reasons for this tax treatment.

7.347. Section 26(1)(a) of the SEZ Act provides for:

[529] The United States only challenges this treatment insofar as accorded to SEZ "Units"; it does not challenge (where applicable) the same treatment granted to developers of SEZs or entrepreneurs establishing SEZ Units (United States' responses to Panel questions No. 74, para. 119 and No. 76, para. 121). For the definitions of "developer", "entrepreneur" and "Unit", see paras. 7.147-7.149 above.

[530] Section 26(1)(a) (for imports) and Section 26(1)(b) (for exports) of the SEZ Act.

[531] Notification No. 15/2017, (Exhibit USA-27).

[532] Section 27 and the Second Schedule of the SEZ Act; Income Tax Act, 1961, Sections 10A and 10AA, (Exhibit USA-29).

[533] United States' first written submission, paras. 110-117.

[534] United States' first written submission, paras. 110, 112, 114, and 116; response to Panel question No. 67, paras. 92-96.

[535] United States' first written submission, paras. 105-106 and 109; second written submission, para. 136.

[536] India's first written submission, para. 329; opening statement at the meeting of the Panel, para. 105; and response to Panel question No. 64, p. 51.

[537] India's first written submission, para. 329; opening statement at the meeting of the Panel, para. 105; responses to Panel questions No. 64, p. 51 and No. 66, p. 52.

> [E]xemption from any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force, on goods *imported* into, or services provided in, a Special Economic Zone or a Unit, to carry on the authorized operations by the Developer or entrepreneur.[538]

7.348. Similarly, Section 26(1)(b) of the SEZ Act provides for:

> [E]xemption from any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force, on goods *exported* from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India.[539]

7.349. Thus, the SEZ Act exempts SEZ Units[540] from "any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force", on the importation and exportation of goods into and from India.[541]

7.350. Before turning to the second step in the analysis, we consider the objective reasons for this fiscal treatment.[542] India contends that the SEZ Scheme is not an export promotion scheme[543] and "cannot be reduced to the promotion of exports".[544] Instead, the scheme "is [...] integral to the maintenance of the sovereignty and integrity of India", and its measures are "designed to increase the production capacity of the SEZ Units, and result in additional economic activity, promotion of investment, and creation of employment opportunities".[545]

7.351. The opening paragraph of the SEZ Act describes it as an "Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto".[546] This suggests that the central objective of the Act and the measure set forth in it is the promotion of exports, other matters being "connected therewith or incidental thereto". Further, the NFE requirement is a central operational characteristic of the SEZ Scheme, in line with the central objective of promoting exports.[547]

7.352. In addition, Indian officials have stated[548] that "[t]he Special Economic Zones (SEZs) scheme has been a key instrument for promoting exports from India"[549] and that "SEZ Act and Rules provide a very competitive package for setting up export-oriented manufacturing and services units"[550]. Likewise, India's Minister of Commerce and Industry observed that "SEZ Schemes are important components of [India's] export promotion efforts contributing about

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[538] SEZ Act. (emphasis added)

[539] SEZ Act. (emphasis added)

[540] The United States' challenge in the present case does not extend to the exemptions, if any, afforded to entities other than SEZ Units. (See fns 251 and 529 above).

[541] See e.g. United States' first written submission, paras. 103, 112, and 114.

[542] See para. 7.306 above.

[543] India's first written submission, para. 321; second written submission, paras. 152-155.

[544] India's first written submission, para. 322; second written submission, para. 149; and opening statement at the meeting of the Panel, paras. 87 and 88.

[545] India's second written submission, para. 154. (fn omitted)

[546] First page of the SEZ Act.

[547] India argues that the NFE requirement is not meant to induce exports (India's first written submission, para. 348). We address this argument in the discussion of export contingency.

[548] India objects to giving probative value to "the subjective statements of government officials". We note however that with regard to the "objective reasons" behind the challenged tax and duty treatment, previous panels have relied on published government statements explaining the objective of the challenged measures, and press statements by government officials, as well as on the text of the relevant legislation or instrument, the operation of the scheme, and other evidence. India's second written submission, para. 156. See ibid., para. 157 and opening statement at the meeting of the Panel, para. 89; Panel Reports, *Brazil – Taxation*, paras. 7.407, 7.409, 7.410, 7.486, 7.832, 7.833, 7.841, 7.1157, 7.1159-7.1162, and 7.1210; *US – Tax Incentives*, paras. 7.62-7.63; and *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, paras. 8.875, 8.994-8.996, and 8.1035.

[549] Address by Shri Anand Sharma (Annual Supplement 2013-2014 to the Foreign Trade Policy 2009-2014, (Exhibit USA-23), para. 25).

[550] Nirmala Sitharaman, "SEZ scheme of India is quite comprehensive", *Daily News and Analysis*, (20 December 2014), (Exhibit USA-24).

one-third of our national exports".[551] And India's Ministry of Electronics and Information Technology recognizes the SEZ Scheme as an "export promotion scheme".[552] These statements confirm what the text of the SEZ Act and the operational characteristics of the Scheme indicate, namely, the central role of export promotion as a reason for the measures comprising the SEZ Scheme.

7.353. India points out that the SEZ Act also describes a range of considerations that must guide the Central Government of India in discharging its functions under the SEZ Act.[553] These considerations that must guide the Government include, together with the "promotion of exports of goods and services", the generation of additional economic activity, the promotion of investment from domestic and foreign sources, the creation of employment opportunities, the development of infrastructure facilities, and the maintenance of the sovereignty and integrity of India, the security of the State and friendly relations with foreign States.[554]

7.7.4.1.2 Second step: Benchmark for comparison

7.354. As a second step, we identify the benchmark for comparison, i.e. the fiscal situations that it is legitimate to compare. We recall that the challenged tax treatment consists of the customs duty treatment of the importation and exportation of goods. The fiscal situation that it is legitimate to compare, therefore, must be identified within India's regime for customs duties on the importation and exportation of goods.[555]

7.355. Section 12 of India's 1962 Customs Act provides:

> Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.[556]

7.356. In accordance with Section 12 of the 1962 Customs Act, the First Schedule of India's 1975 Customs Tariff Act[557] sets forth the rate of *import* duty for the listed products[558], and the Second Schedule of India's 1975 Customs Tariff Act sets forth the rate of *export* duty for the listed products.[559]

7.357. We have asked both parties to identify the normative benchmark against which the exemption from customs duties on importation and exportation under the SEZ Scheme must be assessed. The parties have not identified other elements of India's tax rules as forming part of the relevant normative benchmark.[560]

7.358. We also note that the SEZ Act explicitly refers to the 1962 Customs Act and the 1975 Customs Tariff Act (and "any other law for the time being in force", which is also the wording used in the 1962 Customs Act) as laying down the duties with regard to which it sets forth "exemption[s]".[561]

7.359. Taxpayers subject to duties on importation and exportation under the 1962 Customs Act and 1975 Customs Tariff Act are importers or exporters, respectively, of goods. Taxpayers exempt

[551] "Export Champions", *The Economic Times*, (12 February 2018), (Exhibit USA-4).
[552] Export Promotion Schemes, (Exhibit USA-35).
[553] Section 5 of the SEZ Act. See also India's second written submission, para. 154.
[554] Section 5 of the SEZ Act.
[555] See e.g. Panel Report, *US – Tax Incentives*, para. 7.118.
[556] Customs Act (1962) as amended, Section 12 to Section 15, (Exhibit USA-8).
[557] Excerpt from Customs Tariff Act (1975) as amended, First Schedule, (Exhibit USA-89). See fn 508 above.
[558] United States' first written submission, para. 112; response to Panel question No. 67, para. 95.
[559] Customs Tariff Act, (Exhibit USA-31), Second Schedule; United States' first written submission, para. 114; and response to Panel question No. 67, para. 95.
[560] United States' response to Panel question No. 67, paras. 94-95; India's response to Panel question No. 66, p. 52; and comments on the United States' response to Panel question No. 67.
[561] Section 26(1)(a)-(b) of the SEZ Act. As regards customs duties on importation, see also fn 512 above.

from those duties under the SEZ Scheme are, equally, importers or exporters of goods. Moreover, customs duties are an indirect charge imposed on the goods themselves upon their importation or exportation, rather than a direct tax that would vary, for example, based on taxpayers' income. Therefore, for the purpose of an analysis of India's customs duties on importation and exportation, taxpayers subject to duties under the 1962 and 1975 Acts, and taxpayers exempt from those duties under the SEZ Scheme, are comparably situated.

7.360. We therefore consider that the customs duty liabilities and rates set out under the 1962 Customs Act and the 1975 Customs Tariff Act for the importation and exportation of goods are the appropriate benchmark for comparison.

7.7.4.1.3 Third step: Comparison of the applicable treatment with the benchmark

7.361. As a third step, we compare the tax treatment identified under the first step in the analysis with the benchmark treatment identified in the second step in the analysis.

7.362. As described above, the 1962 Customs Act provides that goods imported into, or exported from, India, are subject to the customs duties set forth in the 1975 Customs Tariff Act (and "any other law for the time being in force"[562]). By contrast, the SEZ Act exempts goods imported or exported by SEZ Units from those same customs duties. Therefore, under the SEZ Scheme, India foregoes revenue otherwise due in the form of customs duties on goods imported or exported by SEZ Units.

7.363. We recall our earlier finding that the promotion of exports is a key reason behind the SEZ Scheme, as well as our observation that, according to India, other reasons for the Scheme include the generation of additional economic activity, investment, and employment, and the maintenance of India's sovereignty.[563] None of these reasons explains the different tax treatment otherwise than as the foregoing of revenue, and therefore none of these reasons detracts from our finding that India is foregoing revenue otherwise due.

7.364. We therefore conclude that by exempting from customs duties the importation and exportation of goods by SEZ Units, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), and thus provides a financial contribution.

7.7.4.2 The exemption from IGST

7.7.4.2.1 First step: Applicable treatment

7.365. Turning to the exemption from IGST, we begin by identifying the challenged tax treatment. This is set out in Notification No. 15/2017, which:

> exempts all goods or services or both imported by a unit or a developer in the Special Economic Zone, from the whole of the integrated tax leviable thereon under sub-section (7) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) for authorised operations.[564]

7.366. Thus, Notification No. 15/2017 exempts SEZ Units from payment of IGST on the importation of goods.[565]

7.367. We have considered the reasons for the fiscal treatment under the SEZ Scheme in paragraphs 7.350-7.353, and we refer to that discussion, which applies equally here.

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[562] Customs Act (1962) as amended, Section 12 to Section 15, (Exhibit USA-8), Section 12.

[563] See paras. 7.350-7.353 above.

[564] Notification No. 15/2017, (Exhibit USA-27). Notification No. 15/2017 refers to the importation by an SEZ Unit or an SEZ developer. However, the United States' challenge in the present case is limited to the exemption granted to SEZ Units. (See fns 251 and 529 above).

[565] Notification No. 15/2017 "exempts ... goods or services". But as we will see below, the provision derogated from, i.e. Section 3(7) of the Customs Tariff Act (1975), only refers to "articles". The United States, too, only refers to an exemption as it relates to goods: see e.g. United States' first written submission, paras. 116 and 117.

7.7.4.2.2 Second step: Benchmark for comparison

7.368. As a second step, we identify the benchmark for comparison, i.e. the fiscal situations that it is legitimate to compare. We recall that the challenged tax treatment consists of an exemption from IGST on the importation of goods, where IGST is an "integrated goods and services tax", similar to value added tax, which is levied on interstate transactions and on import transactions.[566] The fiscal situation that it is legitimate to compare, therefore, must be identified within India's regime for such taxes as it applies to the importation of goods.[567]

7.369. Section 5(1) of the IGST Act stipulates that:

> [T]here shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services … at such rates, not exceeding forty per cent, as may be notified by the Government … [p]rovided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 [concerning the levy of additional duty equal to excise duty, sales tax, local taxes and other charges] on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962.[568]

7.370. Section 3(7) of the 1975 Customs Tariff Act provides that:

> Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding forty per cent as is leviable under section 5 of the Integrated Goods and Services Tax Act, 2017 on a like Article on its supply in India, on the value of the imported article as determined under sub-section (8) or sub-section (8A), as the case may be.[569]

7.371. Thus, taken together, Section 5(1) of the IGST Act and Section 3(7) of the 1975 Customs Tariff Act impose the applicable IGST on all goods imported into India.

7.372. Pursuant to Section 6 of the IGST Act, the Government may lay down exemptions from IGST where it "is satisfied that it is necessary in the public interest".[570] It may lay down exemptions "generally" for "goods or services or both of any specified description", "either absolutely or subject to such conditions as may be specified therein".[571] Or, "under circumstances of an exceptional nature", it may individually exempt from payment of the IGST "goods or services … on which tax is leviable".[572]

7.373. Notification No. 15/2017, which sets out the challenged tax exemption, was adopted "[i]n exercise of the powers conferred by sub-section (1) of section 6 of the Integrated Goods and Service Tax Act, 2017"[573], i.e. it was expressly worded as a derogation from the IGST liability that is otherwise set forth in the IGST Act. Further, Notification No. 15/2017 is expressly worded as an exemption from Section 3(7) of the 1975 Customs Tariff Act, i.e. the provision extending the IGST to imports.

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[566] Integrated Goods and Services Tax Act, (Exhibit USA-32), Section 5(1).
[567] See e.g. Panel Report, *US – Tax Incentives*, para. 7.118.
[568] Integrated Goods and Services Tax Act, (Exhibit USA-32), Section 5(1). The applicable tax rates can be found at: https://cbec-gst.gov.in/gst-goods-services-rates.html (accessed on 25 March 2019), also submitted as Indian Ministry of Finance, Department of Revenue website, Rates of Goods and Services Tax (accessed 14 March 2019), (Exhibit USA-65).
[569] Customs Tariff Act (1975) as amended, (Exhibit USA-87), Section 3(7). The United States initially submitted a version of the Customs Tariff Act (1975), (Exhibit USA-7) that contained an outdated version of Section 3(7). In response to a request to this effect from the Panel, the United States submitted the updated version of the Customs Tariff Act (1975), including the updated Section 3(7), as Exhibit USA-87.
[570] Integrated Goods and Services Tax Act, (Exhibit USA-32), Sections 6(1)-(2).
[571] Integrated Goods and Services Tax Act, (Exhibit USA-32), Section 6(1).
[572] Integrated Goods and Services Tax Act, (Exhibit USA-32), Section 6(2).
[573] Notification No. 15/2017, (Exhibit USA-27).

7.374. In response to our request to parties that they identify the relevant normative benchmark, neither party has identified elements of India's tax regime other than those set out above.[574]

7.375. Taxpayers subject to IGST on imported goods under the 1962 Customs Act and 1975 Customs Tariff Act are importers of goods into India. Taxpayers exempt from IGST under the SEZ Scheme are, equally, importers of goods into India. Moreover, the IGST is an indirect tax imposed on the goods themselves (for present purposes, upon the importation of the goods), rather than a direct tax that would vary, for example, based on taxpayers' income. Therefore, taxpayers subject to IGST on importation under the 1975 Customs Tariff Act, and taxpayers exempt from IGST on importation under the SEZ Scheme, are comparably situated.

7.376. We therefore consider that the IGST liability and rates set out under the IGST Act and the 1975 Customs Tariff Act for the importation of goods are the appropriate benchmark for comparison.

7.7.4.2.3 Third step: Comparison of the applicable treatment with the benchmark

7.377. As a third step, we compare the tax treatment identified under the first step in the analysis with the benchmark treatment identified in the second step in the analysis, also taking into account the reasons behind the challenged tax treatment.

7.378. As described above, Section 3(7) of the 1975 Customs Tariff Act, extending Section 5(1) of the IGST Act to imported goods, entitles India to collect the IGST on "[a]ny article which is imported into India". By contrast, Notification No. 15/2017, expressly derogating from Section 3(7) of the 1975 Customs Tariff Act, provides that the IGST shall not be levied on goods imported by an SEZ Unit. Therefore, under the SEZ Scheme, India foregoes revenue otherwise due in the form of the IGST on imported goods.

7.379. We recall our earlier finding that the promotion of exports is a key reason behind the SEZ Scheme, as well as our observation that, according to India, other reasons for the Scheme include the generation of additional economic activity, investment, and employment, and the maintenance of India's sovereignty.[575] None of these reasons explains the different tax treatment otherwise than as the foregoing of revenue, and therefore none of these reasons detracts from our finding that India is foregoing revenue otherwise due.

7.380. We therefore conclude that by exempting from IGST the importation of goods by SEZ Units, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), and thus provides a financial contribution.

7.7.4.3 The deduction from corporate income tax

7.381. We now turn to the challenged deduction from the base on which income tax is levied.

7.7.4.3.1 First step: Applicable treatment

7.382. We begin by identifying the challenged tax treatment through which India allegedly foregoes revenue otherwise due.

7.383. Section 27 of the SEZ Act provides that:

> The provisions of the Income-tax Act, 1961, as in force for the time being, shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorised operations in a Special Economic Zone or Unit subject to the modifications specified in the Second Schedule.[576]

[574] United States' response to Panel question No. 67, paras. 94-95; India's response to Panel question No. 66, p. 52; and comments on the United States' response to Panel question No. 67.
[575] See paras. 7.350-7.353 above.
[576] SEZ Act.

7.384. The Second Schedule of the SEZ Act modifies India's 1961 Income Tax Act in relevant part to the effect that:

> Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause (j) of section (2) of the Special Economic Zones Act, 2005, from his Unit, who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any assessment year commencing on or after the 1st day of [April, 2006, a deduction of]—
>
> (i) hundred per cent of profits and gains derived from the export, of such articles or things or from services for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the Unit begins to manufacture or produce such articles or things or provide services, as the case may be, and fifty per cent of such profits and gains for further five assessment years and thereafter[.][577]

7.385. Thus, the SEZ Act and its Second Schedule, and the Income Tax Act as accordingly amended, entitle SEZ Units to deduct from taxable income 100% of profits from exports of goods and services during the first five years of operation, and 50% for five further years.

7.386. We have considered the reasons for the fiscal treatment under the SEZ Scheme in paragraphs 7.350-7.353, and we refer to that discussion, which applies equally here.

7.7.4.3.2 Second step: Benchmark for comparison

7.387. As a second step, we identify the benchmark for comparison, i.e. the fiscal situations which it is legitimate to compare.

7.388. As we have seen above, the United States challenges tax treatment consisting of a deduction granted by India "in computing the total income of" an SEZ entrepreneur from an SEZ Unit, for purposes of the Income Tax Act.[578] Specifically, with regard to goods, SEZ entrepreneurs are allowed to deduct from the total income of SEZ Units all or part of the "profits and gains derived from the export of … articles or things or … services".[579]

7.389. The benchmark for comparison, therefore, must be the tax treatment of "legitimately comparable income"[580] "for taxpayers in comparable situations".[581] By way of example, *income* might not be legitimately comparable "if the measure at issue involves income earned in sales transactions, [and that income is compared with] employment income".[582] As for the comparability of *taxpayers*, again by way of example, "a domestic corporation" might not be comparably situated to a "foreign corporation".[583] Thus, in the case of income from export sales earned by SEZ Units, which are located in India, the income earned by other undertakings located in India from the exportation of goods and services provides an appropriate benchmark for comparison.

7.390. To identify the benchmark for comparison, the United States relied on Section 80A of India's 1961 Income Tax Act. This provision, titled "[d]eductions to be made in computing total income", states in relevant part:

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[577] SEZ Act; Income Tax Act, 1961, Sections 10A and 10AA, (Exhibit USA-29) (fn omitted). The cited language is from Section 10AA. Section 10A provided for the equivalent deduction for SEZ Units having begun production before the year preceding "the assessment year commencing on or after the 1st day of April, 2006", and which were initially located in a free trade zone or export processing zone.

[578] Second Schedule of the SEZ Act; Income Tax Act, 1961, Sections 10A and 10AA, (Exhibit USA-29), Section 10AA.

[579] Second Schedule of the SEZ Act; Income Tax Act, 1961, Sections 10A and 10AA, (Exhibit USA-29), Section 10AA.

[580] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 91.

[581] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 92. See also ibid. para. 98 ("the fiscal treatment of comparable income, in the hands of taxpayers in similar situations").

[582] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 90.

[583] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 92.

> (1) In computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of this Chapter, the deductions specified in sections 80C to [80U].[584]

7.391. Because this provision expressly enumerates the deductions that are allowed "[i]n computing the total income of an assessee", the United States infers from it that, "as a general rule, profits are not deductible", and considers that this inability to deduct profits is the appropriate benchmark for comparison.[585]

7.392. India does not contest the United States' reliance on Section 80A.[586] However, India points out that this provision together with the deductions specified in Sections 80C to 80U show that "the Income Tax Act, 1961, allows for a range of deductions", and that "the deduction of profits is not restricted to the profits earned by enterprises engaged in SEZ / SEZ Development".[587] India points to several examples of profits that can or could be deducted from taxable income, including profits from certain undertakings in backward areas, profits from exports (which could be deducted until, and not after, 2005), profits "derived … from any business of developing a Special Economic Zone", and profits from certain undertakings "in any of the North-Eastern States" (which could be deducted between 2007 and 2017).[588]

7.393. The Appellate Body has urged panels assessing allegations of revenue foregone "to develop an understanding of the tax structure and principles that best explains that Member's tax regime, and to provide a reasoned basis for identifying [the benchmark]".[589] We therefore review the legislation relied upon by both parties to develop an understanding of the "tax structure and principles" that are relevant to India's tax treatment of income, and in particular of income from export sales.

7.394. First, in reviewing the provisions allowing for tax deductions and enumerated in Section 80A, we note that, for a time, taxpayers resident in India could deduct a certain proportion of profits from export sales, but that no such deduction is "allowed in respect of the assessment year beginning on the 1st day of April, 2005 and any subsequent assessment year".[590]

7.395. Second, we note that, as pointed out by India, Sections 80C to 80U allow a "range"[591] of other deductions of profits from taxable income, including for example profits from certain undertakings in backward areas, from the business of developing an SEZ and, until 2017, from certain undertakings in the North-Eastern States. We do not, however, see these deductions as coalescing into some general rule according to which the deduction is the rule.[592] Rather, India appears to have selected a range of disparate situations in which it allows, indefinitely or for a finite period of time, the deduction of profits from taxable income, all the while maintaining its

[584] Income Tax Act, 1961, Section 80A, (Exhibit USA-30) (fn omitted), cited in United States' first written submission, para. 110; and United States' responses to Panel questions No. 63, paras. 89-90 and No. 67, para. 93.

[585] United States' responses to Panel questions No. 63, para. 90 and No. 67, para. 93.

[586] As a general matter, India's position is that, because the SEZ Scheme is not export contingent, India need not address the arguments going to the existence of a subsidy. (India's first written submission, para. 329; second written submission, paras. 187-189; and comment on the United States' response to Panel question No. 67).

[587] India's comments to the United States' response to Panel question No. 63.

[588] Income Tax Act, 1961, Sections 80HH, 80HHC, 80IAB, and 80IE, referred to in India's comments to the United States' response to Panel question No. 63. Instrument No. 26 in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), annex A; Exhibits USA-84 and IND-23.

[589] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 813. See para. 7.303 above.

[590] Income Tax Act, Section 80HHC, referred to in India's comments on the United States' response to Panel question No. 63. Instrument No. 26 in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), annex A; Exhibits USA-84 and IND-23.

[591] India's comments on the United States' response to Panel question No. 63.

[592] Compare Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 815 ("we note that a domestic tax system may be so replete with exceptions that the rate applicable to the general category of income in fact no longer represents the 'general rule' but, rather, the 'exception'").

entitlement, outside those situations specifically provided for, to treat profits as part of taxable income.

7.396. Third, in examining the "tax structure and principles" as evidenced in the Income Tax Act, we note that where a "Central Act" provides that income tax will be charged, it must be "charged … in accordance with … the provisions … of" the Income Tax Act, "in respect of the total income of the previous year of every person".[593] For that purpose, the Income Tax Act defines the "scope of total income". It provides that, subject to the provisions of the Income Tax Act, the "total income" of residents includes "all income from whatever source derived which (a) is received … in India by or on behalf of such a person; or (b) accrues or arises … to him in India …; or (c) accrues or arises to him outside India …".[594]

7.397. Taken together, these provisions of the Income Tax Act therefore outline a system in which the definition of income is broad and encompasses profits from export sales, while at the same time India has chosen, in a range of disparate situations, to allow certain deductions from profits, including, to this day, the deduction of profits from export sales of SEZ Units.

7.398. Our review of the relevant provisions therefore confirms to us the inference drawn by the United States from Section 80A, i.e. that the benchmark treatment of income is that the income is *included* in (and not deducted from) the taxable income, and it confirms to us that this inference is also specifically valid for income from export sales by undertakings which, like SEZ Units, are situated in India.

7.399. We therefore conclude that the benchmark for comparison is that "profits and gains" from the export of goods are included in the taxable income of the undertakings to whom those profits and gains accrue.

7.7.4.3.3 Third step: Comparison of the applicable treatment with the benchmark

7.400. As a third step, we compare the tax treatment identified under the first step in the analysis with the benchmark treatment identified in the second step in the analysis.

7.401. As set out above, the SEZ Act, modifying in relevant part the Income Tax Act, provides that SEZ entrepreneurs may deduct from the taxable income of their SEZ Unit 100% of profits and gains from the export of goods during the first five years after the Unit has started "to manufacture or produce" such goods, and 50% of such profits for a further five years.[595] By contrast, such income from export sales would otherwise be included in the taxable income under the Income Tax Act.[596]

7.402. We have found that the promotion of exports is a key reason for the different tax treatment afforded under the SEZ Scheme, and we have also noted India's contention that other reasons for the Scheme include the generation of additional economic activity, investment, and employment, and the maintenance of India's sovereignty.[597] None of these reasons explains the different tax treatment otherwise than as the foregoing of revenue otherwise due, and therefore, like for the other prongs of the SEZ Scheme, consideration of the objective reasons behind the tax treatment does not detract from our finding that India is foregoing revenue otherwise due.

7.403. We therefore conclude that, by allowing SEZ entrepreneurs to deduct all or half of profits and gains from exports from the taxable income of SEZ Units during two consecutive periods of five years, India foregoes the revenue otherwise due to it in the form of tax on that income, and

[593] Income Tax Act, Section 4. Instrument No. 26 in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), annex A; Exhibits USA-84 and IND-23.

[594] Income Tax Act, Section 5. Instrument No. 26 in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), annex A; Exhibits USA-84 and IND-23.

[595] See paras. 7.383-7.385 above.

[596] See paras. 7.390-7.399 above.

[597] See paras. 7.350-7.353 above.

thus provides a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

7.7.5 Whether India foregoes revenue otherwise due under the Duty-Free Imports for Exporters Scheme

7.404. The United States argues that DFIS exempts importers from the payment of customs duties that would otherwise be due on the importation of particular goods in the absence of the measure[598], up to the value of that participant's duty-free entitlement under DFIS.[599] According to the United States, comparably situated enterprises importing the same products must pay customs duties according to India's national tariff schedule. The United States refers to the Indian customs legislation to show that, under DFIS, enterprises receive an exemption from the payment of customs duties that comparably situated enterprises in India must pay.[600] The United States contends that therefore DFIS provides exemptions from customs duty which constitute revenue foregone within the meaning of Article 1.1(a)(1)(ii).[601]

7.405. According to India, the customs duty exemption falls within the scope of footnote 1 and Annex I(i), and therefore the appropriate comparison is not between comparably situated enterprises, but rather between duties accrued and duties from which DFIS participants are exempted.[602]

7.406. In paragraph 7.310 above, however, we have already rejected India's argument in this regard. To recall, we have found that, among the nine Conditions/duty stipulations comprising DFIS, Conditions 36, 60(ii), and 61, in their entirety, and Conditions 10 and 21, for one and six items respectively, fall outside the scope of footnote 1.[603] It is therefore for these Conditions/duty stipulations that we examine whether India is providing a financial contribution by foregoing revenue that is otherwise due.

7.7.5.1 First step: Applicable treatment

7.407. As a first step, we identify the challenged tax treatment. The pairings of Conditions and duty stipulations at issue are set out in Notification No. 50/2017. This provides, in relevant part:

> In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 … and sub-section (12) of section 3, of Customs Tariff Act, 1975 … the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods [identified in Customs Notification No. 50/2017] when imported into India,-
>
> (a) from so much of the duty of customs leviable thereon under the said First Schedule [of the 1975 Customs Tariff Act] as is in excess of the amount calculated at the standard rate specified in the corresponding entry in column (4) of the said Table; …
>
> subject to any of the conditions, specified in the Annexure to this notification[.][604]

7.408. For the Line Numbers at issue, Notification No. 50/2017 indicates "Nil" as the "Standard rate" of customs duties.[605] Thus, under Notification No. 50/2017, participating enterprises are exempt from import duties subject to meeting the relevant Conditions.

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[598] United States' first written submission, paras. 152-156.
[599] United States' first written submission, para. 154.
[600] United States' first written submission, para. 155; response to Panel question No. 84, paras. 143 and 144.
[601] United States' first written submission, para. 156; second written submission, para. 169.
[602] India's first written submission, para. 391 and 392; second written submission, para. 203 (referring to Appellate Body Report, *EU – PET (Pakistan)*, para. 5.79); responses to Panel questions No. 35, p. 23-28, No. 36, p. 28-31 and No. 83, p. 61; and comments on the United States' responses to Panel question No. 84, p. 25.
[603] See para. 7.267 above.
[604] Notification No. 50/2017, (Exhibit USA-36), p. 1.

7.409. Before turning to the second step in the analysis, we consider the "objective reasons" behind this duty treatment.[606] Notification No. 50/2017 does not provide any express statement of objectives. However, it ties the value of goods eligible for customs duty exemption to the value of past export performance, which indicates that the promotion of export performance underlies the duty treatment at issue, as argued by the United States. India has not identified a different objective, and has argued that DFIS was intended as a drawback of customs duties related to exported products[607], an argument which is consistent with the view that the reason behind DFIS is the promotion of exports.

7.7.5.2 Second step: Benchmark for comparison

7.410. As a second step, we identify the benchmark for comparison, i.e. the fiscal situations which it is legitimate to compare. We recall that the challenged tax treatment consists of customs duties on the importation of goods. The fiscal situation which it is legitimate to compare, therefore, must be identified within India's regime for customs duties on the importation of goods.[608]

7.411. Section 12 of India's 1962 Customs Act provides that "[e]xcept as otherwise provided … duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975] … on goods imported into … India".[609] The First Schedule of India's 1975 Customs Tariff Act accordingly sets forth the rate of import duty for the listed products.

7.412. In response to questioning from the Panel, the parties have not identified other elements of India's tax rules as forming part of the relevant normative benchmark.[610]

7.413. We also note that Notification No. 50/2017, itself, refers to the First Schedule of the 1975 Customs Tariff Act as the norm it departs from.[611]

7.414. Taxpayers exempt from duties on the listed goods under DFIS are importers of those goods into India. Taxpayers subject to duties on the importation of those same goods under the 1962 Customs Act and 1975 Customs Tariff Act are, equally, importers of the same goods into India. Moreover, customs duties are an indirect charge imposed on the goods themselves upon their importation or exportation, rather than a direct tax that would vary, for example, based on taxpayers' income. Therefore, for the purpose of an analysis of India's customs duties on the importation of capital goods, taxpayers subject to duties under the 1962 and 1975 Acts, and taxpayers exempt from those duties under DFIS, are comparably situated.

7.415. We therefore consider that the customs duty liability and rates set forth in the First Schedule of the 1975 Customs Tariff Act 1975, in accordance with the 1962 Customs Act, are the appropriate benchmark for comparison.[612]

7.7.5.3 Third step: Comparison of the applicable treatment with the benchmark

7.416. We now turn to comparing the tax treatment identified under the first step in the analysis with the benchmark treatment identified in the second step in the analysis.

7.417. As seen above, the First Schedule of the 1975 Customs Tariff Act sets forth the rates of customs duty that, pursuant to the 1962 Customs Act, apply to goods imported into India. By contrast, for the Line Numbers at issue, DFIS reduce those duty rates to zero for participating enterprises (until they reach the ceiling placed on their duty-free entitlement under DFIS).

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[605] Notification No. 50/2017, (Exhibit USA-36), table, column (4).
[606] See para. 7.306 above.
[607] India's first written submission, paras. 388-390.
[608] See e.g. Panel Report, *US – Tax Incentives*, para. 7.118.
[609] Customs Act (1962) as amended, Section 12 to Section 15, (Exhibit USA-8).
[610] United States' response to Panel question No. 84, para. 144; India's response to Panel question No. 83, p. 61.
[611] Notification No. 50/2017, (Exhibit USA-36), p. 1.
[612] See also fn 512 above.

7.418. Our review of the limited evidence and arguments regarding the reasons for this difference in tax treatment[613] has disclosed nothing that would detract from our finding that India is foregoing revenue otherwise due.

7.419. We therefore conclude that, through the duty stipulations that correspond to Conditions 10, 21, 36, 60(ii), and 61, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), and thus provides a financial contribution.

7.8 Direct transfer of funds under Article 1.1(a)(1)(i)

7.420. This section assesses the United States' contention that the provision of scrips under MEIS is a direct transfer of funds by India, and thus a financial contribution, within the meaning of Article 1.1(a)(1)(i).[614]

7.421. India responds that MEIS scrips are merely a mechanism to remit indirect taxes already paid. According to India, therefore, they are not a direct transfer of funds but an exemption or remission consistent with footnote 1 read together with Annexes I(g), I(h), or I(i).[615] However, we have already found that MEIS does not meet the conditions of footnote 1 read together with Annexes I(g), I(h), and I(i).[616]

7.422. Further, India argues that the United States has not shown that MEIS scrips "can be equated to or are similar to the examples" of direct transfer of funds in Article 1.1(a)(1)(i), namely "grants, loans, and equity infusions".[617]

7.423. Below, we recall the legal standard applicable to direct transfers of funds pursuant to Article 1.1(a)(1)(i) and then examine whether the provision of MEIS scrips is a direct transfer of funds.[618]

7.8.1 The applicable legal standard under Article 1.1(a)(1)(i)

7.424. Article 1.1(a) of the SCM Agreement provides, in relevant part:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)[.]

7.425. Thus, a government practice involving a direct transfer of funds constitutes a financial contribution.

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[613] See para. 7.409 above.

[614] United States' first written submission, paras. 56-57. The United States does not exclude that MEIS scrips could additionally be characterized as financial contributions in the form of government revenue foregone under Article 1.1(a)(1)(ii) of the SCM Agreement. (United States' responses to Panel questions No. 54, para. 85 and No. 55, para. 87; comments on India's response to Panel question No. 57, paras. 124 and 125).

[615] India's first written submission, paras. 231-236 and 245-278; second written submission, paras. 96-98 and 100-118; opening statement at the meeting of the Panel, paras. 65-76; responses to Panel questions No. 57, No. 60, and No. 62; and comments on the United States' responses to Panel questions No. 54 and No. 55.

[616] See para. 7.294 above.

[617] E.g. India's first written submission, para. 251.

[618] The parties do not dispute that the scrips are provided "by a government" within the meaning of Article 1.1(a)(1). As will be seen below, scrips are provided by the Government of India in accordance with the Foreign Trade Policy, which is an administrative instrument adopted by the Government. Therefore, to the extent it is established that the provision of scrips is a direct transfer of funds, we are satisfied that this financial contribution is "by a government" within the meaning of Article 1.1(a)(1).

7.426. The focus of subparagraph (i), like of the other subparagraphs of Article 1.1(a)(1), is "primarily on the action taken by the government or a public body".[619] Under the first clause of this subparagraph, the action is a "direct transfer of funds", where "the term 'funds' encompasses not only 'money', but also financial resources and other financial claims more generally".[620] The phrase "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) "therefore captures conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient".[621]

7.427. Article 1.1(a)(1)(i) also provides examples of a direct transfer of funds, namely, "grants, loans, and equity infusion": the list is illustrative, and the examples provide "an indication of the type of transactions intended to be covered by the more general reference to 'direct transfer of funds'".[622]

7.428. While "the types of financial contributions set out in Article 1.1(a)(1) are [not] the same", the subparagraphs are not mutually exclusive, i.e. it is possible for the same transaction to "fall under more than one type of financial contribution".[623]

7.8.2 Whether MEIS involves a direct transfer of funds

7.429. Pursuant to the Foreign Trade Policy, the Government of India "grant[s]" scrips, under MEIS, as a reward for exports.[624] Scrips have a value which is the result of multiplying the recipient's FOB value of exports by reward rates that vary by product exported and country of export.[625] As we now turn to discussing, a recipient of scrips may either use them to offset certain liabilities *vis-à-vis* the Government of India, or transfer them to third parties for consideration.

7.430. First, scrips may be used to pay for (a) basic and additional customs duties applying on importation under the 1975 Customs Tariff Act (with some exclusions), (b) excise duties on goods purchased domestically, and (c) certain other fees and charges owed to the Government, such as charges for failing to fulfil one's export obligations under certain other Government schemes.[626]

7.431. Second, scrips are "freely transferable".[627] There was some factual disagreement between the parties as to the meaning of "freely transferable". The United States argued this means that the scrips can be sold for cash to third party recipients, and provided evidence of online marketplaces where such transactions take place.[628] India argued that the legislation setting forth MEIS "does not state that the scrip can be sold for cash nor does it mandate that the scrip must be sold for cash", regardless of whether "in practice, the scrip(s) are or can be sold for cash".[629] We note that the Foreign Trade Policy expressly provides that "Scrips … shall be freely transferable", a point further confirmed by the evidence of marketplaces where scrips are traded for money; India failed to rebut this factual evidence. Indeed, India stated that "freely transferable" in the provision in question "means that MEIS Scrips can be transferred to third parties, for which no further permission is required from the government"[630], and further stated that the "third party [recipient] can use the scrip for any of the Specified Uses listed in Paragraph 3.02 of the Foreign Trade

[619] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 613.
[620] Appellate Body Reports, *Japan – DRAMs (Korea)*, para. 250; *US – Large Civil Aircraft (2nd complaint)*, para. 614.
[621] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614.
[622] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 615; *Japan – DRAMs (Korea)*, para. 251.
[623] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.120.
[624] Sections 3.02 ("Duty Credit Scrips shall be granted as rewards under MEIS …") and 3.04 of the FTP.
[625] Section 3.04 of the FTP and Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B.
[626] Sections 3.02 and 3.18 of the FTP. See para. 7.161 above. As reflected there, such charges for failing to fulfil one's export obligations include the back payment of customs duties.
[627] Section 3.02 of the FTP.
[628] E.g. United States' second written submission, para. 109 and comment on India's response to Panel question No. 56, para. 121 with reference to Scripbazaar, a platform dedicated to "trad[ing] in MEIS & SEIS scrips", which advertises: "If you are interested in selling … Scripbazaar.com will have the physical scrip picked up from your address and transfer the money to your account". (Scripbazaar website (accessed 9 October 2018), (Exhibit USA-57), p. 2).
[629] E.g. India's second written submission, para. 110. See also India's responses to Panel questions No. 56 and No. 59.
[630] India's response to Panel question No. 56.

Policy".[631] We therefore consider it established, as a matter of fact, that scrips can be sold to third party recipients for consideration such as money.

7.432. We recall that "direct transfer of funds … captures conduct on the part of the government by which money, *financial resources*, and/or *financial claims* are made available to a recipient".[632] We consider that both because scrips can be used to pay for customs duties and other liabilities *vis-à-vis* the Government, and because they can be sold to third party recipients for consideration, they are "financial resources and/or financial claims", i.e. "funds" within the meaning of Article 1.1(a)(1)(i). Therefore, the provision of scrips under MEIS is a direct transfer of funds by the Government of India to the initial recipients of the scrips, within the meaning of Article 1.1(a)(1)(i).

7.433. India argues that MEIS scrips in fact are a mechanism to remit indirect taxes already paid, falling under footnote 1 of the SCM Agreement. However, we have already found, as a matter of fact, that MEIS is not a mechanism to remit indirect taxes already paid, and, as a matter of law, that it does not meet the conditions of footnote 1.[633]

7.434. India also argues that the United States has not established that MEIS scrips "can be equated to or are similar to the examples" in Article 1.1(a)(1)(i), namely "grants, loans, and equity infusions", and therefore has not established that they are direct transfers of funds.[634]

7.435. The examples in Article 1.1(a)(1)(i) are illustrative: they do not exhaust the category of "direct transfer of funds".[635] At the same time, they provide an indication of the types of transactions intended to be covered by it[636], and where "there are measures that have sufficient characteristics in common with one example in subparagraph (i), this commonality indicates … that the measures fall within the concept of 'direct transfer of funds'".[637]

7.436. While for a measure to be a direct transfer of funds it is not necessary for it to fall among the three examples in the first clause of subparagraph (i), we examine, in light of India's contention, the relationship between the MEIS scrips and those three examples. The first example, i.e. "grants", consists of transactions in which "money or money's worth is given to a recipient, normally without an obligation or expectation that anything will be provided to the grantor in return"[638]; in contrast, the other two examples, "loans" and "equity infusion", "are characterized by reciprocity".[639] We note that, when India grants MEIS scrips, it provides "money's worth … to a recipient". While past exports trigger the granting of scrips, there is no obligation or expectation that any form of return will be provided to the Government of India for the scrips. Further, grants can be "conditional", as MEIS scrips are.[640] Therefore, MEIS scrips have significant commonalities with grants, which further confirms that they do fall within subparagraph (i).

7.437. Finally, India suggests that MEIS scrips cannot fall under subparagraph (i) because they fall under subparagraph (ii) of Article 1.1(a)(1).[641] However, while the two subparagraphs are of course context for each other, they are not mutually exclusive.[642] Having examined the measure, including identifying its "principal characteristics"[643], we have found that MEIS scrips fall within subparagraph (i). For this finding to stand, we do not need, in addition, to exclude that aspects of the measure may fall under subparagraph (ii).

[631] India's response to Panel question No. 59.
[632] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614. (emphasis added)
[633] See para. 7.294 above.
[634] E.g. India's first written submission, para. 251.
[635] See para. 7.427 above.
[636] See para. 7.427 above.
[637] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 624.
[638] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 616.
[639] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 616.
[640] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, fn 1292.
[641] E.g. India's first written submission, paras. 253-258.
[642] See para. 7.428 above.
[643] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.120.

7.438. We therefore confirm our preliminary finding, in paragraph 7.432 above, that by providing MEIS scrips India provides a direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, and thus provides a financial contribution.

7.9 Benefit under Article 1.1(b) of the SCM Agreement

7.439. We now turn to examine whether the measures that we have found to be financial contributions by the Government of India also confer a "benefit" within the meaning of Article 1.1(b).

7.9.1 The applicable legal standard under Article 1.1(b)

7.440. Under Article 1.1(b) of the SCM Agreement, a financial contribution by a government is a "subsidy" if "a benefit is thereby conferred".

7.441. A benefit within the meaning of Article 1.1(b) is an "advantage"[644] to the *recipient* of the financial contribution.[645] That is, there is a benefit for purposes of this provision if "the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution".[646]

7.442. In past cases, WTO adjudicators have held that "the marketplace provides an appropriate basis for comparison … because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient on the market".[647]

7.443. Article 14 of the SCM Agreement, which addresses the "Calculation of the Amount of the Subsidy", by an investigating authority, "in Terms of the Benefit to the Recipient", provides context for the interpretation of Article 1.1(b).[648] Among other things, Article 14 confirms that the focus of the analysis is on the recipient[649], and that benefit is assessed by reference to the conditions that would exist on the market in the absence of the financial contribution.[650]

7.444. The two types of financial contribution that we have found to be established in the case before us are the foregoing of revenue otherwise due, within the meaning of Article 1.1(a)(1)(ii), and a direct transfer of funds, within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. We therefore address, in turn, certain peculiar traits of the benefit analysis for these two types of financial contribution.

7.445. Adjudicators examining cases of revenue foregone have consistently held that a finding of benefit "readily follows" from a finding that the government is foregoing revenue otherwise due.[651]

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[644] Panel Report, *Canada – Aircraft*, para. 9.112; Appellate Body Report, *Canada – Aircraft*, para. 153. Also e.g. Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.159; Panel Report, *US – Tax Incentives*, para. 7.159.

[645] E.g. Appellate Body Reports, *Canada – Aircraft*, paras. 154 ("the focus … should be on the recipient and not on the granting authority") and 155-156; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.159; and Panel Report, *US – Tax Incentives*, para. 7.159.

[646] Appellate Body Report, *Canada – Aircraft*, para. 157. Also e.g. Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 5.107; Panel Report, *US – Tax Incentives*, para. 7.159.

[647] Appellate Body Report, *Canada – Aircraft*, para. 157. See also e.g. Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.164; *EC and certain member States – Large Civil Aircraft*, para. 5.107; Panel Reports, *US – Tax Incentives*, para. 7.159; and *US – Large Civil Aircraft (2nd complaint)*, para. 7.168.

[648] Appellate Body Reports, *Canada – Aircraft*, para. 155 and 158; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.163

[649] Appellate Body Report, *Canada – Aircraft*, para. 155.

[650] Appellate Body Report, *Canada – Aircraft*, para. 158. Article 14 refers, in particular, to "the usual investment practice … of private investors in the territory of [the Member concerned]", "a comparable commercial loan which the [recipient] could actually obtain on the market", "the amount that the [recipient] would pay on a comparable commercial loan", and "prevailing market conditions … in the country of provision or purchase".

[651] Panel Reports, *EU – PET (Pakistan)*, para. 7.36 ("readily follows"); *Brazil – Taxation*, paras. 7.491-7.494; *US – Tax Incentives*, paras. 7.160-7.164; *US – Large Civil Aircraft (2nd complaint)*, paras. 7.169-7.171; *US – FSC*, para. 7.103; *US – FSC (Article 21.5 – EC)*, para. 8.46; and *Canada – Autos*,

The panel in *US − Large Civil Aircraft (2nd complaint)* explained that, in its view, this is because a "tax break is essentially a gift from the government, or a waiver of obligations due, and it is clear that *the market does not give such gifts*".[652] The panel in *US − Tax Incentives* similarly explained that "*the relief from taxation otherwise due is not generally available to market participants*, nor does it exist as a general condition in the marketplace".[653]

7.446. As a result, although financial contribution and benefit are "separate *legal* elements"[654], the "same *factual* elements" may form the basis both of a finding that the government is foregoing revenue otherwise due, and of a finding of benefit.[655]

7.447. The second type of financial contribution we have found to be established in this case is a direct transfer of funds. Specifically, we have found there to be a direct transfer of funds that shares "significant commonalities with grants".[656] Similar to revenue foregone, adjudicators have repeatedly found that grants, by their nature, confer a benefit to the recipient: "they place the recipient in a better position than the recipient otherwise would have been in the marketplace"[657], because no entity acting pursuant to commercial considerations would make such unremunerated payments.[658]

7.448. Turning to the measures before us, we will assess, first, whether a benefit is conferred through the financial contributions taking the form of tax exemptions and deductions; and, second, whether a benefit is conferred through the MEIS scrips. Before doing so, we note that for the EOU/EHTP/BTP Schemes, EPCG Scheme, DFIS, and MEIS, India argues that the measures at issue fall under footnote 1, and therefore cannot be held to confer a benefit within the meaning of Article 1 of the SCM Agreement.[659] We recall however that, for these schemes, we have proceeded to the analysis of the existence of financial contribution and benefit to the extent that we have found that these schemes do not meet the conditions of footnote 1. Therefore, we reject India's footnote 1 argument in the context of the benefit analysis.

7.9.2 Whether the tax exemptions and deductions under the Export Oriented Units and Sector-Specific Schemes, Export Promotion Capital Goods Scheme, Special Economic Zones Scheme, and Duty-Free Imports for Exporters Scheme, confer a benefit

7.449. We begin with the financial contributions taking the form of revenue foregone. We have found that the following tax exemptions and deductions are financial contributions in the form of revenue foregone: (a) the exemptions from customs duties on importation under the EOU/EHTP/BTP Schemes, EPCG Scheme, SEZ Scheme, and DFIS; (b) the exemption from customs duties on exportation under the SEZ Scheme; (c) the exemption from IGST on importation under the SEZ Scheme; and (d) the deductions from taxable income under the SEZ Scheme.

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para. 10.165. See also, espousing this position, United States' first written submission, para. 43; Canada's response to Panel question No. 11, paras. 21-22; and Japan's response to Panel question No. 11. Indeed, India itself, discussing *EU − PET (Pakistan)*, notes that the rationale behind it "could be, that cases of government revenue foregone result in a finding of benefit conferred as well, since *there can never be a market equivalent of government revenue foregone*, such as tax remissions, since the authority to tax is a sovereign function of states". (India's first written submission, para. 287. (emphasis added))

[652] Panel Report, *US − Large Civil Aircraft (2nd complaint)*, para. 7.170. (emphasis added)

[653] Panel Report, *US − Tax Incentives*, para. 7.162. (emphasis added)

[654] Appellate Body Report, *Brazil − Aircraft*, para. 157. (emphasis added)

[655] Panel Report, *US − Tax Incentives*, para. 7.163 (emphasis added). See also European Union's third-party response to Panel question No. 11, para. 35. In *US − Tax Incentives*, the panel noted that this is because "the 'market conditions' that are relevant as a benchmark in this context are the competitive conditions that exist in the absence of the challenged financial contribution". (Panel Report, *US − Tax Incentives*, para. 7.162).

[656] See para. 7.436 above.

[657] Panel Report, *US − Upland Cotton*, paras. 7.1116 and 7.1118. See also Panel Reports, *EC and certain member States − Large Civil Aircraft*, para. 7.1501; *US − Large Civil Aircraft (2nd complaint)*, paras. 7.1228-7.1229 and 7.1362. See also Canada's third-party response to Panel question No. 11, para. 22 ("[i]t is simply a consequence of the nature of the financial contribution which confers a benefit *per se*").

[658] Panel Report, *US − Large Civil Aircraft (2nd complaint)*, para. 7.1229.

[659] India's first written submission, paras. 217 (EOU/EHTP/BTP Schemes), 284 (MEIS), 314 (EPCG Scheme), and 397 (DFIS); second written submission, paras. 83 (EOU/EHTP/BTP Schemes), 120-123 (MEIS), 206 (DFIS), and 194 (EPCG Scheme); and opening statement at the meeting of the Panel, paras. 58 (EOU/EHTP/BTP Schemes), 73 (MEIS), 83 (EPCG Scheme), and 112 (DFIS).

7.450. The United States argues that these exemptions confer a benefit on their recipients, because recipients do not have to pay the duties and taxes they would otherwise have to pay and, therefore, are financially "better off" than in the absence of the financial contribution.[660] The United States asserts that in cases of government revenue foregone, such as these, the benefit resides in the very fact that revenue is forgone.[661]

7.451. As others before us, we note that "relief from taxation otherwise due is not generally available to market participants, nor does it exist as a general condition in the marketplace".[662] Beginning with the exemptions from customs duties on importation, we observe that an importer of goods under the EOU/EHTP/BTP Schemes, EPCG Scheme, SEZ Scheme, or DFIS, gets to import goods free of customs duties. The market − however defined − does not offer this "gift".[663] An importer of the very same goods outside these or other exemption schemes is subject to customs duties. Thus, a recipient of the customs duty exemption under the EOU/EHTP/BTP Schemes, EPCG Scheme, SEZ Scheme, or DFIS is "'better off' than it would otherwise have been, absent that contribution".[664]

7.452. The same considerations are valid for the other exemptions from duties and indirect taxes at issue, namely: the exemption from customs duties on exportation (an exporter of goods under the SEZ Scheme gets to export the goods free of customs duties, but an exporter of the same goods outside the SEZ or similar schemes must pay customs duties on exportation); and the exemption from IGST on importation (an importer of goods under the SEZ Scheme gets to import the goods free of IGST, but importers of the same goods, outside this or similar schemes, must pay IGST). Again, the market "does not give such gifts"[665], and therefore the recipients of these tax exemptions are better off than they would be on the market in the absence of the financial contribution.

7.453. Similar considerations are also valid for the deduction from taxable income under the SEZ Scheme. To recall, SEZ entrepreneurs are allowed to deduct profits and gains from exports from the total income of their Units, to which income tax is applied. By contrast, entities outside the SEZ Scheme have to pay tax on such income. Again, this makes SEZ entrepreneurs and their Units better off than they would be in the absence of the financial contribution − i.e. better off than if they had to pay tax on their export income.

7.454. India argues that this line of reasoning wrongly conflates the notions of financial contribution and benefit.[666] Relying among others on *Canada − Renewable Energy / Canada − Feed-in Tariff Program*, India emphasizes the need for "an appropriate understanding of 'the market' … to determine whether a benefit has been conferred".[667] In particular, with regard to the exemptions under the EOU/EHTP/BTP Schemes, EPCG Scheme, and DFIS, India argues that the

[660] United States' first written submission, paras. 44 (EOU/EHTP/BTP Schemes), 76 (EPCG Scheme), 118, 120 (SEZ Scheme), and 159 (DFIS); second written submission, paras. 97 (EOU/EHTP/BTP Schemes), 131 (EPCG Scheme), 137 (SEZ Scheme), and 174 (DFIS); and opening statement at the meeting of the Panel, paras. 11 (EOU/EHTP/BTP Schemes), 21 (EPCG Scheme), 26 (SEZ Scheme), and 29 (DFIS).

[661] United States' first written submission, para. 43 (EOU/EHTP/BTP Schemes), 75 (EPCG Scheme), 119 (SEZ Scheme), 158 (DFIS); second written submission, paras. 94 (EOU/EHTP/BTP Schemes), 127 (EPCG Scheme), and 171 (DFIS).

[662] Panel Report, *US − Tax Incentives*, para. 7.162.

[663] Panel Report, *US − Large Civil Aircraft (2nd complaint)*, para. 7.170.

[664] Appellate Body Report, *Canada − Aircraft*, para. 157.

[665] Panel Report, *US − Large Civil Aircraft (2nd complaint)*, para. 7.170.

[666] E.g. India's first written submission, para. 135. India makes the same argument for all tax exemptions under the EOU/EHTP/BTP Schemes, EPCG Scheme and DFIS. India's first written submission, paras. 216 (EOU/EHTP/BTP Schemes), 313 (EPCG Scheme), and 396 (DFIS); second written submission, paras. 82 (EOU/EHTP/BTP Schemes), 140 (EPCG Scheme), and 205 (DFIS). For the SEZ Scheme, India argues that the measure is not export contingent, and that therefore it need not address the allegations of subsidy. India's first written submission, para. 329; second written submission, paras. 187 and 189; opening statement at the meeting of the Panel, para. 105; and response to Panel question No. 64.

[667] India's first written submission, para. 136.

United States has failed to establish the existence of a benefit because it has not provided "an appropriate analysis or definition of the market".[668]

7.455. However, the fact that a certain type of market analysis is required, for example, to ascertain whether a government purchase was made for more than adequate remuneration (as in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, which India relies on) does not mean that the same type of analysis is required in every case. Here, India foregoes revenue from certain enterprises, and this is not a gift the market gives.[669]

7.456. India further argues that the relevant market in fact consists of the "like competitors"[670] to the recipients of the financial contribution at issue, who would therefore qualify under the relevant scheme. These like competitors, if only they applied, would receive the same exemptions, and therefore "'participating enterprises' are only made 'better off' insofar as they submitted the appropriate paperwork".[671]

7.457. India is, in essence, suggesting that the relevant market should be defined as all entities potentially qualifying for an alleged subsidy scheme (and, further, that qualifying entities that fail to apply should not be considered). This cannot be the appropriate framework for analysis. As set out above, the relevant question is whether "the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution"[672], i.e. *outside* the alleged subsidy scheme. Therefore, India's suggestion that the relevant market consists of those entities that could, or do, fall *within* the challenged schemes goes against the very notion of a benchmark for ascertaining the existence of a benefit, and does not persuade us.

7.458. We therefore find that the duty and tax exemptions and deductions at issue confer a benefit on their recipients, by making them better off than they would be, in the market, absent those exemptions and deductions. And, to recall, we have already found that they are a financial contribution by the government.[673] Therefore, these duty and tax exemptions and deductions are a subsidy within the meaning of Article 1.1 of the SCM Agreement.

7.9.3 Whether MEIS scrips confer a benefit

7.459. The other category of financial contribution we have found to be established in this case is a direct transfer of funds, in the form of MEIS scrips.

7.460. The United States argues that, by providing MEIS scrips, India confers a benefit on the scrips' recipients, because recipients can use the scrips to pay for customs duties, central excise duties, and other liabilities *vis-à-vis* the Government, and can also sell the scrips for money.[674]

7.461. We have found that MEIS scrips are "money's worth"[675], which can be used to pay for a number of liabilities *vis-à-vis* the Government, and can also be sold to third parties for money.[676] Further, we have found that India provides MEIS scrips with no obligation or expectation of any form of return.[677]

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[668] E.g. India's first written submission, para. 218, with reference to the EOU/EHTP/BTP Schemes. To recall, India does not address the United States' allegation that the exemptions under the SEZ Scheme confer a benefit. See fn 666 above.

[669] We also recall that the challenged schemes exempt from duties or taxes the very *same* transactions, involving the very *same* goods, that would be subject to those duties or taxes outside the schemes.

[670] India's first written submission, para. 399, with reference to DFIS.

[671] India's first written submission, para. 400, with reference to DFIS. Also India's first written submission, paras. 218-219 (EOU/EHTP/BTP Schemes); second written submission, paras. 84 (EOU/EHTP/BTP Schemes), 142 (EPCG Scheme), and 207 (DFIS).

[672] Appellate Body Report, *Canada – Aircraft*, para. 157.

[673] See section 7.7 above.

[674] United States' first written submission, para. 59; second written submission, para. 111; and opening statement at the meeting of the Panel, para. 17.

[675] See para. 7.436 above.

[676] See paras. 7.430-7.431 above.

[677] See para. 7.436 above.

7.462. Like others before us, we are of the view that "no private entity acting pursuant to commercial considerations" would provide money's worth "to another commercial entity" for no remuneration.[678]

7.463. Therefore, the provision by India of money's worth in the form of MEIS scrips makes recipients better off than they would otherwise be, absent that financial contribution, on the market.

7.464. Similar to its arguments on the tax exemptions discussed above, India argues that the United States failed to identify the relevant market, and thus failed to discharge its burden to prove benefit.[679] India relies, again, on the Appellate Body Reports in *Canada – Renewable Energy / Canada – Feed-in Tariff*.[680]

7.465. However, we reiterate that the fact that some subsidy cases require an elaborate definition of the relevant market does not mean that all do. For some types of financial contribution, an elaborate analysis and definition of the relevant market is crucial. By way of example, this may be the case of financial contributions consisting of the provision or purchase of goods (where it is necessary to assess the adequacy of remuneration), or of loans (where it is necessary to ascertain the amount the recipient would pay on a comparable commercial loan that it could obtain on the market).

7.466. In contrast to these two examples, under MEIS, India provides recipients with scrips that have a monetary value, with no obligation or expectation that recipients will provide any form of return. As we have noted, the market does not make such gifts, whichever way the market boundaries are drawn.

7.467. India also argues that the United States failed to substantiate that MEIS "as such" confers a benefit.[681] India submits that, to this end, the United States must demonstrate that MEIS *requires* the conferral of a benefit.[682] Since the applicable legal instruments do not "specif[y] that the recipient of a scrip must utilize the MEIS Scrip", and instead they "merely give[] the MEIS Scrip recipient an option to utilize the scrips … the law does not require conferral of any alleged benefit".[683]

7.468. We disagree with India. MEIS scrips have a monetary value and, on receiving them, their recipients are made better off than they would have been on the market, where no such gifts are made. That the applicable legal instruments do not oblige recipients to *realize* that monetary value does not mean that, by providing MEIS scrips, India does not confer a benefit on their recipients.

7.469. Finally, India argues that the United States failed to establish that MEIS as such confers a benefit because, if the recipient fails to provide the necessary documents upon request, it must refund the value of the scrips, with interest.[684] However, that the competent authority can reclaim the value of the scrips if recipients are unable to prove their entitlement to them does nothing to contradict the conclusion that the provision of MEIS scrips confers a benefit.

7.470. We therefore find that MEIS scrips confer a benefit on their recipients, by making them better off than they would have been, in the market, absent such an unremunerated direct transfer of funds. Thus, we find that because MEIS scrips are a financial contribution by the government[685] and confer a benefit on their recipient, they are a subsidy within the meaning of Article 1.1 of the SCM Agreement.

[678] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.1229.
[679] India's first written submission, paras. 285-287.
[680] India's first written submission, para. 286.
[681] India's first written submission, paras. 288-291; second written submission, para. 122.
[682] India's first written submission, paras. 288-291; second written submission, para. 122.
[683] India's first written submission, para. 290.
[684] India's first written submission, para. 290. Also ibid. para. 291, with regard to transfer of the scrips to third parties.
[685] See section 7.8 above.

7.10 Export contingency under Articles 3.1(a) and 3.2 of the SCM Agreement

7.471. We now address the United States' argument that the subsidies provided under the five challenged schemes are export contingent within the meaning of Article 3.1(a) of the SCM Agreement, and that, therefore, by providing these subsidies India is acting inconsistently with Articles 3.1(a) and 3.2 of the SCM Agreement.

7.472. We begin by setting out the applicable legal standard. We then examine, in turn, whether the challenged subsidies under each of the five schemes are export contingent and therefore inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

7.10.1 The applicable legal standard under Articles 3.1(a) and 3.2

7.473. Article 3.1 of the SCM Agreement provides, in relevant part:

> … the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent, in law or in fact,[4] whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;
>
> …

[4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

7.474. Article 3.1(a) thus prohibits subsidies "contingent … upon export performance". The ordinary meaning "of 'contingent' is 'conditional' or 'dependent for its existence on something else'".[686] That is, for a subsidy to be export contingent, "the grant of the subsidy must be conditional or dependent upon export performance".[687]

7.475. Article 3.1(a) clarifies that whether export performance is the sole condition, or one of several conditions for granting the subsidy, there is export contingency for purposes of that provision. Moreover, when a certain subsidy is available on condition of export performance, the fact that the same subsidy can also be obtained under a different set of circumstances, which may or may not involve export contingency, does not prevent a finding that the subsidy is export contingent.[688]

7.476. Article 3.1(a) further provides that prohibited export contingent subsidies "includ[e] those illustrated in Annex I" to the SCM Agreement. The subsidies illustrated in items (b) to (l) of Annex I share the common feature "that the subsidy gives certain advantages to exported products and favours exported products over products destined for domestic consumption".[689]

[686] Appellate Body Report, *Canada – Aircraft*, para. 166.

[687] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 111. Further, "the relevant question … is not whether the eligibility requirements under a subsidy may *result* in" exportation, but whether there is "a *condition requiring*" exportation. (Appellate Body Report, *US – Tax Incentives*, paras. 5.18 and 5.40 (emphasis original)). These statements were made in the context of Article 3.1(b), which prohibits subsidies that are "contingent … upon the use of domestic over imported goods". However, the "legal standard for establishing the existence of 'contingency' under Article 3.1(b) is the same as under Article 3.1(a) of the SCM Agreement". (Appellate Body Reports, *Brazil – Taxation*, para. 5.241).

[688] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 119. See also European Union's third-party submission, para. 29 (referring to Appellate Body Report, *US – Upland Cotton*, paras. 579-580).

[689] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1053.

7.477. Article 3.1(a) prohibits both subsidies that are export contingent in law and subsidies that are export contingent in fact. The difference between the two resides in the evidence establishing the existence of export contingency.[690]

7.478. Export contingency in law is demonstrated on the basis of the very words of the legal instrument constituting the measure, either because the measure expressly conditions the granting of the subsidy on export performance, or because it does so implicitly, by necessary implication from the words used in the measure.[691]

7.479. For example, in *Canada – Autos*, the challenged legal instruments did not say, in so many words, that a manufacturer's exemption from customs duties on the import of motor vehicles was conditioned on export performance. However, the necessary implication of the words used in those legal instruments was that they "operate[d], as a matter of law, in such a manner that the more motor vehicles a manufacturer export[ed], the more motor vehicles that manufacturer [was] entitled to import duty-free".[692] The panel and Appellate Body therefore found that the subsidy was contingent in law upon export performance.

7.480. Conversely, "[t]here is no single legal document which will demonstrate, on its face," export contingency in fact.[693] Therefore, "the existence of this relationship of contingency … must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case".[694] And "what facts should be taken into account in a particular case will depend on the circumstances of that case".[695] While "there can be no general rule as to what … kinds of facts must be taken into account"[696], relevant facts may include "the design and structure of the measure granting the subsidy", "the modalities of operation set out in such a measure", and "the relevant factual circumstances surrounding the granting of the subsidy".[697]

7.481. While the "legal standard expressed by the word 'contingent' is the same for both *de jure* or *de facto* contingency"[698], the different evidentiary basis is reflected in the way the analysis is conducted. For determining contingency in fact, "the Uruguay Round negotiators provided a standard, in footnote 4 of the SCM Agreement"[699], which "requires proof of three different substantive elements: first, the 'granting of a subsidy'"[700]; second, "tied to"; and, third, "actual or anticipated exportation or export earnings".[701] This standard shares commonalities with the analysis of export contingency in law, but also differences, such as the enquiry into "actual or anticipated exportation".

7.482. As will be seen below, we find that all the subsidies in question are export contingent in law, and we therefore do not examine the United States' alternative argument that the subsidies provided under the SEZ Scheme are export contingent in fact. As a result, we do not elaborate further, here, on the specificities of the analysis of export contingency in fact.

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[690] Appellate Body Report, *Canada – Aircraft*, para. 167.

[691] Appellate Body Report, *Canada – Autos*, para. 100. See also Appellate Body Report, *Canada – Aircraft*, para. 167 ("[*d*]*e jure* export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument.").

[692] Appellate Body Report, *Canada – Autos*, para. 106.

[693] Appellate Body Report, *Canada – Aircraft*, para. 167.

[694] Appellate Body Report, *Canada – Aircraft*, para. 167. (emphasis original)

[695] Appellate Body Report, *Canada – Aircraft*, para. 168.

[696] Appellate Body Report, *Canada – Aircraft*, para. 169.

[697] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1046.

[698] Appellate Body Report, *Canada – Aircraft*, para. 167. See also Appellate Body Report, *Canada – Autos*, para. 107. Further, in the context of contingency under Article 3.1(b), the Appellate Body has noted that "the analysis of *de jure* and *de facto* contingency … [is] a continuum", and a panel "need not compartmentalize" the two analyses. (Appellate Body Report, *US – Tax Incentives*, para. 5.13).

[699] Appellate Body Report, *Canada – Aircraft*, para. 168. At the same time, because the standard for contingency in law and in fact are the same, except for the *evidence* supporting the finding of contingency, some of the considerations derived from the analysis of footnote 4 can also be extended, with the necessary adaptations, to export contingency in law. See Appellate Body Report, *Canada – Autos*, para. 107. This applies in particular to the analysis of "tied to".

[700] Appellate Body Report, *Canada – Aircraft*, para. 169.

[701] Appellate Body Report, *Canada – Aircraft*, para. 169. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1043-1044.

7.483. Turning to Article 3.2 of the SCM Agreement, this provides:

> A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

7.484. As a result, when a Member grants or maintains a subsidy that is export contingent under Article 3.1(a) of the SCM Agreement, that Member also violates Article 3.2 of the SCM Agreement.[702]

7.485. Having set out the relevant legal standard, we now turn to applying it to the subsidies at issue in this dispute.

7.10.2 Whether the subsidies granted under the Export Oriented Units and Sector-Specific Schemes are export contingent

7.486. The United States argues that the exemption from customs duties under the EOU/EHTP/BTP Schemes is export contingent in law.[703] According to the United States, this is because "India conditions the availability" to participating Units of the customs duty exemption under the scheme "upon the [Units'] promise of agreeing to export their entire production and obtaining and maintaining of a positive NFE".[704] This is "evidenced throughout government documents"[705], including in the provision for penal action if a Unit fails to maintain a positive NFE.[706]

7.487. The United States argues that, like in *Canada – Autos*, the customs duty exemption available under the challenged scheme is "simply not available to a manufacturer unless it exports"[707], and this is apparent from "the 'words of the relevant legislation, regulation, or other legal instrument'".[708]

7.488. India disagrees and argues that the United States has not established the export contingency of the challenged measures.[709] According to India, the EOU/EHTP/BTP Schemes are "an administrative system that seeks to boost the manufacturing capabilities of [the] domestic industry"[710], and are remission schemes falling under footnote 1 and the Annexes of the SCM Agreement.[711] Regarding the NFE requirement, India argues that it is not indicative of export contingency but ensures that Units act with commercial prudence and without operating at a loss.[712] And as for the United States' reliance on *Canada – Autos*, India argues that the factual pattern in the present dispute differs from that at issue in *Canada – Autos*.[713]

7.489. We turn to assess whether the United States has established the measures' export contingency, in light of the legal standard outlined above.

7.490. The challenged exemption from customs duties under the EOU/EHTP/BTP Schemes are exclusively available to Units set up under the schemes.[714] To be "set up under" the EOU/EHTP/BTP Schemes, Units must "*undertak[e] to export their entire production of goods and*

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[702] See, e.g. Panel Reports, *Canada – Aircraft*, para. 9.231; *US – FSC (Article 21.5 – EC)*, paras. 8.109-8.110.

[703] United States' first written submission, paras. 44-46; second written submission, paras. 98-101; and opening statement at the meeting of the Panel, para. 14.

[704] United States' first written submission, para. 46.

[705] United States' first written submission, para. 46.

[706] United States' first written submission, para. 46 (referring to Section 6.05 of the FTP).

[707] United States' first written submission, para. 45 (quoting Appellate Body Report, *Canada – Autos*, para. 104).

[708] United States' first written submission, para. 45 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167).

[709] India's first written submission, paras. 221-226; second written submission, paras. 86-93; and opening statement at the meeting of the Panel, paras. 59-62.

[710] India's first written submission, para. 222.

[711] India's first written submission, para. 222; second written submission, para. 90.

[712] India's first written submission, paras. 223-225; second written submission, paras. 91-92; and opening statement at the meeting of the Panel, para. 61.

[713] India's second written submission, paras. 86-89.

[714] See paras. 7.314-7.315 above.

services (except permissible sales in the DTA)".[715] In addition, the schemes require participating Units to *maintain a positive NFE*.[716] The HBP defines the NFE as follows:

> 6.10 Net Foreign Exchange (NFE) Earnings
>
> (a) EOU / EHTP / STP / BTP unit shall be a positive net foreign exchange earner. NFE earnings shall be calculated cumulatively in the block period as per Paragraph 6.04 of FTP, according to the formula given below. Items of manufacture for export specified in LoP / LoI alone shall be taken into account for calculation of NFE.
>
> Positive NFE = A − B> 0
>
> Where
>
> 'NFE' is Net Foreign Exchange;
>
> 'A' is FOB value of exports by EOU / EHTP / STP / BTP unit;
>
> 'B' is sum total of CIF value of all imported inputs and CIF value of all imported capital goods, and value of all payments made in foreign exchange by way of commission, royalty, fees, dividends, interest on external borrowings / high sea sales during first five year period or any other charges. It will also include payment made in Indian Rupees on high sea sales.
>
> "Inputs" mean raw materials, intermediates, components, consumables, parts and packing materials.[717]

7.491. Thus, to achieve a positive NFE under these schemes, a Unit must export more than it imports. Further, the schemes set forth provisions to monitor compliance with the NFE requirement, and envisage sanctions, including possible penal action, for a unit's failure to comply with the requirement. For example, the standard format for the letter of permission provides that an approved Unit "would be required to achieve positive … NFE … failing which it would be liable for penal action".[718]

7.492. Thus, "on the basis of the very words of the relevant legislation, regulation or other legal instrument"[719] setting forth the measure, the subsidies provided under the scheme are only available to Units (a) that undertake to export their entire production, with limited exceptions, and (b) that undertake to export more than they import, with provision for sanctions in case this undertaking is not met. Therefore, on the face of the legal instruments in which the measure is reflected, the availability of the subsidy is "dependent for its existence"[720] on exportation, within the meaning of Article 3.1(a).

7.493. India argues that the schemes, and the NFE requirement, have other objectives, different from export performance. It argues that the schemes "seek[] to boost the manufacturing capabilities of the domestic industry" and streamline the process of exemption or remission of duties[721], and that the NFE requirement aims to ensure that enterprises act prudently, do not operate at a loss, and do not import more inputs than needed.[722]

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[715] Section 6.00(a) of the FTP.

[716] While disputing the purpose of the NFE, India does not dispute the existence or definition of the requirement in the context of the EOU/EHTP/BTP Schemes.

[717] Section 6.10 of the HBP.

[718] Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D, para. (ii). Similarly, the FTP provides that failure to maintain a positive NFE may render the Unit liable to penal action and lead to cancellation of the letter of permission or of intent. (Subsection 6.05(c) of the FTP).

[719] Appellate Body Report, *Canada − Autos*, para. 100.

[720] Appellate Body Report, *Canada − Aircraft*, para. 166.

[721] India's first written submission, para. 222.

[722] India's first written submission, paras. 193 and 223-225. The United States points out that India's argument that the positive NFE requirement is a tool to protect the participating enterprises is

7.494. We note that India's arguments appear to be somewhat contradictory. India argues, on the one hand, that the schemes are meant to "boost the manufacturing capabilities of the domestic industry"[723] but, on the other hand, that they do not seek to ensure a certain level of exports and instead seek to ensure that participating Units do not import more inputs than needed.[724] For a scheme under which participating Units "undertake to export their entire production"[725], it is hard to see how one could "boost" manufacturing capabilities without boosting exports.

7.495. In any event, however, the relevant enquiry is whether the subsidies in question are "contingent …, whether solely or as one of several other conditions, upon export performance".[726] When a subsidy is indeed contingent upon export performance, the fact that there may be other rationales behind the scheme, or even other conditions on the grant of the subsidy, does not change the conclusion that the subsidy is prohibited under Article 3.1(a).

7.496. India has also highlighted certain factual differences between the measure challenged in *Canada − Autos*, where the adjudicators found the measures to be export contingent, and the measures before this panel.[727] Specifically, India observes that, in *Canada − Autos*: the duty exemption applied to the importation of motor vehicles, not inputs; the duty-exempt goods and the goods that had to be exported were the same "class of goods" (motor vehicles); the amount of the exemption depended on the amount exported; and the measure operated on the basis of a ratio requirement.[728] However, none of the differences highlighted by India goes to the legal standard for export contingency. It does not matter *per se* that the duty-exempt goods and the mechanism conditioning the subsidy on export contingency are not the same in this case and in *Canada − Autos*: what matters is that the measures before us lay down requirements which do condition the subsidy on export performance.

7.497. Finally, India argues that the measures meet the conditions of footnote 1. We recall, however, that we are examining the export contingency of the challenged measures because we have found that they do not meet the conditions of footnote 1.[729]

7.498. We therefore find that the challenged subsidies under the EOU/EHTP/BTP Schemes are contingent in law upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Moreover, since through the legal instruments discussed above India grants or maintains such subsidies, India is also acting inconsistently with Article 3.2 of the SCM Agreement.

7.10.3 Whether the subsidies granted under the Export Promotion Capital Goods Scheme are export contingent

7.499. To recall, under the EPCG Scheme, India provides a subsidy in the form of an exemption from customs duties on the importation of capital goods.

7.500. The United States argues that the duty exemption under the EPCG Scheme is contingent in law upon export performance.[730] According to the United States, the scheme requires participating exporters to fulfil two cumulative export obligations and even incentivizes their early fulfilment.[731] Non-compliance with these obligations results in duty liability and sanctions.[732]

contradicted by the provision for penal action as a sanction for failing to meet the requirement. (United States' second written submission, paras. 100-101).

[723] India's first written submission, para. 222.

[724] India's first written submission, paras. 224-225.

[725] Section 6.00(a) of the FTP.

[726] Article 3.1(a) of the SCM Agreement.

[727] India's second written submission, paras. 86-89.

[728] India's second written submission, para. 89.

[729] See para. 7.236 above.

[730] United States' first written submission, paras. 77-78; second written submission, para. 132; and opening statement at the meeting of the Panel, para. 23.

[731] United States' first written submission, para. 78; opening statement at the meeting of the Panel, para. 23.

[732] United States' first written submission, para. 78; opening statement at the meeting of the Panel, para. 23.

7.501. India does not respond to the United States' arguments on export contingency and contends that the United States has not established the existence of a subsidy under Article 1 of the SCM Agreement.[733] Rather, in India's view, the scheme falls under footnote 1 and thus does not qualify as a subsidy within the meaning of Article 1.[734]

7.502. With reference to the duty-exempt importation of capital goods under the EPCG Scheme, the Foreign Trade Policy provides that:

> Import under EPCG Scheme shall be subject to an export obligation equivalent to 6 times of duties, taxes and cess saved on capital goods, to be fulfilled in 6 years reckoned from date of issue of Authorisation.[735]

7.503. The Foreign Trade Policy further specifies that:

> [The export obligation] shall be fulfilled by the authorisation holder through export of goods which are manufactured by him or his supporting manufacturer … for which the EPCG authorisation has been granted.[736]

7.504. Thus, over a six-year period, a scheme participant must achieve exports of the goods specified in the EPCG authorization equalling at least six times the duties, taxes, and cess[737] saved on capital goods under the scheme.[738]

7.505. The HBP requires the authorisation holder to fulfil half of this export obligation within the first four years[739], failing which the "holder shall … pay duties of customs … proportionate to duty saved amount on total unfulfilled [export obligation] block".[740]

7.506. In addition to this six-year export obligation, participants in the scheme must also fulfil an "average" export obligation. That is, subject to certain limited exceptions[741], a scheme participant must maintain exports of the goods specified in the EPCG authorization above the average level of export of the same or similar products during the three-year period preceding the EPCG authorization.[742]

7.507. Thus, the very words of the FTP and HBP, which provide for the EPCG Scheme, condition the availability of the subsidy on the fulfilment of obligations to export. This in itself is sufficient to make the subsidies at issue export contingent in law, within the meaning of Article 3.1(a) of the SCM Agreement.

7.508. Moreover, other aspects of the EPCG Scheme, as they also emerge from the words of the legal instruments that regulate it, further confirm the scheme's characterization as export contingent.

7.509. For example, the scheme provides an "incentive for early … fulfilment" of the export obligation: a portion of the export obligation can be "condoned" when "75% or more of [the] specific export obligation and 100% of Average Export Obligation till date" have been met in half or less the required period.[743]

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[733] India's first written submission, paras. 317-319; second written submission, paras. 144-145; see also opening statement at the meeting of the Panel, paras. 83-84.
[734] India's opening statement at the meeting of the Panel, para. 84.
[735] Section 5.01(c) of the FTP.
[736] Section 5.04(a) of the FTP.
[737] See fn 221 above.
[738] Section 5.01(c) of the FTP; Section 5.14(a) of the HBP.
[739] Section 5.14(a) of the HBP.
[740] Section 5.14(c) of the HBP.
[741] Section 5.13 of the HBP.
[742] Section 5.04(b) of the FTP; Section 5.12 of the HBP; and India's responses to Panel questions Nos. 51 and 52.
[743] Section 5.09 of the FTP.

7.510. Further, applicants for EPCG authorisation must provide, as part of their application, a certification by a chartered engineer of the "nexus" between the capital goods to be imported and the manufacture of products for export[744], certifying that the capital goods in question are "required" to manufacture specified "export product(s)".[745]

7.511. In sum, "the very words of the relevant legislation, regulation or other legal instrument"[746] show that the EPCG Scheme conditions the availability of the subsidy on export performance, in violation of Article 3.1(a) of the SCM Agreement. Those words even emphasize further the centrality of the export performance conditions by setting forth incentives for the early fulfilment of those conditions, sanctions for failure to fulfil them, and additional requirements to certify the nexus between the goods benefiting from duty-free treatment and the manufacture of goods for export.

7.512. We therefore find that the exemption from customs duties for the importation of capital goods under the EPCG Scheme is contingent in law upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Moreover, since through the legal instruments discussed above India grants or maintains such subsidy, India is also acting inconsistently with Article 3.2 of the SCM Agreement.

7.10.4 Whether the subsidies granted under the Special Economic Zones Scheme are export contingent

7.513. The United States argues that the challenged subsidies under the SEZ Scheme are contingent on export performance, in law or in fact.[747] In particular, first, to qualify as SEZ Units, applicants must undertake to meet a positive NFE requirement, and this requirement is then subject to monitoring and "penal action" in case of non-compliance.[748] Second, SEZ Units are required to "export the goods manufactured".[749] Third, one of the subsidies, i.e. the deduction from total income for purposes of corporate income tax, is reserved to "export" income.[750] In addition, in the context of its argument that the subsidies under the SEZ Scheme are also export contingent in fact, the United States relies on the preamble of the SEZ Act, the description of the functions of the competent agencies in the SEZ Act, and public statements of government officials, all to the effect that the purpose of the SEZ Scheme is the promotion of exports.[751]

7.514. India disagrees with the United States and argues that the SEZ Scheme is not export-contingent, in law or fact.[752] According to India, the United States has mischaracterized the obligation to achieve a positive NFE, because SEZ Units can fulfil that requirement through domestic transactions, without making any export sales.[753] Moreover, India disagrees with how the United States has portrayed, and relied upon, the application, approval and monitoring process for SEZ Units.[754] Further, India submits that the United States failed to apply the correct legal test for *de jure* contingency.[755] With regard to *de facto* contingency, India argues in particular that the

[744] Section 5.03(a) of the HBP.
[745] Appendices and Aayat Niryat Forms, (Exhibit USA-6), appendix 5A ("Format of Chartered Engineer Certificate for Nexus under EPCG Scheme").
[746] Appellate Body Report, *Canada – Autos*, para. 100.
[747] United States' first written submission, paras. 121-138; second written submission, paras. 138-161; and opening statement at the meeting of the Panel, para. 27. See also response to Panel question No. 78, para. 124.
[748] United States' first written submission, paras. 123-126; second written submission, paras. 144-150.
[749] United States' first written submission, para. 124.
[750] United States' first written submission, para. 137; response to Panel question No. 77, para. 122.
[751] United States' first written submission, paras. 128-138; second written submission, paras. 152-161; and opening statement at the meeting of the Panel, para. 27. See also response to Panel question No. 77, paras. 122-123.
[752] India's first written submission, paras. 330-380; second written submission, paras. 161-189; opening statement at the meeting of the Panel, paras. 94-105.
[753] India's first written submission, paras. 344-351; second written submission, paras. 168-173 and 183; opening statement at the meeting of the Panel, paras. 97-99 and 104; and comments on the United States' responses to Panel questions Nos. 69, and 70-73.
[754] India's first written submission, paras. 337, 338, 342, 343, 351, and 352-355; second written submission, paras. 166, 167 and 174.
[755] India's first written submission, paras. 339-341.

United States erred in giving probative value to statements of government officials[756] and in relying on the same type of evidence relied upon to prove *de jure* contingency.[757]

7.515. We begin by examining the United States' contention that the SEZ Scheme is contingent *in law* upon export performance.

7.516. We recall that, under the SEZ Scheme, India provides subsidies in the form of (a) an exemption from customs duties on imports and exports, (b) an exemption from IGST, and (c) a deduction from the taxable base for corporate income tax.

7.517. The exemption from customs duties is provided to "every Developer and … entrepreneur" for imports into, or exports from, "a Special Economic Zone or a Unit".[758] The exemption from IGST applies to "all goods … imported by a unit or a developer in the Special Economic Zone".[759] And the deduction from the taxable base for corporate income tax applies "in computing the total income of an assessee, being an entrepreneur … from his Unit".[760]

7.518. Thus, the three sets of exemptions are available (a) to *Units*, (b) for imports into or exports from *Units*, or (c) for income from *Units*; but on the face of the measure, the customs duty and IGST exemptions appear to be also available (d) to entrepreneurs and developers for imports into, or exports from, the Special Economic Zone more generally, i.e. outside the context of Units.[761]

7.519. We recall that an entrepreneur is a person who has been authorized to set up a Unit, and a developer is a person who has been authorized to set up a Special Economic Zone.[762] India has explained that, in SEZs, the manufacturing of goods (and rendering of services) takes place in Units, and the activities of an entrepreneur are limited to setting up such Units and then manufacturing goods (and rendering services) within the Unit[763]; whereas a developer, in addition to setting up an SEZ, also "develop[s] and maintain[s] the necessary infrastructure", and would "benefit from the exemptions or deductions available under the SEZ scheme to the extent such activities are for the development or maintenance of SEZ infrastructure".[764] Thus, while some economic activity covered by the SEZ Scheme takes place outside the context of Units, the bulk of the economic activity within an SEZ is carried out through the Units, leading India to say that "[i]n general, the economic activities in a Special Economic Zone under the SEZ Scheme are undertaken through a 'Unit'".[765]

7.520. The United States has clarified that it challenges only subsidies under the SEZ Scheme that apply to *Units*.[766]

7.521. The SEZ Scheme imposes conditions on the very existence of Units, prominent among which is a requirement to "achieve Positive Net Foreign Exchange". Rule 53 of the SEZ Rules provides:

> Net Foreign Exchange Earnings – The Unit shall achieve Positive Net Foreign Exchange to be calculated cumulatively for a period of five years from the commencement of production according to the following formula, namely:-

[756] India's first written submission, para. 371; opening statement at the meeting of the Panel, para. 103.
[757] India's first written submission, paras. 331 and 375-376.
[758] Section 26(1) of the SEZ Act.
[759] Notification No. 15/2017, (Exhibit USA-27).
[760] Second Schedule of the SEZ Act.
[761] In contrast, the deduction from the taxable base for corporate income tax is limited to income "from [a] Unit". (para. 7.517 above).
[762] See paras. 7.147 and 7.148 above.
[763] India's responses to panel questions Nos. 74-75, p. 58.
[764] India's response to Panel question No. 75, p. 58.
[765] India's response to panel question No. 74, p. 58.
[766] United States' response to Panel question No. 74, para. 119. As set out in the opening part of para. 7.518, the connection to a Unit can reside in one of the following: the subsidy is provided to the Unit; the subsidy is provided for imports into and exports from the Unit; or the subsidy is provided as a deduction in calculating income from the Unit.

Positive Net Foreign Exchange = A - B >> 0

Where:-

A: is Free on Board value of exports … against freely convertible currency, by the Unit and the value of … supplies of their products [falling under items A(a) to A(k) of Section 53].

…

B: consists of sum of the following:

(a) sum total of the Cost Insurance and Freight value of all imported inputs used for authorised operations … and … of all imported capital goods …;

(b) value of goods obtained from other Unit or [EOU/EHTP/BTP] Unit or from bonded warehouses or … from international exhibitions held in India or precious metals …

(c) the Cost Insurance Freight value of the goods and services … imported duty free or leased … or received [in specified circumstances].[767]

7.522. Thus, Section 53 *requires* a Unit ("The Unit shall…") to achieve a "*Positive* Net Foreign Exchange", defined by the formula "A − B >> 0". Since A − B must be greater than 0, the first item, i.e. "A", must be greater than 0. A comprises several components. The first is the FOB value of exports by the Unit.[768] Therefore, one condition triggering the subsidies to Units is export performance: exports greater than 0.

7.523. In addition to achieving Positive NFE by exporting goods, the SEZ Rules also set forth other "supplies" by the Units that can be counted in computing "A".[769] These other supplies include, for example, the supply of capital goods to holders of a licence under the EPCG Scheme[770], the supply of goods to nuclear power projects meeting the conditions in the FTP[771], the export of services, the rendering of services within the DTA against free foreign exchange[772], and the supply of goods to other entities within the same SEZ or to other SEZs or EOU/EHTP/BTPs.[773]

[767] Rule 53 of the SEZ Rules, (Exhibit USA-28, as amended by Exhibits USA-60 and IND-22). (underlining added)

[768] India points out, and the United States agrees, that Section 2(m) of the SEZ Act defines exports as including not only the "taking of goods … outside India", but also as the export of services, and the sale of goods or services to other Units or developers within the same SEZ or to other SEZs. E.g. India's response to Panel question No. 69; United States' response to Panel question No. 69. We note, however, that these same "additional" items are also included in the subparagraphs of Section 53A, discussed in paras. 7.523-7.524. We therefore consider that the discussion of Section 2(m) is subsumed in the discussion of the subparagraphs of Section 53A.

[769] There have been amendments to the list of these "supplies", which is set forth in Rule 53 of the SEZ Rules: the 2006 SEZ Rules listed items (a) to (o); this list was then substantially amended in 2018 to set forth a revised list consisting of items (a) to (k) (Exhibit USA-60); further amendments introduced in 2019 made minor modifications to the existing list of items (a) to (k) (Exhibit IND-22). See also India's responses to Panel questions No. 65 and 68. These amendments however do not have a material effect on our findings: the parties agree that, before and after the amendments, the majority of the additional "supplies" listed in the subparagraphs of item A are sales to the DTA, but see para. 7.524 below. See India's responses to Panel questions Nos. 70 and 72; United States' responses to Panel questions Nos. 70 and 71.

[770] 2019 Amendment to the SEZ Rules, (Exhibit IND-22), Rule 7, amending Rule 53A(b) of the SEZ Rules.

[771] 2019 Amendment to the SEZ Rules, (Exhibit IND-22), Rule 7, amending Rule 53A(f) of the SEZ Rules.

[772] 2019 Amendment to the SEZ Rules, (Exhibit IND-22), Rule 7, amending Rule 53A(h) of the SEZ Rules.

[773] 2019 Amendment to the SEZ Rules, (Exhibit IND-22), Rule 7, amending Rule 53A(j) of the SEZ Rules.

7.524. The United States describes these as "a narrowly defined list of exceptions in the form of encouraged domestic sales"[774], and we agree with this description. More importantly, however, when a subsidy is available on condition of export performance, the fact that the same subsidy can also be obtained under a different set of circumstances, not involving export contingency, does not prevent a finding that the subsidy is export contingent.[775] Therefore, because achieving a positive NFE means that "A" must be greater than 0, and one component of A is exports of goods, exports of goods are a condition for purposes of Article 3.1(a).

7.525. Other elements of the legal instruments setting out the SEZ Scheme reiterate the NFE requirement. For example, Rule 18(2)(i) of the SEZ Rules provides that proposals to set up an SEZ Unit shall be approved if, among other requirements, "the proposal meets … the positive net foreign exchange earning requirement as provided in rule 53".

7.526. Rule 19 of the SEZ Rules provides that upon approval of a Unit, the Development Commissioner "shall issue a Letter of Approval in Form G, for setting up of the Unit". The text of Form G, which is part of the SEZ Rules, includes the following language:

> The approval is subject to the following terms and conditions:
>
> > (i) You shall export the goods manufactured / … imported / … procured for trading and services … as per the provisions of the Special Economic Zones Act, 2005, and Rules made thereunder for a period of five years from the date of commencement of production/service activities. For this purpose, you shall execute the Bond-cum-Legal Undertaking as prescribed under the Special Economic Zones Rules, 2006.
> >
> > …
> >
> > (iii) You shall achieve positive Net Foreign Exchange (NFE) as prescribed in the Special Economic Zones Rules, 2006 … failing which you shall be liable for penal action under the Foreign Trade (Development and Regulation) Act, 1992.
> >
> > …
> >
> > (xii) You shall confirm acceptance of the above terms and conditions … within forty-five days of issue of this Letter of Approval.
> >
> > (xiii) If you fail to comply with the conditions stipulated above, this Letter of Approval shall be cancelled as per the provisions of the Special Economic Zones Act, 2005 and the rules and orders made thereunder.
> >
> > (underlining added)

7.527. Thus, first, the text of Form G, which is part of the SEZ Rules and which must be accepted by an entrepreneur whose proposal to set up a Unit has been approved, further confirms the

[774] United States' response to Panel question No. 69, para. 106.

[775] Para. 7.475 above; Appellate Body Reports, *US – FSC (Article 21.5)*, para. 119; and *US – Upland Cotton*, paras. 579-580. See also European Union's third-party submission, para. 29, noting that the Appellate Body in *US – Upland Cotton* rejected the argument made by the United States in that case that, since Step 2 payments were available to both exporters and domestic users, and the conditions applying to the latter had not been found to involve export contingency, the payments were not export contingent. The Appellate Body explained that the fact that the subsidies granted in a second set of circumstances might not be export contingent did not dissolve the export contingency arising in the first set of circumstances.

Relying on *Canada – Autos*, India argues instead that the test for export contingency in law is a "but for" test, i.e. the subsidies must be unavailable but for export performance. (India's first written submission, paras. 339-341). However, the text relied upon by India is part of the Appellate Body's description of the measure before it, and not the Appellate Body's articulation of the test for export contingency. The text of Article 3.1(a) itself makes it clear that export performance can be "one of several … conditions".

requirement to achieve positive NFE, and envisages "penal action" for failing to achieve positive NFE.[776]

7.528. Second, Form G also provides that the entrepreneur who is thus being authorized to set up the Unit "shall export … as per the provisions of the Special Economic Zones Act, 2005", for five years. As the United States pointed out, the definition of "export" in the SEZ Act, as it applies to SEZ Units for trade in goods, only includes "taking goods … out of India" and supplying goods to other SEZ Units or developers.[777] Thus, this too, amounts to a requirement for all approved Units to "export", further reinforcing the export contingency of the subsidies provided to Units under the SEZ Scheme.

7.529. Third, Form G requires its recipient to execute the prescribed "bond-cum-legal undertaking", which is also part of the SEZ Rules and is set out in Form H. Form H, to be undertaken by the SEZ Unit "unto the President of India", reiterates that the Letter of Approval "contain[s] terms and conditions for setting up and operating the unit … including the requirement of achieving positive Net Foreign Exchange Earning"[778], and further reads:

> We, the obligors shall achieve positive Net Foreign Exchange Earning and shall fulfil other conditions stipulated in the Letter of Approval and in case of failure to achieve the said positive Net Foreign Exchange Earnings, … we shall be liable for penal action under the provisions of the Foreign Trade (Development and Regulation) Act, 1992.[779]

7.530. Therefore, the applicable legal instruments provide, and reiterate, that SEZ Units must meet a positive NFE requirement, and at least one way in which this requirement is met is by exporting. Further, we recall that the challenged subsidies are provided to Units. Therefore, the challenged subsidies under the SEZ Scheme are contingent in law upon export performance within the meaning of Article 3.1(a).

7.531. Moreover, the Letter of Approval also provides that the SEZ Unit will "export" and, again, one of the ways in which this requirement is met is by exporting goods out of India.[780] For this reason too, the challenged subsidies under the SEZ Scheme are contingent in law upon export performance within the meaning of Article 3.1(a).

7.532. In addition, as regards the third type of subsidy that we have found to be provided under the SEZ Scheme, i.e. the deduction from the taxable base for corporate income tax, the relevant provisions expressly provide for the deduction, "in computing the total income of … an entrepreneur … from his Unit", of "profits and gains derived from … *export*".[781] That is, export is, again, a condition for the grant of the subsidy. For this reason, too[782], this deduction from taxable income is contingent in law upon export performance within the meaning of Article 3.1(a).

7.533. We therefore find that the challenged subsidies under the SEZ Scheme, namely, (a) the exemption from customs duties on imports into, and exports from, Units, (b) the exemption from IGST on imports into Units, and (c) the deduction of export profits from the income of Units for purposes of corporate income tax, are contingent in law upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Further, because India grants or maintains such subsidies, it also acts inconsistently with Article 3.2 of the SCM Agreement.

7.534. The United States also argued that the challenged subsidies under the SEZ Scheme are contingent in fact upon export performance. We have found that they are contingent in law upon

[776] Form G, para. (iii) of the SEZ Rules.
[777] Section 2(m) of the SEZ Act. See also fn 768 above.
[778] Form H, p. 1 of the SEZ Rules.
[779] Form H, para. 8 of the SEZ Rules.
[780] See fn 768 above.
[781] Income Tax Act, 1961, Sections 10A and 10AA, (Exhibit USA-29). (emphasis added)
[782] In addition to the fact that the very existence of Units is contingent upon export performance, as discussed in the previous paragraphs with reference to all the challenged subsidies under the SEZ Scheme.

export performance, and we therefore do not proceed to examine whether they are contingent in fact upon export performance.[783]

7.10.5 Whether the subsidies granted under the Duty-Free Imports for Exporters Scheme are export contingent

7.535. To recall, we have found that the exemptions from customs duties under Conditions 10, 21[784], 36, 60(ii), and 61 of DFIS constitute a subsidy.

7.536. The United States argues that the DFIS exemptions from customs duties are contingent in law upon export performance.[785] According to the United States, under DFIS, participating exporters must have made exports in the previous year to obtain the exemptions, and the value of these past exports determines the amount of the duty-free entitlement.[786]

7.537. India mostly[787] does not respond to the United States' arguments on export contingency and contends that the United States has not established the existence of a subsidy under Article 1 of the SCM Agreement.[788] Rather, in India's view, DFIS falls under footnote 1 and thus does not qualify as a subsidy within the meaning of Article 1.[789] However, we recall that we are examining Conditions 10, 21, 36, 60(ii), and 61 of DFIS to the extent that we have found them not to fall under footnote 1.[790]

7.538. Each of the duty exemptions at issue is subject to a "Condition" under the legal instrument setting forth the measure, i.e. Notification No. 50/2017. In each case, the Condition includes a requirement that the total value of the goods imported under the exemption not exceed a certain percentage of the FOB value of exports of the specified product in the preceding year, ranging from 1% to 25%.[791]

7.539. Thus, first, on the face of the measure itself, the exemption is not available without exportation: as the United States puts it, "[t]o receive the import duty exemption, an enterprise must have made exports in the past year".[792] Second, again on the face of the measure itself, the extent of the exemption (i.e. the total value of the goods that can be imported under the exemption) depends on the value of exports of the specified products during the previous year. That is, like in *Canada – Autos*, the more the subsidy recipient exports, the more it is entitled to import under the duty exemption.[793]

7.540. In both these ways, the import duty exemptions under DFIS are contingent upon export performance, as established on the basis of the very words of the legal instrument that provides for DFIS. In other words, they are contingent in law upon export performance.

7.541. India argues that insofar as the goods imported free of duty "are … for research and development purposes … the duty exemption is not export contingent".[794] This argument applies to Condition 61, which requires, among others, that the goods be "imported for Research and

[783] See also United States' response to Panel question No. 78 ("if the Panel agrees … that the SEZ scheme is *de jure* contingent upon export performance, the Panel need not conduct a *de facto* analysis").
[784] For one and six items, respectively. See among others paras. 7.255, 7.256, 7.267, and 7.406 above.
[785] United States' first written submission, paras. 160-161; second written submission, para. 175; opening statement at the meeting of the Panel, para. 30.
[786] United States' first written submission, para. 161; opening statement at the meeting of the Panel, para. 30.
[787] See para. 7.541 below.
[788] India's first written submission, paras. 402-404; second written submission, paras. 209-210; and opening statement at the meeting of the Panel, paras. 113-114.
[789] India's opening statement at the meeting of the Panel, para. 113.
[790] See para. 7.267 above.
[791] Notification No. 50/2017, (Exhibit USA-36). See also Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.104-2.107.
[792] United States' first written submission, para. 161.
[793] Appellate Body Report, *Canada – Autos*, para. 106.
[794] India's response to Panel question No. 80.

Development purpose".[795] However, as we have just found, Condition 61 both requires past exports as a condition of the import duty exemption, and ties the extent of the duty-free entitlement to the value of those past exports.[796] That the goods imported with the benefit of this duty-free entitlement are to be used for research and development does not make the duty exemption any less export contingent.

7.542. We therefore find that the exemptions from customs duties under Conditions 10, 21[797], 36, 60(ii), and 61 of DFIS are subsidies that are contingent in law upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Moreover, since India grants or maintains such subsidies, India is also acting inconsistently with Article 3.2 of the SCM Agreement.

7.10.6 Whether the subsidies granted under the Merchandise Exports from India Scheme are export contingent

7.543. To recall, under MEIS, India provides a subsidy in the form of MEIS scrips.

7.544. The United States argues that MEIS scrips are contingent upon export performance.[798] Specifically, citing the Foreign Trade Policy, the United States argues that under MEIS, a "program participant receives scrips conditioned and tied to the value it exports, where the exports are sold, and of what product".[799] According to the United States, "[f]rom approval to award to monitoring, the amount of scrips hinges on export performance".[800]

7.545. India does not respond to the United States' arguments on export contingency and submits that the question of export contingency is moot because MEIS falls under footnote 1 and Annexes I(g) and I(h).[801]

7.546. The Foreign Trade Policy provides that MEIS scrips "shall be granted as rewards under MEIS".[802] The set of conditions giving rise to "entitlement under MEIS" is described in Section 3.04 of the Foreign Trade Policy.[803] This provision reads:

> 3.04 Entitlement under MEIS
>
> Exports of notified goods/products with ITC[HS] code, to notified markets as listed in Appendix 3B, shall be rewarded under MEIS. Appendix 3B also lists the rate(s) of rewards on various notified products [ITC (HS) code wise]. The basis of calculation of reward would be on realised FOB value of exports in free foreign exchange, or on FOB value of exports as given in the Shipping Bills in freely convertible foreign currencies, whichever is less, unless otherwise specified.

7.547. Thus, the condition giving rise to "entitlement under MEIS" is the "*export* of notified goods/products … to notified markets"; the "basis of calculation of reward" is the "FOB *value of exports*"; and the "rate" of entitlement depends on the product exported and the country it is exported to, as further specified in Appendix 3B.[804]

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[795] The argument was also applicable to Condition 60(i). However, the United States has clarified that its challenge does not extend to this Condition. See fn 266 above.

[796] In the case of Condition 61, the requirement is worded as follows: "If, … (b) the total value of goods imported does not exceed one % of the FOB value of exports made during the preceding financial year…". (Notification No. 50/2017 (Exhibit USA-36), p. 68).

[797] For one and six items, respectively. See among others paras. 7.255, 7.256, 7.267, and 7.406 above.

[798] United States' first written submission, paras. 60-61; second written submission, para. 114; and opening statement at the meeting of the Panel, para. 18.

[799] United States' first written submission, para. 61.

[800] United States' first written submission, para. 61. See also United States' second written submission, para. 114.

[801] India's first written submission, paras. 292-295; second written submission, para. 124; and opening statement at the meeting of the Panel, para. 76.

[802] Section 3.02 of the FTP.

[803] See also United States' first written submission, paras. 51-52 and 61.

[804] Section 3.04 of the FTP. (emphasis added)

7.548. Appendix 3B, in turn, sets out a "list of Countries and ITC (HS) code wise list of products with reward rates under the Merchandise Exports from India Scheme (MEIS)".[805] Appendix 3B groups export destination countries into three "country groups".[806] Appendix 3B then lists, over 332 pages, the "MEIS- Reward Rate" for each covered product; specifically, for each covered product, it lists three rates, the choice between the three being determined by the country to which the exports giving rise to the reward were made.[807]

7.549. India has not rebutted any of this evidence of export contingency. Instead, India argues that MEIS falls under footnote 1 of the SCM Agreement, and that every measure falling under footnote 1, by definition, requires the export of products.[808] We note that while it is correct that every measure falling under footnote 1 requires the export of products, we are undertaking the analysis of export contingency because we have found that MEIS does not fall under footnote 1.[809]

7.550. Therefore, we find that "on the basis of the very words of the relevant legislation, regulation or other legal instrument"[810], the fact of exporting is both the triggering condition for the award of MEIS duty credit scrips, and the basis on which the value of the scrips is calculated. As set out above, under the legal instruments regulating MEIS, that value is based on (a) the FOB value of exports of the recipient of the scrips, and (b) a rate determined by the type of goods exported and the destination country. That is, MEIS scrips are export contingent in law.

7.551. We therefore find that the provision of duty credit scrips under MEIS is contingent in law upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Moreover, since through the legal instruments discussed above India grants or maintains such subsidies, India is also acting inconsistently with Article 3.2 of the SCM Agreement.

7.11 The Panel's duty under Article 12.11 of the DSU

7.552. Article 12.11 of the DSU requires that panels, in cases in which "one or more of the parties is a developing country Member",

> explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.553. The "relevant provisions on differential and more-favourable treatment … raised by" India in this dispute are Article 12.10 of the DSU and Article 27 of the SCM Agreement.

7.554. We begin with Article 12.10 of the DSU. Pursuant to this provision, "in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation".

7.555. In these Panel proceedings, we took account of India's status as a developing country Member, under Article 12.10, in adopting and reviewing the Working Procedures and timetable. Although established under the fast-track procedures contemplated in Article 4 of the SCM Agreement, we allowed four weeks for India to prepare its first written submission following the United States' first written submission, and four weeks for India to prepare its second written submission following the United States' second written submission. The Panel's timetable also

[805] Public Notice 2/2015-2020, (Exhibit USA-11), cover page.
[806] Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B, table 1.
[807] Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B, table 2. The United States also points out that "India controls how the product exported and the destination market for that product determine the rate of receiving scrips", and in particular "reserves the right" to modify the goods or destination markets giving rise to rewards, and to modify the rates of reward. (United States' first written submission, para. 54; Section 3.13 of the FTP). Further, the United States also refers to a number of statements of Indian government agencies to the effect that MEIS seeks to promote the export of goods covered by the scheme. (United States' first written submission, para. 50).
[808] India's first written submission, paras. 292-294.
[809] See para. 7.294 above.
[810] Appellate Body Report, *Canada – Autos*, para. 100.

provided for more than two months between the filing of submissions and the substantive meeting with the parties.

7.556. In addition, after the substantive meeting with the parties, India requested us to double the time for responding to our questions. In light of Article 12.10 of the DSU, we acceded to that request for all but two of our questions.

7.557. We also considered India's developing country Member status and the requirements of Article 12.10 when reconciling competing considerations in our decision to hold a single substantive meeting, although we ultimately did not accede to India's request that we not limit ourselves to a single meeting.[811]

7.558. We now turn to Article 27 of the SCM Agreement. The question whether the special and differential treatment provisions of Article 27 of the SCM Agreement exclude India from the scope of application of Articles 3 and 4 of the SCM Agreement has been a key issue in this dispute.

7.559. India argued, and the United States disputed, that Article 27.2(b) of the SCM Agreement exempted India from the prohibition of export subsidies set forth in Article 3.1(a) and, by virtue of Article 27.7, from the applicability of Article 4. In resolving this dispute, we were therefore called upon to interpret the meaning of the special and differential treatment provision of Article 27.2(b) of the SCM Agreement. In doing so, we also took into account other relevant special and differential treatment provisions included in Article 27 and Annex VII of the SCM Agreement. Our analysis in section 7.3 of this Report reflects our consideration of the relevant provisions on special and differential treatment.

7.560. India also requested us to rule at preliminary stage that, as a result of Article 27 of the SCM Agreement, the procedures of Article 4 of the SCM Agreement were not applicable to this dispute. We therefore considered India's request at preliminary stage. At the same time, India also requested us not to rule at preliminary stage on the parties' interpretive disagreement on Article 27 itself, and to do so instead through the full panel proceedings, because India considered this to be "a legal issue that goes to the essence of the dispute".[812] We explained, in a communication to the parties at preliminary stage, that we could not rule on India's preliminary request on the applicability of Article 4 of the SCM Agreement without resolving the parties' interpretive disagreement under Article 27.[813]

8 CONCLUSIONS

8.1. For the reasons set out in this Report, we conclude that:

a. the exemptions from customs duties on importation under the EOU/EHTP/BTP Schemes are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement;

b. the exemptions from customs duties on importation under the EPCG Scheme are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement;

c. the exemptions from customs duties on importation and exportation, the exemption from IGST on importation, and the deductions from taxable income, all provided under

[811] Paras. 1.9-1.15 of this Report reflect the procedural background regarding the single meeting issue. Our communications dated 22 January 2019 and 16 April 2019 to the parties set out the reasoning for our decision (Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting (Annex D-1), paras. 2.1-2.21, and in particular paras. 2.13, 2.15 and 2.20; Communication dated 16 April 2019 from the Panel to the parties concerning the Panel's Working Procedures and Timetable, (Annex D-3)).

[812] India's first written submission, para. 79.

[813] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 3.1-3.13.

the SEZ Scheme, are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement;

d. the exemptions from customs duties on importation under Conditions 10, 21, 36, 60(ii) and 61 of DFIS are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement; and

e. the duty credit scrips awarded under MEIS are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

8.2. Further, we reject the United States' claims that the exemption from central excise duty on domestically procured goods under the EOU/EHTP/BTP Schemes and the exemptions from customs duties on importation under Conditions 28, 32, 33, and 101 of DFIS are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

8.3. 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 of benefits. We conclude that, to the extent the measures at issue are inconsistent with the SCM Agreement, India has nullified or impaired benefits accruing to the United States under this agreement.

9 RECOMMENDATIONS

9.1. Pursuant to Article 4.7 of the SCM Agreement, if the measures in question are found to be prohibited subsidies, the panel must "recommend that the subsidizing Member withdraw the subsid[ies] without delay". Accordingly, we recommend that India withdraw, without delay, the subsidies we have found to be inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

9.2. Article 4.7 further requires a panel to "specify in its recommendation the time-period within which the measure must be withdrawn".

9.3. We recall that Article 4.7 is a "special or additional rule or procedure", which prevails over the rules and procedures of the DSU to the extent they conflict.[814] Article 4.7 departs, among others, from Article 21.3 of the DSU: in particular, "in contrast to Article 21.3(c) of the DSU, the use of the term 'without delay' in Article 4.7 *constrains the latitude* available to a panel in specifying the time period under that provision".[815]

9.4. At the same time, Article 4.7 itself does not prescribe "a single standard or time period applicable in all cases".[816] A panel must determine what would constitute withdrawal "without delay" taking into account the relevant facts and circumstances of the case[817], i.e. "typically … the nature of the measure(s) to be revoked or modified and the domestic procedures available for such revocation or modification".[818]

9.5. On this basis, many panels called upon to determine the appropriate time period under Article 4.7 have considered that, for the measures before them, this time period was 90 days.[819]

9.6. Other panels have considered that a different time period was appropriate for the measures before them. In *US − Upland Cotton*, the panel recommended withdrawal of the measures either within six months from adoption of the panel report, or by 1 July 2005 (which was a little less than ten months from the date of circulation of the panel report), whichever was earlier.[820]

[814] Article 1.2 and Appendix 2 of the DSU. See also e.g. Appellate Body Reports, *Brazil − Taxation*, para. 5.445.
[815] Appellate Body Reports, *Brazil − Taxation*, para. 5.447. (emphasis added)
[816] Appellate Body Reports, *Brazil − Taxation*, para. 5.446.
[817] Appellate Body Reports, *Brazil − Taxation*, para. 5.454.
[818] Appellate Body Reports, *Brazil − Taxation*, paras. 6.43 and 5.446.
[819] E.g. Panel Reports, *Korea − Commercial Vessels*, para. 8.700; *Canada − Aircraft Credits and Guarantees*, para. 8.4; *Canada − Autos*, para. 11.7; *Australia − Automotive Leather II*, para. 10.7; *Brazil − Aircraft*, para. 8.5; and *US − Tax Incentives*, para. 8.6.
[820] Panel Report, *US − Upland Cotton*, paras. 8.3(b) and 8.3(c).

9.7. In *US − FSC*, the panel took note that withdrawal of the prohibited subsidy required legislative action, and also that the measures were part of the respondent's tax legislation, which was revised every year with effect from the beginning of each fiscal year.[821] On that basis, the panel considered that withdrawal would be "without delay" if it took place no later than the start of the fiscal year that would follow completion of the appeal process.[822] This was a year from the expected circulation of the panel report, and about half a year from the time at which the panel expected adoption of the report in case of an appeal.[823]

9.8. Turning to the case before us, the United States has requested us to specify that the inconsistent measures must be withdrawn within 90 days from the DSB's adoption of the recommendations and rulings in this dispute.[824]

9.9. On the basis of our factual findings, above, we note that withdrawal of the prohibited subsidies under the EOU/EHTP/BTP Schemes, EPCG Scheme, and MEIS, appears to require, at least, amendments to the FTP. According to its preamble, the FTP is adopted by "the Central Government", in the "exercise of powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992".[825] Thus, on the face of the FTP, it appears that it is adopted, and that therefore it can be amended, by the Government on the basis of authority already conferred by India's legislature. In addition, withdrawal of these prohibited subsidies may require amendments to certain other subordinated instruments, such as the HBP, which, too, are administrative measures. India's interim review comments confirm our understanding.[826]

9.10. India has also observed that modifying the FTP requires "consultations with various stakeholders", including at central and state government level, and "an express approval from India's cabinet"[827]; that "the next review of the FTP is scheduled for April 2020"[828]; and that modifications to the FTP "may have to be laid before the Indian Parliament for a period of 30 days".[829]

9.11. We consider that adoption by the Government (as opposed to the legislature) of amendments to the FTP and related administrative measures, in the exercise of powers already conferred upon the Government by India's legislature, can be achieved within 90 days, also taking into account the consultation of stakeholders. As for the fact that the next review of the FTP is scheduled to come into effect in April 2020, we consider that this may further facilitate withdrawal of the prohibited subsidies in question. We also consider however that the possible need to lay the amendments to the FTP before Parliament for 30 days requires that we include these 30 days in the time period within which the prohibited subsidies under the EOU/EHTP/BTP Schemes, EPCG Scheme, and MEIS, must be withdrawn. For these prohibited subsidies, therefore, we consider that withdrawal "without delay" would be withdrawal within 120 days from adoption of the Report.

9.12. We therefore recommend that India withdraw the prohibited subsidies under the EOU/EHTP/BTP Schemes, EPCG Scheme, and MEIS, within 120 days from adoption of the Report.

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[821] Panel Report, *US − FSC*, para. 8.8. See also ibid. para. 4.1362.

[822] The complainant, while accepting such a timeframe in case of an appeal, had asked the panel to state as an alternative timeframe, in case of no appeal, the start of the fiscal year following adoption of the panel report. (Panel Report, *US − FSC*, para. 4.1362).

[823] Panel Report, *US − FSC*, para. 8.8 ("this Report is not scheduled for circulation to Members until September 1999 (and, if appealed, might not be adopted until as late as early spring 2000)"). The panel report was actually circulated on 8 October 1999.

[824] United States' first written submission, para. 164; second written submission, para. 179. India set out its arguments on the time period for withdrawal in its written request for review of the Interim Report and in its oral statements at the Panel's interim review meeting with the parties (India's request for review, paras. 88-93; India's opening statement at the interim review meeting of the Panel with the parties, para. 43; India's closing statement at the interim review meeting of the Panel with the parties, paras. 9). The United States commented on India's interim review arguments in this regard in United States' comments on India's request for review, paras. 59-65. See also Annex A-2, section 9.2.

[825] Preamble of the FTP.

[826] India's request for review, paras. 89-91.

[827] India's request for review, para. 90.

[828] India's request for review, para. 91.

[829] India's request for review, para. 91.

9.13. Turning to the prohibited subsidies under DFIS, on the basis of our factual findings, we note that their withdrawal appears to require amendments to Notification No. 50/2017. According to its terms, Notification No. 50/2017 is adopted by the "Central Government", in the "exercise of powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and sub-section (12) of section 3, of Customs Tariff Act, 1975 (51 of 1975)".[830] Thus, similar to our observations in the preceding paragraphs, it appears from its face that Notification No. 50/2017 was adopted and can be amended by the Government, on the basis of authority already conferred by India's legislature. Thus, for the prohibited subsidies under DFIS, we consider that withdrawal "without delay" would be withdrawal within 90 days from adoption of the Report.[831]

9.14. We therefore recommend that India withdraw the prohibited subsidies under DFIS within 90 days from adoption of the Report.

9.15. Turning to the SEZ Scheme, based on our factual findings, it appears that withdrawal of the measures we have found to constitute prohibited subsidies would require, at least, amendments to the SEZ Act (for the exemptions from customs duties on importation and exportation, and the deduction from taxable income), the Income Tax Act (for the deduction from taxable income), and Notification No. 15/2017 (for the exemption from IGST). While Notification No. 15/2017, like the measures we have reviewed in the previous paragraphs, is adopted by the Government in the "exercise of the powers conferred" by the legislature, the SEZ Act and Income Tax Act are, themselves, legislative acts. Their amendment, therefore, appears to require action by India's Parliament. Withdrawal of the measure may additionally require amendments to certain other subordinated acts, such as the SEZ Rules, which were adopted by the Government in the exercise of powers conferred by the SEZ Act.[832] India's interim review comments confirm our understanding regarding the SEZ Scheme.[833]

9.16. Because withdrawal of the prohibited subsidies under the SEZ Scheme thus appears to require amendments to legislative acts of India's Parliament, we do not consider it "practicable"[834] to envisage withdrawal within 90 days. Instead, we consider that withdrawal "without delay" would be withdrawal within 180 days from adoption of the Report.

9.17. During the interim review, India commented that modifications to tax legislation are "*mostly* made through a general budget", and that such modifications "*can* be implemented at the start of the next fiscal year".[835] On this basis, while India's comments concede that 180 days suffice as a minimum period for withdrawal[836], India asked that, *after* expiry of 180 days from adoption, the time period for withdrawal *additionally* include any amount of time running until the beginning of India's following fiscal year.[837] Depending on the date of adoption of the Report, this could result in a time for withdrawal ranging from 180 to 544 days.[838]

9.18. Given the degree of uncertainty and potential delay that this proposed formula would introduce, and given that India's own comments manifest that it is not strictly necessary to implement withdrawal as part of India's general budget and with effect from the start of a new fiscal year[839], we consider that acceding to India's request would be incompatible with the requirement of Article 4.7 that we recommend withdrawal "without delay".

9.19. Therefore, we recommend that India withdraw the prohibited subsidies under the SEZ Scheme within 180 days from the date of adoption of the Report.

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[830] Notification No. 50/2017, (Exhibit USA-36), p. 1.
[831] In their comments on the Interim Report, both parties appeared to accept this assessment. India's request for review, para. 93; United States' comments on India's request for review, para. 65.
[832] Preamble of the SEZ Rules.
[833] India's request for review, para. 92.
[834] Panel Report, *US − FSC*, para. 8.8.
[835] India's request for review, para. 92. (emphasis added)
[836] Annex A-2, para. 9.11, with reference to India's request for review, para. 93.
[837] India's request for review, para. 93. India indicated that its fiscal year starts on 1 April.
[838] Annex A-2, para. 9.8.
[839] Annex A-2, para. 9.11, with reference to India's request for review, para. 92.

WORLD TRADE ORGANIZATION

WT/DS541/R/Add.1

31 October 2019

(19-7315)

INDIA – EXPORT RELATED MEASURES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS541/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 22 August 2018

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the written submission in question is presented to the Panel, unless the Panel establishes a different deadline upon written request of a party showing good cause.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel, in accordance with the timetable adopted by the Panel:

a. a first written submission, in which it presents the facts of the case and its arguments; and

b. a written rebuttal.

(2) Each third party that chooses to make a written submission prior to the substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(3) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) The following procedures shall apply if the responding party considers that the Panel should make a ruling prior to the issuance of the Report that certain measures or claims in the panel request or the complaining party's first written submission are not properly before the Panel. Exceptions to this procedure shall be granted upon a showing of good cause.

a. India shall submit any such request for a preliminary ruling no later than in its first written submission to the Panel. The United States shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by India prior to the meeting, and any subsequent submissions of the parties in relation thereto prior to the meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel prior to the substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) The procedure set out in paragraph (1) is without prejudice to the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel with its first written submission, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or the meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. Exhibits submitted by India should be numbered IND-1, IND-2, etc. If the last exhibit in connection with the first submission was numbered IND-5, the first exhibit in connection with the next submission thus would be numbered IND-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party should consider making its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Prior to the meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of the meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally in the course of the meeting, and in writing following the meeting, as provided for in paragraphs 16 and 21 below.

Substantive meeting

10. The Panel notes the request by the United States for an open or partially open hearing, and will revert to this issue in due course before the date of that meeting.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. There shall be one substantive meeting with the parties.

16. The substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite India to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 5 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

Third party session

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the third party session of the meeting with the Panel.

21. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. In the event that interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit one integrated executive summary, which shall summarize the facts and arguments as presented to the Panel during the proceedings.

24. Each integrated executive summary shall be limited to no more than 15 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If the documents comprising a third-party's submission, oral statement and/or responses to questions do not exceed six pages in total, these may serve as the executive summary of that third party's arguments.

Interim review

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable

adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

29. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties in the course of the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

b. Each party and third party shall submit two paper copies of its submissions and two paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute.

c. Each party and third party shall also send an e-mail to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such e-mails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose e-mail addresses have been provided to the parties in the course of the proceeding. Where it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with three copies of the Exhibits on USB keys, CD-ROMs or DVDs.

d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by e-mail or on a CD-ROM, DVD or USB key only, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion and disposition of the requests for review made at interim review stage. As explained below, where the Panel considered it appropriate, it has modified certain aspects of its Interim Report in light of the parties' comments. The parties have also made some comments on typographical errors: the Panel thanks the parties for those comments, has accepted them in their entirety, and does not discuss them below. In addition, some other corrections of a typographical nature were made to the Report.

1.2. Due to changes resulting from our review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbering in the Interim Report, with the numbering in the Final Report in parentheses for ease of reference, if different.

1.3. Below, we first consider India's requests for review, and then the United States'.

2 INDIA'S REQUESTS CONCERNING THE INTERPRETATION OF ARTICLE 27 OF THE SCM AGREEMENT

2.1 Presentation of India's arguments

2.1.1 Paragraph 7.24 of the Interim Report

2.1. India asks us to supplement the description of India's arguments at paragraph 7.24 of the Interim Report.[1] The United States opposes India's request as unnecessary.[2] We had already reflected the arguments at issue elsewhere in the Interim Report and had considered them in our assessment of the matter before us. Adding the description of the arguments as requested by India does not, however, affect the substance of our Report. Therefore, we have decided to make most of the proposed changes.

2.1.2 Paragraphs 7.40 and 7.59 of the Interim Report

2.2. India argues that it has not asked the Panel to "depart" from giving the terms in Article 27.2(b) their ordinary meaning and that the Panel has thus mischaracterized India's arguments.[3] India therefore requests us to revise the description of India's arguments.[4] Similarly, India argues that we have incorrectly described India's arguments in paragraph 7.59 of the Interim Report as requesting the Panel to "disregard" the text of Article 27.2(b)[5], and therefore asks us to delete the first sentence of that paragraph.

2.3. The United States disagrees with India's requests and argues that India did indeed ask the Panel to ignore the ordinary meaning of Article 27.2(b).[6]

[1] India's request for review, para. 5.
[2] United States' comments on India's request for review, paras. 2-3.
[3] India's request for review, para. 7.
[4] India's request for review, para. 7.
[5] India's request for review, para. 16.
[6] United States' comments on India's request for review, paras. 5 and 8.

2.4. We recall that India argued against giving the terms of Article 27.2(b) their "ordinary meaning"[7] and against a "literal"[8] or "textual"[9] interpretation of that provision. India further argued that it was "the manifest unreasonableness and ambiguity presented in a textual interpretation of Article 27" that called for recourse to supplementary means of interpretation under Article 32 of the Vienna Convention.[10] In this light, we consider it appropriate to describe India's arguments as requesting us to "depart" from giving the terms in Article 27.2(b) their ordinary meaning, or from a literal or textual interpretation of that provision.[11] We therefore reject India's request. We have, however, included references to India's written and oral submissions where the arguments referred to above are found (in footnote 86 of the Interim Report) and a clarification in paragraph 7.40 of the Interim Report that we refer to the SCM Agreement. We have also replaced the term "disregard" with "depart from" paragraphs 7.59 and 7.71 of the Interim Report.

2.2 The Panel's interpretation of Article 27.2(b) in accordance with the general rule of interpretation codified in Article 31 of the Vienna Convention

2.2.1 Paragraph 7.39 of the Interim Report

2.5. India requests us to add language at the end of paragraph 7.39 of the Interim Report[12], for it to read: "[t]he text of Article 27.2(b) does not leave scope for ambiguity in respect of the end date of that transition period, for other developing country Members".[13]

2.6. The United States objects to India's request.[14]

2.7. We agree with the United States that the proposed change would render our finding inaccurate because it could imply that the text of Article 27.2(b) leaves scope for ambiguity for some but not for other Members.[15] We therefore decline India's request.

2.2.2 Paragraphs 7.45-7.53 of the Interim Report

2.8. India asks us to reconsider our findings in paragraphs 7.45-7.53 concerning Annex VII(b).[16] In doing so, India argues that our findings do not accord developing country Members graduating from Annex VII(b) the same treatment as afforded to other developing country Members in Article 27.2(b) and that our findings disregard the mandatory language in Annex VII(b) ("shall be subject to the provisions which are applicable to other developing country Members").[17] India also submits that our interpretation of Annex VII(b) would render that provision ineffective.[18]

2.9. The United States opposes India's request as simply repeating India's previous arguments with which the Panel has disagreed in the Interim Report.[19]

[7] India's first written submission, para. 159; second written submission, paras. 10 and 27.
[8] India's first written submission, para. 164; second written submission, para. 10, response to Panel question No. 18; comments on the United States response to Panel question No. 21, first para.; and request for review, paras. 5 (as regards the proposed change to paragraph 7.24 of the Interim Report), 14, 15, 17, and 20.
[9] India's second written submission, paras. 8, 14, 19, and 31; opening statement at the meeting of the Panel, para. 15.
[10] India's second written submission, para. 31. See also India's first written submission, para. 166; second written submission, para. 27.
[11] We also note that India does not take issue with the same phrase used elsewhere in the Interim Report, see Interim Report, paras. 7.52 and 7.68.
[12] India's request for review, para. 6.
[13] Underlining added. The underlined text is the addition requested by India.
[14] United States' comments on India's request for review, para. 4.
[15] United States' comments on India's request for review, para. 4.
[16] India's request for review, para. 12.
[17] India's request for review, paras. 8, 10, and 11; opening statement at the Panel's interim review meeting, paras. 5-7.
[18] India's request for review, para. 10; opening statement at the Panel's interim review meeting, para. 7.
[19] United States' comments on India's request for review, para. 6.

2.10. We share the United States' view that India repeats at interim review stage arguments that it has already made during the proceedings and that we have considered and rejected in the Interim Report.[20] We therefore decline India's request.

2.2.3 Paragraphs 7.50-7.51 of the Interim Report

2.11. India requests that the Panel reconsider its findings in paragraphs 7.50-7.51 concerning the different types of flexibilities afforded to developing and least-developed country Members under Articles 27.2(a) and (b) and Annexes VII(a) and (b).[21] India submits that the Panel's findings result in less or no flexibility for developing country Members graduating from Annex VII(b) compared to the other developing country Members falling under Article 27.2(b).[22] India also argues that the Panel's interpretation renders Annex VII(b) ineffective and is irreconcilable with the object and purpose of the SCM Agreement.[23]

2.12. The United States opposes India's request as simply repeating India's previous arguments with which the Panel has disagreed in the Interim Report.[24]

2.13. We consider that India, again, repeats at interim review stage arguments that it has already made during the proceedings and that we have carefully considered and rejected in the Interim Report.[25] We therefore decline India's request but have nevertheless slightly modified paragraph 7.50.

2.2.4 Paragraphs 7.62-7.64 of the Interim Report

2.14. With respect to paragraphs 7.62-7.64 of the Interim Report, India submits that the Panel failed to address the "main contradiction" between the second sentence of Article 27.5 and Article 27.2(b) which, according to India, would arise from the Panel's findings in case a developing country Member graduates from Annex VII(b) after having reached export competitiveness with respect to a particular product.[26] According to India, the Panel's interpretation would lead to differing timelines for phasing out export subsidies on products that have reached export competitiveness and for eliminating all other export subsidies.[27] India therefore asks us to reconsider our findings.[28]

2.15. The United States opposes India's request as simply repeating India's previous arguments with which the Panel has disagreed in the Interim Report.[29]

2.16. We have expressly considered and rejected India's arguments concerning the alleged "contradiction" in the Interim Report.[30] India now adds that "the Panel has not elaborated on the basis of such a finding [that the alleged contradiction is based on a misreading of Article 27.5] as Article 27.5 does not qualify the term 'referred to Annex VII'".[31] We refer India to paragraph 7.62 of the Interim Report, where we explained that on graduating, a Member ceases to be one "referred to in Annex VII". We reject the proposition that after graduation, a Member drops out of Annex VII(b) but remains "a developing country Member which is referred to in Annex VII" for purposes of Article 27.5. Such a reading seeks to introduce a contradiction that does not exist in Article 27 and Annex VII.

2.17. India also repeats its argument that the interpretation we have espoused ignores that subsidy programmes often encompass a range of products, with the result that a product could benefit from

[20] United States' comments on India's request for review, para. 6; Interim report, paras. 7.42-7.52.
[21] India's request for review, para. 15.
[22] India's request for review, para. 14.
[23] India's request for review, para. 15.
[24] United States' comments on India's request for review, para. 7.
[25] Interim report, paras. 7.49, 7.51-7.52, and 7.65-7.68.
[26] India's request for review, paras. 17 and 18; opening statement at the Panel's interim review meeting, paras. 8-9.
[27] India's request for review, paras. 17 and 18; opening statement at the Panel's interim review meeting, para. 9.
[28] India's request for review, para. 19; opening statement at the Panel's interim review meeting, para. 9.
[29] United States' comments on India's request for review, para. 9.
[30] Interim Report, paras. 7.60-7.64.
[31] India's request for review, para. 18.

the 8-year period under Article 27.5 while other export subsidies under the same subsidy programme would need to be withdrawn immediately upon graduation from Annex VII(b).[32] In the Interim Report, we have not separately addressed this particular aspect of India's arguments because it is based on the same erroneous premise that the Article 27.5 phase-out period survives graduation from Annex VII(b).

2.18. For the same reason, we now reject India's request.

2.3 Recourse to supplementary means of interpretation

2.19. With respect to paragraph 7.73 of the Interim Report, India repeats its request for the Panel to have recourse to supplementary means of interpretation in accordance with Article 32 of the Vienna Convention.[33]

2.20. The United States objects to India's request. To the United States, recourse to supplementary means of interpretation is unnecessary because the textual interpretation of the terms in Article 27.2(b) does not leave their meaning ambiguous or obscure, or lead to manifestly absurd or unreasonable results.[34]

2.21. We re-affirm our findings in paragraph 7.72 of the Interim Report and thus continue to be of the view that recourse to supplementary means of interpretation is not required on grounds of ambiguity, obscurity, absurdity, and unreasonableness resulting from the interpretation according to Article 31 of the Vienna Convention.

2.22. We also remain convinced that it is not necessary for us to have recourse to supplementary means of interpretation to confirm the meaning resulting from the application of Article 31, as set out in paragraph 7.73 of the Interim Report.

2.23. This notwithstanding, we note India's repeated request "urg[ing] the Panel to resort to … supplementary means of interpretation in order to confirm the meaning resulting from Article 31 of the Vienna Convention".[35] We find that consideration of the negotiating history of Article 27.2(b) and Annex VII(b), as demanded by India, does not lead to a different interpretative outcome.

2.24. India relies on a draft text by the Chairman of the Negotiating Group for the SCM Agreement circulated on 6 November 1990 (the draft Chair text of 6 November 1990).[36] For certain countries, including India, Annex VIII in this draft text, which later became Annex VII of the SCM Agreement, provided for certain reduction commitments in respect of export subsidies to be undertaken when GNP per capita reached USD 1,000 per year.[37] India submits that these countries therefore did not need to eliminate their export subsidies immediately upon graduation. Rather, once graduated, they would become subject to reduction commitments to phase out export subsidies.[38] In India's view, this reflected the intent of the drafters to give certain countries, including India, an additional

[32] India's request for review, para. 18. See also India's second written submission, para. 25.
[33] India's request for review, para 20; opening statement at the Panel's interim review meeting, para. 10.
[34] United States' comments on India's request for review, para. 10.
[35] India's request for review, para 20. See also India's opening statement at the Panel's interim review meeting, para. 10.
[36] Draft Chair text of 6 November 1990, (Exhibit IND-4) (dated 7 November 1990); this document refers to the draft Chair text MTN.GNG/NG10/W/38/Rev.3 of 6 November 1990.
[37] In the draft Chair text of 6 November 1990, the exclusion from the application of the prohibition on export subsidies referred to Annex VIII, which, in turn, set forth ceilings for the level of permissible export subsidies of the listed developing countries. More specifically, Annex VIII provided a country-specific list of progressively decreasing levels of permitted export subsidies. The commitments in respect of export subsidies were divided into three time periods (Periods 1-3). Over up to the three time periods, they provided for decreasing levels of permitted export subsidy rates defined as a percentage of an initial export subsidy rate. For certain countries, including India, Annex VIII did not specify time periods and corresponding levels of permitted export subsidy rates. For these countries, Annex VIII referred to Note 1 according to which the relevant country would undertake a reduction commitment in terms of progressively decreasing levels of permitted export subsidy rates over up to three time periods when that country's GNP per capita reached USD 1,000 per year.
[38] India's first written submission, para. 177.

transition time upon graduation.[39] India posits that this intent must be taken into account when interpreting Article 27.2(b) and Annex VII(b).[40]

2.25. We note that the draft Chair text of 6 November 1990 was one of several revisions of the draft text of the SCM Agreement.[41] It introduced in its Annex VIII the mechanism of reduction commitments on which India now relies.[42] The Draft Final Act circulated on 20 December 1991, however, replaced the previous text of Article 27.2(b) and Annex VIII with the text that corresponds to the ultimately adopted Article 27.2(b) and Annex VII of the SCM Agreement, and which does not provide for an additional transition period for graduating Annex VII(b) Members.[43]

2.26. It may therefore be that the draft Chair text of 6 November 1990 contained a proposal for a mechanism and reflected an intention that was "distinctly different"[44] from the requirement for Members listed in Annex VII(b) to immediately eliminate export subsidies upon graduation. Nevertheless, in contrast to the previous draft text of Article 27.2(b) and the corresponding Annex, the Draft Final Act of 20 December 1991 and the text ultimately adopted differ from the draft of 6 November 1990 specifically with respect to the issue of the graduation mechanism for Annex VII(b) Members.

2.27. There is no apparent reason to give an earlier draft (that of 6 November 1990) greater weight over a subsequent draft (that of 20 December 1991) to interpret the text that was ultimately adopted.[45] Rather, the fact that the draft Chair text of 6 November 1990 is "distinctly different" from the subsequent draft and, more importantly, from the text ultimately adopted, cautions against importing terms and concepts from the 6 November 1990 draft into the SCM Agreement as finally adopted.[46]

2.28. We recall that "the purpose of treaty interpretation under Articles 31 and 32 of the Vienna Convention is to ascertain the "common intention" of the parties"[47], not of one or some parties. The negotiating history discussed above does not establish a common intention of the parties in favour of granting an additional transition period for graduating Annex VII(b) Members, and instead indicates that such an option failed to garner consensus support. Thus, even considering the negotiating history, we find that it does not support India's position. To the contrary, it confirms our interpretation of Article 27.2(b).

[39] India's first written submission, para. 178; response to Panel question No. 23, second para.

[40] India's first written submission, para. 179; second written submission, para. 12.

[41] The text originally circulated in MTN.GNG/NG10/W/38 on 18 July 1990 and first revised in MTN.GNG/NG10/W/38/Rev.1 on 4 September 1990 did not yet contain a special and differential treatment provision equivalent to Article 27 of the SCM Agreement, nor a corresponding Annex. The second revision circulated in MTN.GNG/NG10/W/38/Rev.2 on 2 November 1990 introduced Article 27 in the form reflected in the subsequent draft of 6 November 1990 but contained only a placeholder for Annex VIII.

[42] Following the draft of 6 November 1990, the Draft Final Act circulated on 3 December 1990 kept the text of Article 27 and Annex VIII unchanged. (Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations - Revision, MTN.TNC/W/35/Rev.1 (3 December 1990)).

[43] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (20 December 1991).

[44] India's second written submission, para. 33.

[45] In this context, we note that the Chairman of the Negotiating Group on Subsidies and Countervailing Measures reported that there remained disagreement on Article 27 in the draft of 6 November 1990 and that, in general, "[i]t was clear that the Group was not in a position to reach final Agreement on the text" (Note by the Secretariat on the meeting of 6 November 1990 of the Negotiating Group on Subsidies and Countervailing Measures, MTN.GNG/NG10/24 (29 November 1990), p. 3).

[46] Indeed, in contrast to the Article 27.2(a) approach for least-developing countries, which remained the same, the final version of Article 27.2(b) and Annex VII(b) introduced a different approach to special and differential treatment for developing countries falling under Article 27.2(b). The approach in the draft Chair text of 6 November 1990 was characterized by country-specific, staggered reduction commitments. The subsequent and ultimately adopted version of Article 27.2(b) endorsed a country-neutral, uniform eight-year transition period. Note 1 in the draft Chair text of 6 November 1990 and Annex VII(b) in the final text connected with the respective approaches to special and differential treatment in the relevant versions of Article 27.2(b): upon graduation, Note 1 made applicable the "commitment approach" under Article 27.2(b) and Annex VIII of the draft Chair text of 6 November 1990, while Annex VII(b) renders applicable the transition period of Article 27.2(b) of the SCM Agreement.

[47] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 405.

3 INDIA'S REQUESTS CONCERNING THE DESCRIPTION OF THE MEASURES AT ISSUE

3.1 Export Oriented Units and Sector-Specific Schemes

3.1. Paragraph 7.134 of the Interim Report sets out examples of the sanctions envisaged under the EOU/EHTP/BTP Schemes in the event a Unit fails to ensure positive NFE or fails to abide by other obligations under the schemes. The Interim Report describes one such sanction as "criminal liability". India submits that the appropriate terminology is "penal action".[48] India makes the same request for paragraphs 7.141, 7.487 (7.486), and 7.492 (7.491), and footnotes 716 (718) and 720 (722) of the Interim Report. The United States has not commented on India's request. The Panel has therefore replaced "criminal liability" with "penal action" in the paragraphs and footnotes at issue.

3.2 Special Economic Zones Scheme

3.2. India requests the following addition to paragraph 7.143 of the Interim Report (in the section containing a brief description of the SEZ Scheme)[49]:

> A SEZ is a separate geographical region which provides for more liberal economic measures to be applicable to the Units set up within it, as compared to the rest of India.[236] The rest of India excluding the SEZs is defined as the "Domestic Tariff Area", and the SEZ Scheme recognizes the transfer of inputs and finished goods between the SEZ Units and the Domestic Tariff Area.[237]

[236] India first written submission, para. 321.
[237] India first written submission, para. 326.

3.3. The United States points out that the first part of the language suggested by India is "just India's characterization of the scheme".[50] The United States also observes that the second part of the suggested language is not supported by the factual record.[51]

3.4. Considering India's request, the United States' comments, and the language actually contained in the evidence that India relied on in the passages of its submissions cited in its request, we have added the following new paragraph after paragraph 7.143 of the Interim Report:

> India has submitted that an SEZ is a "distinct"[FN1]"geographical region which provides for more liberal economic measures to be applicable to the Unit set up within it, as compared to the rest of India".[FN2] Further, India has pointed out that the SEZ Act defines the "domestic tariff area" (DTA) as the whole of India excluding SEZs, and that "export" for purposes of the SEZ Act includes not only "the taking of goods … out of India, from a[n SEZ]" and the supply of goods between different Units[FN3] within an SEZ, but also the supply of goods from the DTA to a Unit or developer[FN4] within an SEZ.[FN5]

[FN1] India's first written submission, para. 321; request for review, para. 23.
[FN2] India's first written submission, para. 326; request for review, para. 23. See also Annex A-2, paras. 3.2-3.4.
[FN3] See para. 7.149 [para. 7.148 in the Interim Report] below, defining SEZ "Units".
[FN4] See para. 7.147 [para. 7.146 in the Interim Report] below, defining SEZ "developers".
[FN5] India's first written submission, para. 326; request for review, para. 23. Sections 2(i) and 2(m) of the SEZ Act. See also Annex A-2, paras. 3.2-3.4.

4 INDIA'S REQUESTS CONCERNING THE LEGAL STANDARD UNDER FOOTNOTE 1 OF THE SCM AGREEMENT

4.1 Meaning of "exemption" and "remission"

4.1. Footnote 1 of the SCM Agreement refers to "exemption(s)" and "remission(s)". India disagrees with the Panel's understanding of the respective meaning of these two terms and, as a consequence,

[48] India's request for review, paras. 21-22.
[49] India's request for review, para. 23.
[50] United States' comments on India's request for review, para. 11.
[51] United States' comments on India's request for review, para. 12.

requests changes to paragraphs 7.168 (7.169), 7.172 (7.173) and footnote 281 (286) of the Interim Report.[52]

4.2. First, India observes that footnote 58 of the SCM Agreement defines "remission or drawback" as including "exemption", and that Annexes I(g), (h), and (i) "can involve" both exemptions and remissions.[53] The Panel agrees with these observations, and notes that they are already reflected in footnote 281 (286) of the Interim Report. Indeed, as also already noted in the Interim Report, the relevant clauses of Annex I set out the same disciplines for exemptions and remissions, so that while the mechanism for granting an exemption and remission will differ, the two are subject to the same substantive constraints under footnote 1 read together with Annex I.

4.3. Second, and apparently as a consequence, India disagrees with the following statement of the Panel in paragraph 7.168 (7.169) of the Interim Report[54]:

> We understand the difference between these two groups of measures to be that, in the case of exemptions, the duty or tax liability never arises, whereas, in the case or remissions, the liability first arises, but is later remitted, including by returning the payment if one was already made.[55]

4.4. Instead, according to India:

> [T]he point of difference … is that while the first part [of footnote 1, on exemptions,] applies to taxes or duties <u>on exported products</u>, the second part [of footnote 1, on remissions] applies <u>not</u> to taxes or duties <u>on the exported product itself, but</u> to taxes and duties <u>on inputs</u> that are used … in the production of the exported product or duties <u>or</u> taxes levied <u>on the production/distribution</u> of the exported product.[56]

4.5. In its proposed definition, India draws a distinction between "the exported product itself", on the one hand, and taxes and duties "on inputs" into, or "on the production/distribution" of, that product. India appears to consider that as a matter of definition, exemptions under footnote 1 are only granted with regard to taxes levied on the product "itself" in the final form in which it is exported, whereas remissions under footnote 1 are only granted with regard to taxes and duties imposed on inputs used in the production of an exported product, and with regard to taxes levied on the production or distribution of that product.

4.6. We disagree with India's arguments. Footnote 1 refers to the "exemption *of an exported product* from duties or taxes borne by the like product when destined for domestic consumption", and to the "remission of *such* duties or taxes". The use of the term "such" makes it clear that the difference does not lie in the object of taxation (the product as "itself" exported, versus inputs into its production).[57] To the contrary, in both cases: first, the exemption or remission relates to "an exported product"; and, second, reading footnote 1 together with Annex I makes it clear that there are several ways in which an exemption or omission may relate to an exported product within the meaning of footnote 1, one such way being that there is an exemption from duties or taxes, or a remission of the same, on *inputs* consumed in the production of the exported product.[58] Therefore, we disagree that only exemptions relate to the "exported product itself", and we also disagree that

[52] India's request for review, paras. 24-29 (on para. 7.168 (7.169) and fn 281 (286) of the Interim Report) and 33 (on para. 7.172 (7.173) of the Interim Report).

[53] India's request for review, para. 25. India therefore considers there to be contradictions between the Panel's reasoning and footnote 58, as well as within the Panel's reasoning, and between that reasoning and Annex I and a prior panel report. India's request for review, paras. 24-26. The United States considers India's arguments on such contradictions to be "meritless". (United States' comments on India's request for review, para. 16. See also ibid. para. 15.)

[54] India's request for review, paras. 24, 26, and 28. India also asks the Panel to delete the portion of fn 281 (286) of the Interim Report that mentions this distinction. Ibid. para. 29.

[55] Fns omitted.

[56] India's request for review, para. 27. (underlining added)

[57] In asking the Panel to reject India's request for review, the United States similarly reasons that "[t]he 'such' makes it clear that the remission also refers to remission of 'duties or taxes borne by the like product when destined for domestic consumption'. Both parts of footnote 1 relate to the exemption or remission of duties or taxes borne on the exported product". (United States' comments on India's request for review, para. 18.)

[58] See also Table 2, Step 3, of the Interim Report.

only remissions relate to "inputs" (or to indirect taxes on the production/distribution of the exported product), as proposed by India as a matter of interpretation.

4.7. We therefore reject India's request that we modify paragraph 7.168 (7.169) and footnote 281 (286).

4.8. For the reasons just examined in paragraph 4.5. above, India also asks that we modify paragraph 7.172 (7.173) of the Interim Report, where Annexes I (g), (h) and (i) are described as referring to the exemption and remission of certain taxes and duties "on exported products".[59] However, for the reasons set out in paragraph 4.6. above, we disagree with India's interpretation and we therefore also reject India's request regarding paragraph 7.172 (7.173) of the Interim Report.

4.2 Description of Annex I(h)

4.9. India requests that we modify our description of the first part of Annex I(h), in paragraph 7.175 (7.176) of the Interim Report, by using exactly the language used there.[60] The United States agrees.[61] We have modified the text of paragraph 7.175 (7.176) of the Interim Report accordingly.

5 INDIA'S REQUESTS CONCERNING THE PANEL'S ASSESSMENT OF THE EXPORT ORIENTED UNITS AND SECTOR-SPECIFIC SCHEMES

5.1 The exemption from customs duties: the scope of the Panel's findings

5.1. India asks us to revise the section on "[t]he nature of certain goods covered by the exemptions" from customs duties under the EOU/EHTP/BTP Schemes, spanning paragraphs 7.195-7.215 (7.196-7.216) (Section 7.6.2.1.1) of our Interim Report.[62] India also requests us to revise accordingly our conclusions in paragraphs 7.233 (7.236) and 8.1(a) of the Interim Report.[63]

5.2. According to India, while finding that the exemption is also available to goods other than capital goods, the Panel has then "restricted its evaluation to capital goods".[64] India asks us to review our findings and modify them in essentially two ways, namely (1) by specifying that our findings only relate to "capital goods", and (2) by adding that in all other respects, the EOU/EHTP/BTP Schemes meet the conditions of footnote 1 of the SCM Agreement.[65]

5.3. The United States asks us to reject India's request.[66] Among other things, the United States notes that when aspects of a measure are WTO-inconsistent, the measure as a whole is in breach, and that "[t]o the extent India considers that it need only modify … aspects of a measure in order to come into compliance, that is an issue that would be relevant with respect to compliance and does not affect the Panel's recommendation under Article 19 of the DSU with respect to the measure".[67]

5.4. For the reasons set out in the following paragraphs, we reject India's request.

5.5. As outlined in the Interim Report, the United States articulated a number of ways in which it considered that the customs duty exemption under the EOU/EHTP/BTP Schemes did not meet the third element in our analysis under footnote 1, i.e. the limitation of the exemption to inputs

[59] India's request for review, paras. 30-32. The United States requests the Panel to reject India's request, noting that "[p]aragraph 7.172 summarizes the provisions of Annex I, items (g)-(i), and then the Panel provides a detailed description, with the language directly taken from the provisions themselves, of how each of the relevant Annex I provisions operate". (United States' comments on India's request for review, para. 21.)

[60] India's request for review, para. 33.

[61] United States' comments on India's request for review, para. 24.

[62] India's request for review, paras. 34-39. The text in quotation marks is not reproduced in the request for review and is instead the title of the heading of the section whose review India requests. See also India's opening statement at the Panel's interim review meeting, paras. 12-17.

[63] India's request for review, paras. 46 and 86.

[64] India's request for review, para. 36.

[65] India's request for review, paras. 39, 46, and 86.

[66] United States' comments on India's request for review, paras. 25-29.

[67] United States' comments on India's request for review, para. 28.

consumed in the production of the exported product.[68] Having considered both parties' views, we were persuaded by some of the United States' arguments[69], but not by others.[70]

5.6. The section of the Interim Report that India takes issue with describes one of the two grounds on which we were persuaded that the customs duty exemption under the Schemes is not limited to inputs consumed in the production of the exported product. As its title says, the section in question addresses "[t]he nature of certain goods covered by the exemptions". To summarize, in that section, we find that the exemptions are available, first, for a number of goods that India's measures label as "capital goods"; having examined the definition of "capital goods" in the relevant measures, we have found that these are incapable of constituting "inputs consumed in the production of the exported product".[71] Second, in the same section, we find that certain other goods, in addition to those labelled as "capital goods" in the Indian measures, are also of a nature that makes them incapable of constituting "inputs consumed in the production of the exported product", including for example raw materials for making capital goods for use within a Unit, and prototypes.[72]

5.7. In another section, different from that referred to by India, we have also addressed the fact that the Schemes allow for the exemption from customs duties of "any other item", not expressly listed in the Schemes.[73] We found that the Schemes fail to meet the third element in our analysis under footnote 1 also to the extent that the competent authority approves, under the relevant provision, the duty-free importation of other items that are also incapable of being "inputs consumed in the production of the exported product".[74]

5.8. As noted above, India's first request is that we indicate that our findings are limited to capital goods. We consider, however, that we have been sufficiently precise in indicating the scope of our findings, by reference to the provisions of the Indian legislation and regulations, and to the definitions and lists of goods found therein.[75] "Capital goods", *per se*, is not a notion belonging to the SCM Agreement. As remarked in the Interim Report, the parties appeared to have slightly different understandings of the scope of "capital goods", a divergence that it was not for the Panel to resolve, because the question for the Panel was whether the goods actually covered by the challenged measures were "inputs consumed in the production of the exported product".[76] Moreover, India's measures themselves describe some of the goods that we have found not to qualify as "inputs consumed in the production of the exported product" as belonging to a category "other[]" than capital goods.[77] Therefore, we consider that changing our Report to describe our findings as limited to "capital goods" is neither necessary nor accurate.

5.9. To recall, India's second request is that we add that, in all respects other than capital goods, the challenged customs duty exemption *meets* the conditions of footnote 1.[78] However[79], within the framework set for us by the DSU and by our terms of reference, we consider that our task in assessing a violation complaint is to ascertain, based on the arguments of the parties, whether and to what extent the complainant has *established* the claimed *inconsistencies*. India argues that we have ignored those goods that *are* capable of being inputs consumed in the production of the exported product, and suggests that we have therefore "generaliz[ed] that all duty-free items

[68] Interim Report, para. 7.194 (7.195) and fn 312 (317).
[69] Interim Report, paras. 7.203 (7.204), 7.215 (7.216), and 7.217 (7.218).
[70] Interim Report, para. 7.219 (7.720) and fn 312 (317).
[71] Interim Report, paras. 7.196-7.201 (7.197-7.202).
[72] Interim Report, paras. 7.197 (7.198) and 7.202 (7.203), and fn 322 (327).
[73] Interim Report, para. 7.216 (7.217).
[74] Interim Report, para. 7.217 (7.218) referring to Section 6.04(f) of the HBP.
[75] Interim Report, paras. 7.196 (7.197), 7.197 (7.198), 7.201 (7.202), 7.202 (7.203), 7.215 (7.216), and 7.217 (7.218), and fn 322 (327).
[76] Interim Report, fn 317 (322).
[77] Interim Report, para. 7.197 (7.198).
[78] India asks us to add the following language to para. 7.215 (7.216) of the Interim Report: "[f]or other inputs incorporated in the exported product [footnote reference to HBP Sections 6.04(a) and (f)], the duty exemption meets the conditions of footnote 1 read together with Annex I(i) to the SCM Agreement". (India's request for review, para. 39.) India requests a similar addition to para. 7.233 (7.236) of the Interim Report.
[79] In addition to our objections to India's proposed language on "capital goods", set out in the previous paragraphs.

allowed to be imported under the EOU/EHTP/BTP Schemes are like capital goods".[80] We have not. Our finding of inconsistency is based on, and limited to, the reasoning set out in our Report.

5.2 The exemption from customs duties: India's arguments on a "quantitative analysis" under Annex II of the SCM Agreement

5.10. India asks us to review paragraph 7.213 (7.214) of the Interim Report, where, according to India, we have wrongly taken the view that "India presupposes … the existence of … a scheme that meets the first three requirements of the test under footnote 1 of the SCM Agreement".[81] The United States submits that this is a correct characterization of India's argument and that we should reject India's request for review.[82]

5.11. As reflected in paragraph 7.211 (7.212) of the Interim Report, India repeatedly argued that to establish that the EOU/EHTP/BTP Schemes, EPCG Scheme, MEIS, and DFIS do not meet the conditions in footnote 1 of the SCM Agreement, the United States had to undertake a "data-driven" analysis in accordance with Annex II. In the paragraph India is now asking us to review, we point out that such an analysis[83] presupposes that the first three of the steps in our examination of footnote 1 are met. We remain of this view and we therefore reject India's request.

5.3 The exemption from central excise duty: assessment under footnote 1 of the SCM Agreement

5.12. India requests the Panel to review its analysis of the exemption from central excise duty under footnote 1 of the SCM Agreement, and to find that the exemption meets the conditions in the footnote.[84] The United States disagrees.[85] The parties and the Panel also had an exchange regarding this request for review during the interim review meeting of the Panel with the parties.[86]

5.13. To recall, in the Interim Report we noted that pursuant to Sections 6.08(a)(i) and (v) of the FTP, when an EOU/EHTP/BTP Unit sells finished goods to the DTA, such sales are subject to central excise duty if the finished good itself is subject to central excise duty.[87] Therefore, when the finished good is not subject to central excise duty, these provisions do not provide for the reversal of any central excise duty exemption availed on inputs consumed in the production of the finished good.[88]

5.14. During the interim review, however, India clarified that pursuant to the FTP, sale by an EOU/EHTP/BTP Unit in the DTA also triggers the obligation on the part of such Unit to pay any central excise duty initially foregone on excisable *inputs* consumed to produce the goods in question.[89]

5.15. Specifically, India referred to Section 6.08(a)(vi) of the FTP, which provides for "refund of any benefits under Chapter 7 of the FTP availed by the EOU/supplier as per the FTP, on the goods used for manufacture of the goods cleared into the DTA". India pointed out that Chapter 7 of the FTP, and in particular Section 7.03(c) thereof, provides that domestic suppliers of EOU/EHTP/BTP Units, among others, may obtain a refund of central excise duties on sales to such Units; alternatively, such suppliers may avail themselves of an exemption on sales to Units and therefore not pay the

[80] India's request for review, paras. 36-37. See also opening statement at the Panel's interim review meeting, para. 16.
[81] India's request for review, para. 40.
[82] United States' comments on India's request for review, para. 30.
[83] The subject of "presupposes" in the sentence in question is "the … analysis", not "India", contrary to what is stated in India's review request. Interim Report, para. 7.213 (7.214).
[84] India's request for review, paras. 41-46, and 86. The latter request (in para. 86) relates to paras. 8.1(a) and 8.2 of our Interim Report.
[85] United States' comments on India's request for review, paras. 31-33.
[86] India's opening statement at the Panel's interim review meeting, paras. 21-22; responses to Panel questions Nos. 93-101; and United States' comments on India's responses to Panel questions Nos. 93-101.
[87] Interim Report, para. 7.231 (7.232).
[88] Interim Report, para. 7.231 (7.232).
[89] India's opening statement at the Panel's interim review meeting, para. 21.

central excise duty in the first place, in which case there is no need for the Government to provide them with a refund.[90]

5.16. India further explained that the reference in Section 6.08(a)(vi) to the refund of benefits under Chapter 7 "availed by the EOU/*supplier*" is meant to capture precisely the situation where a benefit was initially availed by a supplier, as is the case for central excise duties on inputs procured by Units: the suppliers are liable for such duties[91], although the benefit is passed on to the Unit, which does not have to pay a price that includes central excise duty.[92] Thus, India explained that pursuant to Section 6.08(a)(vi), any exemption from or refund of central excise duty on inputs consumed in producing a good sold on the DTA is "subject to refund"[93], and that it is the Unit that must provide that refund.[94]

5.17. We find India's explanation to be supported by the evidence on the record (indeed by the FTP, which has featured prominently in the parties' arguments and in our analysis) and in particular by Section 6.08(a)(vi) of the FTP.

5.18. The United States raises a number of objections. First, the United States argues, in several ways, that the exemption it is challenging is provided to EOU/EHTP/BTP Units under Chapter 6 of the FTP, and therefore cannot be undone by the refund of a benefit granted to a supplier under Chapter 7 of the FTP.[95] However, India has explained, as set out above, that in a transaction between a domestic supplier and an EOU/EHTP/BTP Unit purchasing inputs from the domestic supplier, the provision for a central excise duty exemption in favour of the Unit, and for a central excise duty exemption or refund in favour of the supplier, are two sides of the same coin. Moreover, the link between Chapters 6 and 7 of the FTP, and between Units and suppliers, is made in Chapter 6 itself, and specifically in Section 6.08(a)(vi), which provides for a refund of "benefits under Chapter 7 … availed by the EO[Unit]/supplier …".

5.19. Second, the United States argues that Section 7.02 of the FTP does not list, among the transactions covered by Chapter 7 (i.e. "deemed exports"), sales by EOU/EHTP/BTP Units to the DTA[96], and is therefore not applicable to such sales. India, however, is not asserting that. Instead, India is pointing out that the transactions covered by Chapter 7 include the supply of goods by domestic manufacturers *to* EOU/EHTP/BTP Units[97] - i.e. the transactions in which Units purchase inputs *from* the DTA.

5.20. In light of India's explanation of the record evidence on which our analysis has been based, we have therefore reconsidered[98] our findings in paragraph 7.231 (7.232) of the Interim Report, and the findings that presuppose those in paragraph 7.231 (7.232). We have thus revised paragraph 7.231 (7.232-7.235) to conclude that the United States, which bears the burden of proof, has not shown that the EOU/EHTP/BTP Schemes fail to limit the central excise duty exemption to inputs consumed in the production of the exported product. As a consequence, we have also revised paragraphs 7.232 (7.235) and 7.233 (7.236), sections 7.7.2 and 7.10.2, and paragraphs 8.1 and 8.2, of the Interim Report.

[90] India's responses to Panel questions Nos. 95 and 101; Sections 7.02 and 7.03(c) of the FTP (as contained in the second part of Exhibit USA-3).
[91] India's response to Panel question No. 97.
[92] India's response to questioning from the Panel at the interim review meeting (ca. 12.20-12.23 pm).
[93] Section 6.08(a)(vi) of the FTP.
[94] India's response to Panel question No. 99.
[95] United States' comments on India's responses to Panel questions Nos. 95-97 and 99-100.
[96] United States' comments on India's response to Panel question No. 96, paras. 9 and 12-15.
[97] Section 7.02(A)(b) of the FTP.
[98] See Panel Report, *US – Tuna II (Mexico)*, para. 6.3:
[I]n our view, requests to review precise aspects of the Panel's report may legitimately include requests for "reconsideration" of specific factual or legal findings, provided that such requests are not based on the presentation of new evidence.
See also Panel Report, *EC – Large Civil Aircraft*, para. 6.231.

5.4 Export contingency: in general

5.21. India argues that we have failed to take into account its arguments on the (absence of) export contingency of the EOU/EHTP/BTP Schemes.[99] According to India, while the Panel "has correctly identified that EOU/EHTP/...BTP Units are to export the entirety of their production, (except permissible sales to DTA)"[100], it has failed to take into account that the aim of the positive NFE requirement is to "ensure[] business prudence", in particular by ensuring that the value of the imported inputs does not exceed the value of the exported products.[101] India therefore requests us to review section 7.10.2 of the Interim Report.

5.22. The United States takes the view that "the Panel carefully considered India's arguments and rejected them".[102] The United States also addresses those arguments on the merits.[103]

5.23. In our Interim Report, we have identified[104], and addressed[105], India's argument that the NFE requirement is meant to ensure business prudence. We therefore reject India's request for review.

5.5 Export contingency: of the central excise duty exemption

5.24. India asks us to review our findings on the export contingency of the central excise duty exemption under the EOU/EHTP/BTP Schemes.[106] However, as a result of India's request to reconsider our analysis of that same exemption under footnote 1 of the SCM Agreement, we no longer proceed to assess whether that exemption is export contingent.[107]

6 INDIA'S REQUESTS CONCERNING THE PANEL'S ASSESSMENT OF THE DUTY-FREE IMPORTS FOR EXPORTERS SCHEME

6.1 Condition 10

6.1. Under DFIS, Condition 10 (line item 104) exempts food tenderizers for use in the processing of seafood products for export. In the Interim Report, we found that Condition 10 does not meet the conditions of footnote 1 because the evidence submitted by the United States in Exhibit USA-90 indicated that at least one type of tenderizer involves a tool for mechanical tenderization, which would therefore not be physically incorporated into the processed seafood product, and is also not "energy, fuels, and oil".[108]

6.2. India requests us to reconsider our finding in respect of Condition 10 because, in India's view, the evidence submitted by the United States pertains to mechanical meat tenderizers that cannot be used in the production of seafood products.[109]

[99] India's request for review, para. 47; opening statement at the Panel's interim review meeting, para. 27.
[100] India's request for review, para. 47.
[101] India's request for review, paras. 48-49; opening statement at the Panel's interim review meeting, para. 28.
[102] United States' comments on India's request for review, para. 35.
[103] United States' comments on India's request for review, paras. 36-37.
[104] Interim Report, para. 7.489 (7.488) ("[r]egarding the NFE requirement, India argues that it ... ensures that Units act with commercial prudence and without operating at a loss"). India now adds the concern that Units would otherwise be subject to antidumping duties, which does not however add to the substance of its arguments. (India's request for review, para. 48.)
[105] Interim Report, paras. 7.495-7.496 (7.494-7.495).
[106] India's request for review, paras. 50-52; opening statement at the Panel's interim review meeting, paras. 23-26.
[107] See para. 5.20. above.
[108] Interim Report, para. 7.253 (7.256).
[109] India's request for review, paras. 53-54 and 86. The requests relate to paras. 7.253 (7.256), 8.1(d) and 8.2 of our Interim Report. See also India's opening statement at the Panel's interim review meeting, paras. 31-32.

6.3. The United States opposes India's request, observing both that it is unsupported by evidence and that interim review would not be "the proper point at which to make new factual assertions or introduce new evidence".[110]

6.4. We recall that during the proceedings we asked the parties to indicate, among the items eligible under the challenged duty exemptions in Customs Notification No. 50/2017, which were capital goods.[111] In response, the United States asserted that food tenderizers, included in list 1 of Customs Notification No. 50/2017, were capital goods and referred to a website, later submitted as Exhibit USA-90, in support.[112] As we noted in footnote 404 (410) of the Interim Report, India remained silent with regard specifically to food tenderizers. India also neither responded to the United States' assertion that food tenderizers are capital goods, nor objected to the probative value of the United States' evidence in its comments on the United States' response.[113] India's factual assertions at interim review stage are untimely. We therefore reject India's request.

6.2 Condition 36

6.5. Regarding Condition 36, pertaining to the importation of carpet samples, India now invokes, (1) the International Convention to Facilitate the Importation of Commercial Samples and Advertising Materials, 1952 (Convention), which "allows for duty free importation of commercial samples subject to certain conditions"[114], and (2) an Indian measure dated 1994, which was neither submitted nor referred to before and which according to India affords exemptions from customs duties also to importers who do not export.[115] On this basis, India asks us to reconsider our findings on Condition 36.[116]

6.6. The United States submits that we must reject India's request because "India points to no record evidence or any legal argument addressing the Panel's findings" at issue.[117]

6.7. While invoking the Convention, India has made no argument as to how it relates to the Panel's analysis under the WTO Agreement in general and footnote 1 of the SCM Agreement in particular.

6.8. In any event, the Convention being part of international law, we have taken the step of consulting it[118] and we note that it envisages the duty-free importation of samples in two circumstances, namely: when they are of negligible value, and when their admission is temporary (with a view to soliciting orders of goods to be supplied from abroad *to the territory of temporary admission*, and then re-exporting the sample).[119] There is no mention, in DFIS, of these conditions. Instead, DFIS ties the duty-free importation of samples to the value of *exports* of carpets made in the previous year.

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[110] United States' comments on India's request for review, para. 40.

[111] Panel question No. 80.

[112] United States' response to Panel question No. 80, Appendix 2, p. 59, fn 208.

[113] India argues that "[w]hile [it] did not specifically highlight [that mechanical (meat) tenderizers cannot be used in the production of seafood products] in its comments on responses provided by the United States to the Question 80 posed by the Panel, India assumed that the Panel would not base its finding on an incorrect exhibit, that does not relate to the product under consideration". (India's opening statement at the Panel's interim review meeting, para. 32.) We note however that Exhibit USA-90 expressly refers to tenderizers for meat, "[l]et it be red meat consisting of beef, pork, lamb, venison, etc., poultry comprising of chicken, turkey, ducks, etc., *or seafood like fish, shrimp, crabs*, etc." (Exhibit USA-90, p. 1 (emphasis added)) On its face, the evidence submitted by the United States therefore appears pertinent to the issue before us and India did nothing at the appropriate stage of the proceedings to convince us of the opposite.

[114] India's request for review, para. 55. See also India's opening statement at the Panel's interim review meeting, para. 33.

[115] India's request for review, paras. 55-57.

[116] India's request for review, paras. 55-57 and 86. The latter request (in para. 86) relates to paras. 8.1(d) and 8.2 of our Interim Report.

[117] United States' comments on India's request for review, para. 41.

[118] International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, done at Geneva (7 November 1952), available at: https://treaties.un.org/doc/Treaties/1955/11/19551120%2000-56%20AM/Ch_XI_A_05p.pdf (accessed 15 September 2019).

[119] Convention, Articles III and IV.

6.9. Therefore, we see no basis to accept India's request for review based on the Convention.

6.10. Regarding India's 1994 measure, this falls squarely within the category of new evidence, which moreover India could have but has not submitted before, and which it is not appropriate to consider at interim stage.[120]

6.11. We therefore reject India's request relating to Condition 36.

7 INDIA'S REQUESTS CONCERNING THE PANEL'S ASSESSMENT OF THE MERCHANDISE EXPORTS FROM INDIA SCHEME

7.1 Reference period for FOB value of exports

7.1. India points out that paragraph 7.270 (7.273) of the Interim Report indicates that the value of MEIS scrips is a fixed percentage of the FOB value of exports during "the previous year". India explains that scrips are based on the FOB value of the exports but are "not cumulatively provided for an entire year".[121] India therefore requests the Panel to remove the reference to "the previous year" from paragraph 7.270 (7.273). The United States did not comment on this request.

7.2. The Panel has therefore removed the references to "the previous year" from paragraph 7.270 (7.273) of the Interim Report, as requested by India.

7.2 MEIS scrips as a direct transfer of funds

7.3. India asks us to "reconsider [our] findings" in paragraphs 7.433 (7.432) to 7.439 (7.438) of the Interim Report[122], which are part of our assessment of whether MEIS involves a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. While India does not expressly indicate the changes it is seeking, the gist of the request appears to be that we should find that the provision of MEIS scrips belongs, at least in part, to the category of revenue foregone[123] and that, moreover, it is excluded from the definition of a subsidy by virtue of footnote 1 of the SCM Agreement.[124] The United States requests us to reject India's request.[125]

7.4. There are several prongs to India's review request. Factually, India relies on the fact that MEIS scrips may be used to pay for customs duties, excise duties, and certain other government dues, a fact which, India says, the Panel "acknowledges".[126] Indeed, we do not only "acknowledge" this fact: this fact is an important part of the basis on which we have held that scrips are "funds" within the meaning of Article 1.1(a)(1)(i).[127] Thus, pointing to this fact does not warrant a revision of our reasoning, which we will not repeat here.

7.5. India then misquotes us as "not[ing] … that 'MEIS scrips, when used to pay for customs duties, do operate as remitting import charges'".[128] In the relevant passage of our Report however, we say, addressing an argument by India: "*Even assuming* that MEIS scrips, when used …".[129]

7.6. Next, India submits that we have contradicted ourselves by noting that the subparagraphs of Article 1.1(a)(1) are not mutually exclusive, but then only finding that MEIS scrips fall under subparagraph (i), on direct transfer of funds.[130] India also submits that when "government revenue such as taxes, duties collected by the government" are involved, the only applicable clause is

[120] E.g. Appellate Body Report, *EC – Sardines*, para. 301.
[121] India's request for review, para. 58.
[122] India's request for review, para. 63. The request in its entirety is set out ibid. paras. 59-63.
[123] India's request for review, paras. 59-62. The United States describes India's request as "claim[ing] that some unidentified aspect of the MEIS duty scrips fall within subparagraph (ii)", on revenue foregone. (United States' comments on India's request for review, para. 42.)
[124] India's request for review, para. 58.
[125] United States' comments on India's request for review, paras. 42-46.
[126] India's request for review, para. 61.
[127] Interim Report, paras. 7.431 (7.430) and 7.433 (7.432).
[128] India's request for review, para. 60, referring to Interim Report, para. 7.289 (7.292), in the Panel's assessment of MEIS under footnote 1 of the SCM Agreement.
[129] Interim Report, para. 7.289 (7.292) (emphasis added). See also United States' comments on India's request for review, paras. 43-44.
[130] India's request for review, paras. 59 and 61-62.

subparagraph (ii) of Article 1.1(a)(1), not subparagraph (i).[131] These two arguments are in themselves somewhat contradictory, because the first seems to suggest that India considers the subparagraphs not to be mutually exclusive, whereas the second argument seems to suggest India considers them mutually exclusive. Be that as it may, regarding the non-exclusivity of the two subparagraphs, we have already explained that for our finding under Article 1.1(a)(1)(i) to stand, we need not "exclude that aspects of the measure may fall under subparagraph (ii)".[132] Regarding the inapplicability of subparagraph (ii) to measures involving taxes, we recall that while MEIS scrips are instruments that can be used to pay for government dues (and indeed, that is the basis of their monetary value), they are notes provided to recipients as a reward for their exports and are freely transferable.[133] They therefore bear substantial differences from a situation in which a Government merely foregoes taxes owed by the subsidy recipient.

7.7. Finally, India appears to suggest that footnote 1 of the SCM Agreement applies to MEIS scrips.[134] We have extensively addressed India's arguments in this regard in the relevant section of our Interim Report[135], and India has advanced nothing that warrants reviewing that analysis.

7.3 Amendments to MEIS

7.8. India requests changes to paragraphs 7.277 (7.280) and 7.279 (7.282), and footnote 430 (436) of the Interim Report, on the basis of a 2016 amendment to the MEIS list of country groups that was not on the Panel's record and that neither party had previously mentioned in these proceedings.[136] The United States notes that this is "information that is not in the record from … almost two years before the start of this dispute", and that the introduction of new evidence at the interim stage "is not appropriate".[137]

7.9. The paragraphs and footnote that India requests us to review are part of our reasoning regarding India's argument that MEIS scrips are in fact a remission of indirect taxes on products exported in the past.

7.10. There, we noted that the value of the scrips, which the relevant legal instruments describe as a "reward", was determined by multiplying the value of past exports by the "rate(s) of reward"[138] set out in Appendix 3B.[139] We found that nothing in the record evidence indicated that the award of MEIS scrips was based on indirect taxes paid in connection with the exported products[140], and similarly nothing in the record evidence indicated that the rates of reward were in fact determined on the basis of such indirect taxes.[141] We further noted that India changed those rates from time to time: in one such example laid before us, from December 2017, we again found no reference to indirect taxes paid in connection with the exported products playing any role in setting the rates.[142] And we also observed that in the edition of the measure that the parties had laid before us, for some products, MEIS rewarded past exports at different rates depending on the country of export – another fact that was hard to reconcile with the proposition that MEIS scrips merely refunded indirect taxes already paid on past exports.[143]

[131] India's request for review, para. 62. The United States "cannot decipher" the latter argument, and also notes that India's premise, that the "sole purpose [of MEIS scrips] is to offset/refund the indirect taxes already paid by the exporter", was rejected by the Panel. (United States' comments on India's request for review, para. 45.)
[132] Interim Report, para. 7.438 (7.437).
[133] See e.g. Interim Report, paras. 7.160-7.163 (7.161-7.164) and 7.432 (7.431).
[134] India's request for review, para. 60.
[135] Interim Report, section 7.6.5 (paras. 7.265-7.291 (7.268-7.294).
[136] India's request for review, paras. 64-65; opening statement at the Panel's interim review meeting, para. 34.
[137] United States' comments on India's request for review, para. 47.
[138] Section 3.04 of the FTP.
[139] Interim Report, para. 7.276 (7.279).
[140] Interim Report, para. 7.278 (7.281).
[141] Interim Report, para. 7.279 (7.282).
[142] Interim Report, para. 7.280 (7.283).
[143] Interim Report, para. 7.279 (7.282). See also ibid. para. 7.277 (7.280).

7.11. India's request for review relates to this last point, i.e. the provision for different reward rates depending on the country of export. India now argues, relying on new evidence, that in the list of MEIS rates dated April 2016, there is no such variation among reward rates.[144]

7.12. We do not see what difference this would make to our conclusions but, in any event, this Indian legal instrument from 2016 is new evidence, which it is not appropriate for us to consider at interim review stage.[145]

7.4 Use of MEIS scrips in connection with failures to fulfil export obligations

7.13. India requests us to review paragraphs 7.269 (7.272), 7.287 (7.290), 7.431 (7.430) and 7.433 (7.432) of our Interim Report to modify the description of certain uses that MEIS scrips can be put to.[146] The United States does not comment on India's request.

7.14. To recall, the FTP explicitly provides that MEIS scrips can be used to pay for customs duties (basic and additional), excise duties, and to pay for certain other charges *vis-à-vis* the Government in case of "defaults" in export obligations or "shortfall" in export obligations.[147]

7.15. With reference to payment for shortfalls in export obligations, India explained earlier in these proceedings that this occurs when the beneficiaries of certain other government schemes (the exemption or remission scheme, and EPCG, under Chapters 4 and 5 of the FTP) export less than they undertook to: in that case, they have to pay (ex post) customs duties on the "unutilized" goods imported under those schemes.[148]

7.16. On this basis, India asks us to add, wherever we refer to payment for shortfalls in export obligations, that the payment in question consists of "basic customs duty and additional customs duty".[149] We have made certain edits to the language used in our Report in light of India's request, as set out in the subsections below.

7.4.1 Paragraph 7.160 (7.161) of the Interim Report

7.17. India did not refer to this paragraph in its request for review. However, this is where the description at issue first appears. We have made certain changes to this paragraph, to which we will cross-refer in the paragraphs that India requested us to review.

> … "Duty Credit Scrips", … are paper-based notes that can be used to pay for (i) basic and additional customs duties on the importation of goods[264], (ii) central excise duties on domestically procured goods[265], and (iii) certain other charges and fees owed to the Government, such as basic and additional customs duties ~~and fees~~ owed as a consequence of failing to fulfil one's ~~in case of a shortfall~~[266] ~~in~~ export obligations under other schemes.[267] …
>
> ~~[266] The difference between a participating company's actual export performance for a year and its export obligation.~~

[144] India's request for review, para. 64; opening statement at the Panel's interim review meeting, para. 34.

[145] E.g. Appellate Body Reports, *EC – Sardines*, para. 301; *EC – Selected Customs Matters*, para. 259; and Panel Reports, *Russia – Railway Equipment*, paras. 6.45-6.46; *Korea – Radionuclides*, para. 6.8.

[146] India's request for review, paras. 66-69.

[147] Sections 3.02 and 3.18 of the FTP.

[148] India's response to Panel question No. 61. The Panel's question used the term "shortfall". The Panel however understands that India's explanation referred both to defaults and shortfalls in export obligations, which are referred to in Sections 3.18(a) and (b) of the FTP, respectively.

[149] India's request for review, para. 69. However, we note that the language "payment of … shortfall in EO [export obligation]" appears in Section 3.18(b) of the FTP. Further, we note that on the face of Sections 3.02(iv) and 3.18(b) of the FTP, the back payment of customs duties is not the only use to which MEIS scrips can be put under these provisions; this, together with a preference for shorter formulations, accounts for most of the differences between the language proposed by India and our chosen language.

7.4.2 Paragraph 7.269 (7.272) of the Interim Report

7.18. India asks us to reflect the fact that paying for a shortfall in export obligations entails paying for customs duties on past imports. Paragraph 7.269 (7.272) is expressly non-exhaustive ("including"). We have left in a single reference to "customs … duties", without distinguishing the situation of the back payment of customs duties as a result of a default or shortfall in export obligations, and we have added a cross-reference to paragraph 7.160 (7.161) of the Interim Report.

> … The recipient of the scrips can then use them to offset certain liabilities *vis-à-vis* the government, including ~~the payment of~~ customs and excise duties[431] ~~and of shortfalls in export obligations under other schemes~~[432] ….

[431] Sections 3.02 and 3.18 of the FTP. For a fuller description, see para. 7.161 above.

[432] ~~Sections 3.02(iv) and 3.18 of the FTP~~

7.4.3 Paragraph 7.287 (7.290) of the Interim Report

7.19. Since this is a description of India's arguments, we have edited this paragraph using the exact language appearing in one of the cited passages of India's second written submission (paragraph 117).

> India argues that when MEIS scrips are used to pay for customs duties on importation, or ~~for shortfalls~~ to regularize a default in an export obligation, this "results in" a remission of import charges that meets the conditions of footnote 1 read together with Annex I(i).[461]

7.4.4 Paragraph 7.431 (7.430) of the Interim Report

7.20. While leaving this paragraph unchanged, we have edited the footnote.

> First, scrips may be used to pay for (a) basic and additional customs duties applying on importation under the 1975 Customs Tariff Act (with some exclusions), (b) excise duties on goods purchased domestically, and (c) certain other fees and charges owed to the Government, such as charges for failing to fulfil one's export obligations under certain other Government schemes.[624]

[624] Sections 3.02 and 3.18 of the FTP. See para. 7.161 above. As reflected there, such charges for failing to fulfil one's export obligations include the back payment of customs duties.

7.4.5 Paragraph 7.433 (7.432) of the Interim Report

7.21. We do not see the need to modify the relevant portion of this paragraph, given the more detailed descriptions already present earlier in the report, which this paragraph merely sums up.

> … scrips can be used to pay for customs duties and other liabilities *vis-à-vis* the Government …

7.4.6 Footnote 463 (468) of the Interim Report

7.22. We have clarified the language of this footnote, to which India refers in its comments.[150]

> Sections 3.02(i), 3.02(iv) and 3.18(a) of the FTP expressly provide that MEIS scrips can be used to pay for customs duties. In addition, also r~~R~~egarding payments for shortfalls in export obligations pursuant to Section 3.18(b) of the FTP, India appears to argue that paying for such shortfalls ultimately results in paying customs duties on goods imported under the schemes at issue and therefore "results in a remission of these import

[150] India's request for review, para. 68.

charges". (India's second written submission, para. 117). See also India's response to Panel question No. 61. …

7.5 The use of MEIS scrips as a remission or not

7.23. In Section 7.6.5.2, we addressed India's argument to the effect that when MEIS scrips are used to pay for customs duties, they result in a remission that is consistent with Annex I(i) of the SCM Agreement. In footnote 464 of the Interim Report, we noted the contrast between this argument and India's repeated statements that the use of MEIS scrips to pay for customs duties does not result in the remission of those duties. India asks us to delete the footnote, on the basis that the statements at issue were made in the context of the alternative argument that the MEIS scrips are consistent with Annex I(g) and Annex I(h), and that the two arguments are "mutually exclusive".[151] The United States takes the view that footnote 464 "accurately reflects" India's position and asks us to reject India's request for review.[152]

7.24. We disagree with India's reasoning in its request for review. While a litigant may put forward different legal arguments as alternative, the facts presumably remain the same. It is thus at its own peril that a litigant makes contradictory statements of fact in the context of alternative legal arguments.

7.25. At the same time, the observations in footnote 464 of the Interim Report are not required to sustain our findings, and we therefore accede to India's request to delete the footnote.

8 INDIA'S REQUESTS CONCERNING THE PANEL'S ASSESSMENT OF THE SPECIAL ECONOMIC ZONES SCHEME

8.1 The notion of "exports" in the SEZ Scheme

8.1. India recalls its explanations that "the definition of the term 'export' under the SEZ Scheme is wider than the understanding of exports under SCM Agreement", and argues that this argument "has not been considered".[153] India therefore "urges the Panel to provide a detailed consideration of this argument", and to review paragraphs 7.150 (7.151), 7.515 (7.514) and 7.531 (7.530) of the Interim Report.[154] For the same reason, India also asks us to review paragraph 7.529 (7.528) of the Interim Report.[155]

8.2. The United States takes the view that we have addressed this argument in the Interim Report and therefore asks us to reject India's request.[156]

8.3. Contrary to what India contends in its request for review, we have considered India's argument that "export" within the meaning of the SEZ Scheme includes more than taking goods out of India to a third country.

8.4. We have set out the relevant facts, namely (i) the items included in the definition of exports under Section 2(m) of the SEZ Act[157], (ii) the items that can be relied upon to achieve a positive NFE pursuant to the SEZ Rules[158], (iii) the relationship between these two lists of items[159], and (iv) the fact that, in both cases, such items are not limited to taking goods out of India.[160] We have

[151] India's request for review, paras. 70-74.
[152] United States' comments on India's request for review, para. 49.
[153] India's request for review, para. 75; opening statement at the Panel's interim review meeting, para. 36.
[154] India's request for review, paras. 75-76.
[155] India's request for review, para. 83.
[156] United States' comments on India's request for review, paras. 50-52, with reference to India's request for review of paragraphs 7.150 (7.151), 7.515 (7.514), and 7.531 (7.530). Regarding this same request, the United States also comments on the merits of the arguments in line with paragraph 7.525 (7.524) of our Interim Report. Ibid. para. 51. Regarding India's request to review para. 7.529 (7.528), the United States argues it is unsupported. (United States' comments on India's request for review, para. 55.)
[157] Interim Report, fn 766 (768) and para. 7.529 (7.528).
[158] Interim Report, para. 7.524 (7.523) and fns 767-771 (769-780).
[159] Interim Report, fn 766 (768). As set out there, the list of "additional" items in Rule 53 of the SEZ Rules includes, but is more extensive than, the list in Section 2(m) of the SEZ Act.
[160] Interim Report, para. 7.524 (7.523) and fn 766 (768).

referred to India's arguments, based on these facts, that the measure is therefore not export contingent.[161] And we have then addressed and rejected India's arguments on the merits.[162]

8.5. On this basis, we disagree with the contention on which India's request is based, i.e. that we did not consider India's arguments on the scope of the notion of "exports" under the SEZ Scheme.

8.6. In its request for review of paragraphs 7.150 (7.151), 7.515 (7.514) and 7.531 (7.530), India also emphasizes that the definition of exports in the SEZ Act "influences the 'export promotion' objective of the SEZ Scheme".[163] To the extent India considers this argument to be different from the argument on export contingency, which, as just mentioned, we have considered and addressed in our report, we find the argument puzzling. To recall, the items included in the definition of exports provided in the SEZ Act are, in addition to the taking of goods out of India, the export of services, and the supply of goods to SEZs or between SEZs.[164] We do not see how, or to what effect[165], this should influence our understanding of "the 'export promotion' objective of the SEZ Scheme".[166]

8.7. We therefore reject India's request for review in its entirety.

8.2 The Panel's consideration of the objectives of the SEZ Scheme

8.8. India asks us to review our findings regarding the existence of revenue foregone in paragraphs 7.364 (7.363), 7.380 (7.379), and 7.403 (7.402) in light of its description of the SEZ Scheme as creating distinct geographical areas "to increase the production capacity and employment potential of the SEZ Units, and consequently economic development of region".[167] The United States submits that we have already considered these objectives.[168]

8.9. We found the evidence to establish that export promotion was a "central"[169] objective of the SEZ Scheme, and we noted that India argued that, in addition, the objectives of the scheme included the generation of additional economic activity, investment, and employment, and the maintenance of India's sovereignty.[170] We then took these objectives into account in our assessment of the existence of revenue foregone.[171] We have thus already addressed the considerations that India is raising, and we therefore reject India's request.

8.3 Export contingency of the SEZ Scheme

8.10. India asks us to review paragraphs 7.525 (7.524) and 7.531 (7.530) of the Interim Report because, according to India, we have applied the wrong legal standard to assess export contingency.[172]

8.11. We refer to our findings in paragraphs 7.523-7.534 (7.522-7.533) of the Interim Report. What India takes issue with is the fact that we have found there to be export contingency even though it

[161] Interim Report, para. 7.515 (7.514).
[162] Interim Report, para. 7.525 (7.524).
[163] India's request for review, paras. 75-76. This aspect of India's arguments in its interim review request appears to relate to the Panel's finding that the preamble of the SEZ Act refers to "the promotion of exports and ... matters connected therewith and incidental thereto" as objectives of the Scheme. See Interim Report, para. 7.150 (7.151).
[164] Interim Report, fn 766 (768), referring to Section 2(m) of the SEZ Act. Further, as noted in fn 766 (768) and para. 7.524 (7.523) of the Interim Report, yet other supplies are included in the calculation of net foreign exchange under Rule 53 of the SEZ Rules. However, this particular aspect of India's interim review argument (about the measure's "objectives") appears to be related to the definition of exports *per se* rather than to the items comprising net foreign exchange.
[165] To recall, aside from our discussion of *de jure* export contingency (which turns on the conditions triggering the subsidies, rather than on the "objective" of the Scheme as such), the context in which we considered the objectives of the SEZ Scheme in our substantive analysis was our assessment of the existence of revenue foregone under Article 1 of the SCM Agreement.
[166] India's request for review, para. 75.
[167] India's request for review, para. 77.
[168] United States' comments on India's request for review, para. 53.
[169] Interim Report, paras. 7.352-7.353 (7.351-7.352).
[170] Interim Report, paras. 7.150-7.151 (7.151-7.152), and 7.351-7.354 (7.350-7.353).
[171] Interim Report, paras. 7.364 (7.363), 7.380 (7.379), and 7.403 (7.402).
[172] India's request for review, paras. 78-82 and 84-85; opening statement at the Panel's interim review meeting, paras. 37-42.

is possible to achieve a positive NFE through certain listed "supplies" other than taking goods out of India.[173] In particular, India takes issue with our explanation that "when a subsidy is available on condition of export performance, the fact that the same subsidy can also be obtained under a different set of circumstances, not involving export contingency, does not prevent a finding that the subsidy is export contingent".[174]

8.12. According to India, this "runs contrary to the explanation … in footnote 4 of the SCM Agreement"[175], according to which "[t]he mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision".[176] Thus, according to India, our analysis "conflates conditionality with the beneficiaries of a measure".[177]

8.13. The United States responds that "India ignores the fact that SEZ Units are exporters not by happenstance, but by the requirements of the SEZ Scheme".[178]

8.14. We agree with the United States' observation. As set out in our Interim Report, the SEZ Scheme, on its face, conditions the availability of the subsidies on the maintenance of positive NFE[179], which is defined by the formula A − B >> 0. This requires "A" to be greater than 0, and A has several components, the first of which is the FOB value of exports by the Unit. "Therefore, one condition triggering the subsidies to Units is export performance: exports greater than 0".[180] Thus, we are not at all faced with a "mere fact that a subsidy is granted to enterprises which export".[181] Instead, as we have established in the Interim Report, India conditions the subsidy on export performance.

8.15. As it did in the earlier stages of our proceedings, India invokes a passage from the Appellate Body Report in *Canada − Autos*, where the Appellate Body notes that under the measure it is reviewing, "the import duty exemption is simply not available to a manufacturer unless it exports motor vehicles".[182] The Appellate Body therefore finds that the duty exemption in question "is clearly conditional, or dependent upon, exportation".[183] From this, India derives that the legal standard for export contingency is a "but for" standard.[184] India is, however, confusing the Appellate Body's description of the measure before it with the applicable legal standard. That under the measure at issue in *Canada − Autos* exports were the *only* possible trigger of the subsidy does not mean that this is a necessary feature of export contingency.

8.16. India also argues that the reasoning in *US − FSC* is not applicable to the SEZ Scheme because the measures at issue are "structurally different" but, again, India does not identify a difference that would actually affect the application of the legal standard for export contingency.[185]

8.17. Finally, India "emphasize[s]"[186] that in a passage of the panel report in *Canada − Dairy* that was not appealed, that panel observed that "access to milk" at administered prices under certain "milk classes" was "also available (often exclusively) to processors which produce for the domestic

[173] The United States observes that India is repeating arguments already considered by the Panel. (United States' comments on India's request for review, para. 54.)
[174] Interim Report, para. 7.525 (7.524).
[175] India's request for review, para. 78. See also ibid. paras. 84-85.
[176] Fn 4 of the SCM Agreement.
[177] India's request for review, paras. 79; opening statement at the Panel's interim review meeting, para. 40.
[178] United States' comments on India's request for review, para. 56.
[179] And to other requirements involving exportation: see paras. 7.529 (7.528), 7.532 (7.531), and 7.533 (7.532) of the Interim Report.
[180] Interim Report, para. 7.523 (7.522).
[181] Fn 4 of the SCM Agreement.
[182] Appellate Body Report, *Canada − Autos*, para. 104. We had also addressed India's argument in the second part of fn 773 (775) of the Interim Report.
[183] Appellate Body Report, *Canada − Autos*, para. 104.
[184] India's request for review, para. 80; opening statement at the Panel's interim review meeting, para. 41.
[185] India's request for review, para. 81; opening statement at the Panel's interim review meeting, para. 38.
[186] India's request for review, para. 82.

market" and was therefore "not 'contingent on export performance'".[187] We note that the facts underlying this statement were considerably different from those before us.[188] In any event, if India considers that the more recent appellate reports we have relied upon[189] constitute a departure from that earlier report, it has not explained to us why we should nonetheless rely on that earlier report.

8.18. We therefore reject India's request for review.

9 INDIA'S REQUESTS CONCERNING THE PANEL'S RECOMMENDATIONS

9.1 The "extent" of the recommendation

9.1. India asks us to specify that our recommendation to withdraw the prohibited subsidies is only made "to the extent" we have found them to be inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.[190] The United States objects, noting that Article 4.7 of the SCM Agreement expressly refers to a finding that "the *measure* … is … a prohibited subsidy".[191]

9.2. What must be withdrawn pursuant to a recommendation under Article 4.7 is the "prohibited subsidy" − not, for example, aspects of a scheme that do not give rise to a prohibited subsidy. We therefore consider that the requested change is unnecessary, and we decline to make it.

9.2 Time period for withdrawal

9.3. India asks us to review our recommendation on the time period for withdrawal of the prohibited subsidies under four of the five schemes at issue.

9.4. We begin with the prohibited subsidies under the EOU/EHTP/BTP Schemes, EPCG Scheme, and MEIS. For these, in our Interim Report we recommended withdrawal within 90 days, whereas India requests "at least 180 days".[192]

9.5. India does not dispute the Panel's reasoning that withdrawal of the prohibited subsidies in question would require amendment of measures that can be adopted by the Government, i.e. chiefly the FTP and possibly subordinate administrative instruments.[193] India also observes that modifying the FTP requires "consultations with various stakeholders" including at central and state government level, and "an express approval from India's cabinet"[194]; that "the next review of the FTP is scheduled for April 2020"[195]; and that modifications to the FTP "may have to be laid before the Indian Parliament for a period of 30 days".[196]

9.6. The United States considers that the arguments advanced by India are not consistent with the requirement to withdraw prohibited subsidies without delay, and that in the context of its graduation from Annex VII in 2017, as well as following the United States' request for consultations in this dispute in March 2018, India has been on notice of the need to withdraw its prohibited subsidies.[197]

9.7. We consider that stakeholder consultations and approval from India's Cabinet can take place within the three-month framework envisaged in our Interim Report. As for the fact that the next review of the FTP is scheduled to come into effect in April 2020[198], we consider that helpful, as it hopefully facilitates withdrawal of the prohibited subsidies in question. Thus, we do not consider that this warrants an extension to the period for withdrawal. As for the possibility that the FTP may have

[187] India's request for review, para. 82, citing Panel Report, *Canada − Dairy*, para. 7.41. See also India's opening statement at the Panel's interim review meeting, para. 39. We understand the reference to para. "7.14", in India's request for review, to be a typographical error, given that language cited by India is found in para. 7.41 of the cited report.
[188] Panel Report, *Canada − Dairy*, paras. 2.38-2.39.
[189] Interim Report, paras. 7.476 (7.475) and 7.525 (7.524) and fn 773 (775).
[190] India's request for review, para. 87.
[191] United States' comments on India's request for review, para. 58.
[192] India's request for review, para. 91.
[193] India's request for review, paras. 89-91.
[194] India's request for review, para. 90.
[195] India's request for review, para. 91.
[196] India's request for review, para. 91.
[197] United States' comments on India's request for review, paras. 59-63.
[198] Indeed, the current FTP is to "remain in force up to 31st March, 2020". Section 1.01 of the FTP.

to be laid before Parliament for 30 days, we consider that this justifies a 30-day extension to the time period we had envisaged for withdrawal before India made us aware of this requirement. We therefore consider that for the three schemes governed by the FTP, withdrawal "without delay" would be withdrawal within 120 days from adoption of this Report, and we modify our recommendations accordingly.

9.8. We now turn to the prohibited subsidies under the SEZ Scheme. For these, in our Interim Report we envisaged withdrawal within 180 days, in light of the legislative process involved; now India requests us to "allow for the beginning of the next fiscal year after a period of 180 days from the adoption of the report".[199] In other words, India asks for a 180-day period from adoption of the report, plus any period that runs from the end of the 180 days to the beginning of India's fiscal year on 1 April. The resulting time-period could then be anything between 180 days (if the 180-day period ends when the fiscal year starts) and 544 days (if the 180-day period ends the day after).

9.9. India confirms the Panel's understanding that, for the SEZ Scheme, withdrawal of the measures we have found to constitute prohibited subsidies would require legislative action.[200] As reasons for its request for 180 days plus the period up to the start of the following fiscal year, India adds that modifications to tax legislation "are mostly done through a general budget", and "can be implemented at the start of the next financial year".[201]

9.10. The United States argues that we "carefully examined the steps" required for withdrawal of the prohibited subsidies under the SEZ Scheme and that no additional time is required.[202]

9.11. We have considered a number of scenarios under India's proposed approach, and we observe that in the circumstances, *adding up* a 180-day period *and* any other period of time preceding the start of the following financial year introduces elements of uncertainty and potential delay that are incompatible with the requirement to withdraw the prohibited subsidies "without delay". We also note that India's comments concede that 180 days suffice, since under India's proposal, if the fiscal year started immediately after the 180-day period, then India would only have 180 days. We further note that India submits that modifications to tax legislation are "mostly" made through a general budget, which means they are not exclusively made this way; and also that such modifications "can be implemented at the start of the next financial year", which, again, leaves open the possibility of implementing them at a different date.[203] We therefore consider it practicable, also in light of India's interim review arguments, to withdraw the prohibited subsidies in question within 180 days from adoption, as envisaged in our Interim Report.

9.12. We thus reject India's request for a modification of the time period for withdrawal set in our Interim Report for the prohibited subsidies under the SEZ Scheme.

10 THE UNITED STATES' REQUEST CONCERNING SCRIPS PROVIDED UNDER THE EPCG SCHEME

10.1. The United States disagrees with our statement in the last sentence of footnote 219 (220) that duty credit scrips under the EPCG Scheme (EPCG scrips) are not at issue in this dispute, and asks us to delete this sentence.[204] The United States argues that it challenged the provision of EPCG scrips throughout the proceedings[205], and that India failed to rebut the United States' *prima facie* case.[206] The United States therefore also asks us to modify our conclusion in paragraph 8.1(b) of the Interim Report, and conclude that the provision of EPCG scrips is inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

[199] India's request for review, para. 93.
[200] India's request for review, para. 92.
[201] India's request for review, para. 92.
[202] United States' request for review, para. 64.
[203] India's request for review, para. 92.
[204] United States' request for review, paras. 4 and 10.
[205] United States' request for review, paras. 5 and 7, fns 2, 3, and 5 (referring to the United States' first written submission, paras. 64 and 69; second written submission, para. 116; and executive summary, para. 12). With regard to the United States' reference to its executive summary, we note that paragraph 22 of our Working Procedures provides that the parties' "executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case".
[206] United States' request for review, para. 9.

10.2. India opposes the United States' request on the grounds that the United States has not advanced any arguments concerning the EPCG scrips[207], and that these operate in a different manner from the challenged exemption from customs duties under the EPCG Scheme.[208]

10.3. We observe that the United States structured its submissions in two parts with respect to the EPCG Scheme. In a first part, the United States provided a factual description of the Scheme[209] or made introductory remarks.[210] In a second part, the United States articulated its case of inconsistency.[211] The United States referred to EPCG scrips in the first − descriptive or introductory − part[212], but not in the second. Rather, the United States only advanced arguments on the merits in respect of the EPCG's duty exemption. A respondent, however, must be able to understand what case of inconsistency it has to answer. One could not discern from the United States' presentation of its case that the United States was challenging EPCG scrips. We therefore reject the United States' request and do not include EPCG scrips in our analysis and findings.

11 THE UNITED STATES' REQUEST CONCERNING THE PANEL'S ASSESSMENT OF DFIS

11.1. The United States asks us to review our findings, in paragraphs 7.259-7.262 (7.262-7.265) of the Interim Report, that the United States has not established that Conditions 10, 21[213], 28, 32, 33, and 101 do not meet the conditions of footnote 1 of the SCM Agreement.[214] The United States now emphasizes that for each line item the measure "establishes two … conditions"[215], and argues that the backward-looking condition (i.e. the capping of the duty-free entitlement at a value corresponding to a certain percentage of past exports) is not contemplated in footnote 1 of the SCM Agreement and introduces an additional element of export contingency.[216] The United States therefore ask us to conclude that it has demonstrated that the measure does not meet the conditions of footnote 1.

11.2. India responds that the United States is basing its request on a "new theory" and that the request "lacks merit".[217] India observes that the backward-looking element acts as a *limit* on the value of imported inputs consumed in the production of exported products that can benefit from the duty exemption[218], and that while footnote 1 requires exemptions or remissions not to be "*in excess*" of duties or taxes accrued, it does not prevent Members from exempting from, or remitting, *less* than the full exemption or remission allowed by footnote 1.[219]

11.3. We recall that, as described at paragraphs 7.257-7.260 (7.260-7.263) of our Interim Report, there are two requirements (or elements, or "conditions"[220]) attaching to each of the duty exemptions in question. The imported goods must be inputs consumed in the production of an exported product, and the value of the duty-exempt goods must not exceed a defined percentage of the FOB value of the importer's previous year's exports (we referred to the latter as the "backward-looking element"[221]). Until interim review stage, the United States relied on the latter requirement to argue that the duty exemption was "disconnected" from the duties actually levied on

[207] India's comments on the United States' request for review, paras. 3-4 and 6.
[208] India's comments on the United States' request for review, para. 5.
[209] United States' first written submission, paras. 64-69.
[210] United States' second written submission, para. 116.
[211] United States' first written submission, paras. 70-79; second written submission, paras. 117-133.
[212] United States' first written submission, paras. 64 and 69; second written submission, para. 116.
[213] Except for one and six items respectively. Interim Report, paras. 7.252-7.253 (7.255-7.256) and 7.264 (7.267).
[214] United States' request for review, paras. 12-26. We note that the United States mischaracterizes our conclusion as being that "these conditions 'meet the conditions of footnote 1'". Ibid. para. 14. In the passage the United States cites, our conclusion is that "*the United States has not shown* to this Panel that the six duty stipulations at issue do not meet the conditions of footnote 1". Interim Report, para. 7.262 (7.265). (emphasis added)
[215] United States' request for review, para. 15.
[216] United States' request for review, paras. 12-13, and 15-19.
[217] India's comments on the United States' request for review, para. 8.
[218] India's comments on the United States' request for review, para. 9.
[219] India's comments on the United States' request for review, paras. 10 and 14.
[220] Given that the measures are referred to as "Conditions", we prefer to use alternative wording.
[221] Interim Report, para. 7.259 (7.262).

imported inputs. As noted in our Interim Report, that argument all but ignored the first requirement, despite questions in that regard from the Panel.[222]

11.4. As correctly pointed out by India, the United States has now changed approach. Noting that the second element acts as an export-contingent ceiling on an importer's duty-free entitlement under DFIS (when the value of imported inputs exceeds a defined percentage of the FOB value of the previous year's exports), the United States submits that this additional element is not foreseen in footnote 1, and introduces an additional[223] layer of export contingency that does not benefit from the safe harbour of the footnote.

11.5. The fact that an additional condition is not foreseen in footnote 1 is not enough to disqualify a measure from footnote 1. There may well be conditions not foreseen in footnote 1 that make a measure incompatible with the footnote, and there may equally be conditions that are compatible with footnote 1. In the measure before us, the backward-looking element acts as a ceiling on the permissible value of the duty exemption; it does not expand the value of the duty exemption beyond ("in excess of") what is permitted by footnote 1. According to the United States' review request, this ceiling renders the measure incompatible with footnote 1 because it is contingent upon export performance. However, we must first answer the question whether the measure must "not be deemed to be a subsidy" pursuant to footnote 1. While a treaty must be interpreted as a whole, it seems to us that the determination whether there is a subsidy logically precedes, and cannot depend on, a determination of export contingency.

11.6. Therefore, the arguments advanced by the United States in its request for review have not persuaded us to depart from our conclusion that the United States has not established that the duty stipulations at issue do not meet the conditions of footnote 1 of the SCM Agreement.[224] We therefore reject the United States' request for review.

12 THE UNITED STATES' REQUEST CONCERNING THE CHARACTERIZATION OF MUNICIPAL LAW

12.1. At paragraph 7.300 (7.303) of our Interim Report, we have noted that "the rules of taxation of a Member are not part of the applicable law in WTO dispute settlement". The United States submits that this paragraph "could be clarified" by adding "but are instead a question of fact".[225] India does not comment on the United States' request.

12.2. We consider that the statement as currently drafted conveys our reasoning clearly, and we reject the United States' request.

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[222] See Panel question No. 79.
[223] Additional to the export contingency inherent in footnote 1, which foresees the exemption "of an exported product" from duties or taxes, or the remission of the same duties or taxes.
[224] Interim Report, para. 7.262 (7.265).
[225] United States' request for review, para. 27.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

I. INTRODUCTION

1. India provides subsidies to its exporters that are inconsistent with its obligations under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The SCM Agreement prohibits subsidies contingent upon export performance ("export subsidies"). India grants export subsidies through several schemes that are the focus of this dispute.

II. RELEVANT LEGAL STANDARD

2. In summary, under the SCM Agreement, for the complaining Member to establish that a Member provides a prohibited export subsidy, it must show the following three elements: (1) that the government or public body provided a financial contribution through the measure at issue (SCM Agreement Article 1.1(a)); (2) that the financial contribution conferred a benefit (SCM Agreement Article 1.1(b)); and (3) that the resulting subsidy is contingent - in law or in fact - on export performance (SCM Agreement Article 3.1(a)).

3. Although Article 27 of the SCM Agreement provides a limited exception to Article 3.1(a), India no longer qualifies for that limited exception.

III. FACTUAL BACKGROUND AND LEGAL ANALYSIS OF THE PROGRAMS

A. Export Oriented Units and Sector Specific Schemes

4. India designed the Export Oriented Units (EOU) Scheme and Sector Specific Schemes, including the Electronics Hardware Technology Parks (EHTP) Scheme and Bio-Technology Parks (BTP) Scheme, to "promote exports, enhance foreign exchange earnings, and attract investment for export production and employment generation." EOU, EHTP, and BTP units (collectively referred to as "units") agree to export their entire production of goods and services in exchange for exemption from import duties and taxes. Furthermore, throughout these documents, India stresses the requirement that an enterprise maintain a positive net foreign exchange (NFE).

1. Financial Contribution

5. The exemption provided by these schemes from customs and excise duty constitutes "government revenue that is otherwise due [that] is foregone or not collected" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. This provision defines a financial contribution to include a measure through which the government foregoes the collection of revenue that would otherwise be due in the absence of the challenged measure.

6. Exporters participating in the EOU/EHTP/BTP schemes are exempt from the payment of customs and excise duty that would otherwise be due in the absence of the measure. Comparably situated enterprises in India, on the other hand, must pay customs duties according to India's national tariff schedule.

2. Benefit

7. The financial contribution confers a benefit on EOU/EHTP/BTP participants. A benefit analysis under Article 1.1(b) of the SCM Agreement requires considering whether the recipient is in a better position because of the financial contribution. Here, the EOU/EHTP/BTP units receive benefits because they are financially "better off" by receiving an exemption from paying the duties they would otherwise have paid.

3. Export Contingency

8. Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. As evidenced throughout government documents, India conditions the availability of these benefits to the EOU/EHTP/BTP units upon the promise of agreeing to export their entire production and obtaining and maintaining of a positive NFE.

B. Merchandise Exports from India Scheme

9. The Merchandise Exports from India Scheme (MEIS) "provide[s] rewards to exporters to offset infrastructural inefficiencies and associated costs" and thus "promote[s] the manufacture and export of notified goods/products." India, through the MEIS, advances these objectives by providing to exporters transferable import duty credit scrips (scrips) as a reward for export of listed products to specified country markets. These scrips offset the cost of multiple expenses and liabilities, including for: (1) basic customs duty related to import of inputs or goods, including capital goods; (2) central excise duties; (3) basic customs duty related to payment of fees; and (4) a shortfall in export obligation. After an exporter accrues scrips through the MEIS scheme, it may transfer the scrips, and the recipient of the transfer may use the scrips without the same export conditions as the original MEIS participant.

1. Financial Contribution

10. India awards scrips as a "direct transfer" of funds under Article 1.1(a)(1)(i) of the SCM Agreement. India provides the MEIS participants with scrips that serve as a financial claim for that participant. That participant can use the scrips to pay for customs and excise duties, fees, or to cover the difference between an enterprise's deficit in actual export performance for a year versus the export obligation for that year. It is also freely transferable and has cash value.

2. Benefit

11. The MEIS participants receive benefits for participating in this scheme. A benefit analysis under Article 1.1(b) of the SCM Agreement requires considering whether the recipient is in a better position because of the financial contribution. Here, the MEIS participants receive benefits because they are financially "better off" than they would be in the market by receiving scrips that can offset customs duty, central excise duties, and customs fees, and can be used to offset a shortfall in export obligation. These scrips are freely transferable, and can be sold on the open market for cash.

3. Export Contingency

12. Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. An MEIS program participant receives scrips conditioned and tied to the value it exports, where the exports are sold, and of what product. Through an intensive monitoring process, India ensures that the value, place, and product of export, i.e., export performance, determine the MEIS reward.

C. Export Promotion Capital Goods Scheme

13. The Export Promotion Capital Goods Scheme (EPCG) "facilitate[s] import of capital goods for producing quality goods and services and enhance[s] India's manufacturing competitiveness." EPCG applicants promise to fulfil export obligations, i.e., meet export performance benchmarks. In return, participants receive advantages including exemption from paying import duties on capital equipment used to produce exports or duty credit scrips, similar to scrips in the MEIS scheme, which can be used to offset import duty for capital goods imported to produce exports.

1. Financial Contribution

14. Article 1.1(a)(1)(ii) defines a financial contribution to include a measure through which the government foregoes the collection of revenue that would otherwise be due in the absence of the challenged measure. The EPCG scheme exempts a participant from the payment of customs duties otherwise due on the import of capital goods used for export pre-production, production, and post-production. Comparably situated enterprises, not participating in this scheme, in India importing the same or similar capital goods must pay customs duties according to India's national tariff schedule.

2. Benefit

15. EPCG participants receive numerous benefits under the program. A benefit analysis under Article 1.1(b) of the SCM Agreement requires considering whether the recipient is in a better position because of the financial contribution. Here, the participants receive "benefits" because they are financially "better off" by not having to pay the import duties for the capital goods they use for their export operations.

3. Export Contingency

16. Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. Here, a unit receives EPCG benefits conditioned and dependent on its fulfilment of its export obligations. An enterprise agrees to a specific export obligation of six times the duties, taxes, and cess saved on capital goods to be fulfilled in six years from date of issue authorization.

D. Special Economic Zones Scheme

17. Special Economic Zones are geographic areas that contain multiple exporting units (SEZ Units). India established the SEZ scheme for the express purpose of promoting exports by SEZ Units. An SEZ Unit is entitled to a number of tax reductions and customs duty exemptions: (1) Corporate income tax deduction of export earnings (100% for five years, and then 50% each of the subsequent five years); (2) Exemption from customs duty on goods imported into the SEZ; (3) Exemption from export duties; and (4) Exemption from India's Integrated Goods and Services Tax.

18. In the Annual Performance Report, the SEZ Unit reports export value (FOB value of exports for the most recent year) and import value of inputs and capital goods. Using this data, the SEZ Unit calculates the NFE earning for the year: "FOB value of exports for the year" minus total value of imports during the year. If the resulting number is positive, the unit has satisfied the NFE condition.

1. Financial Contribution

19. India makes a financial contribution to SEZ Units in the form of "government revenue that is otherwise due is foregone or not collected" as provided in Article 1.1(a)(1)(ii) of the SCM Agreement. The four tax reductions and duty exemptions identified above [] represent a decision by India to "[give] up an entitlement to raise revenue that it could 'otherwise' have raised." In each instance, as a result of the reduction or exemption provided to SEZ Units, India has foregone revenue that it would otherwise be due.

2. Benefit

20. In the case of each of the reductions or exemptions described above, India confers benefits to SEZ Units. A benefit analysis under Article 1.1(b) of the SCM Agreement requires considering whether the recipient is in a better position because of the financial contribution. Here, the financial contributions confer benefits to SEZ Units within the meaning of Article 1.1(b) to the extent of the tax reduction and customs duty exemptions.

3. Export Contingent in Law

21. Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. The reductions and exemptions India provides through the SEZ scheme are contingent in law. If approved as an SEZ Unit, an enterprise commits to conditions that again relate to export performance. The Letter of Approval issued by India establishes the SEZ Unit's projected annual exports and the NFE earning for the first five years of operation. Finally, the enterprise must commit to achieve a positive NFE, a calculation that relies on the FOB value of exports as the starting point for the determination.

4. Export Contingent in Fact

22. The United States has demonstrated that the challenged subsidies are contingent in law upon export performance, and the Panel's analysis of export contingency may end there. For

completeness, the United States also demonstrates that the facts establish that the subsidies granted or maintained to SEZ Units are also contingent in fact upon export performance by the SEZ Unit.

E. Duty Free Imports for Exporters Scheme

23. The duty-free imports for exporters scheme exempts eligible exporters from customs import duties based on past export performance. The extent of the import duty exemption is contingent upon the FOB value of exports of a given product during the previous year.

1. Financial Contribution

24. India makes a financial contribution to participating enterprises in the form of "government revenue that is otherwise due is foregone or not collected," as defined in Article 1.1(a)(1)(ii). A participating enterprise receives a duty free import entitlement based on export value from the previous year, and is then entitled to import eligible goods duty free until it has exhausted the duty free import entitlement. The enterprise is not required to pay the customs duty that would otherwise be due in the absence of the measures. A comparably situated enterprise in India must pay customs duties according to India's national tariff schedule.

2. Benefit

25. India confers benefits to participating exporters through the exemption of customs duties normally due to the government to the extent of those exemptions. A benefit analysis under Article 1.1(b) of the SCM Agreement requires considering whether the recipient is in a better position because of the financial contribution. Here, the financial contribution confers benefits to a participating enterprise within the meaning of Article 1.1(b) to the extent of the customs duty exemptions.

3. Export Contingency

26. Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. The availability of the duty exemption under the measure is contingent − or conditional − upon the value of the goods an enterprise exported in the previous year, and the value of the exemption is directly related to the value of exports.

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. ARTICLE 3 OF THE SCM AGREEMENT APPLIES TO INDIA

27. India claims that it is entitled to an eight-year phase out of its export subsidy programs pursuant to Article 27 of the SCM Agreement. India undertakes a convoluted interpretive exercise based largely on policy arguments and negotiating history to argue for a legal interpretation that the SCM Agreement still permits India to grant export subsidies otherwise prohibited by Article 3 of the SCM Agreement.

28. Article 31 of the Vienna Convention on the Law of Treaties, which reflects customary rules of interpretation of public international law, provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The starting point of the interpretive exercise is the text of the applicable treaty.

29. Under Article 27.2(b), the prohibition of Article 3.1(a) shall not apply to certain developing country Members "for a period of eight years from the date of entry into force [January 1, 1995] of the WTO Agreement, subject to compliance with the provisions of paragraph 4" of Article 27. A "developing country" Member under Article 27.2(b) had its right to grant export subsidies end on January 1, 2003, unless it requested and was granted an extension, as provided for in Article 27.4.

30. Therefore, reading Annex VII and Article 27.2(b) of the SCM Agreement together, an Annex VII(b) developing country that graduates shall end its prohibited subsidies by the later of January 1, 2003, or the time it reaches $1,000 GNP per capita.

31. India has no textual support for its position that an additional eight-year phase out applies, and instead requests that the Panel consider such supplemental sources as negotiating history and amorphous language about the general support for giving developing country Members the opportunity to provide export subsidies. Such resort to reviewing supplemental sources is unnecessary when the ordinary meaning of the text, in context and in light of the object and purpose of the SCM Agreement, answers the question, and India's argument should be rejected.

II. ARTICLE 4 OF THE SCM AGREEMENT APPLIES TO THIS DISPUTE

32. India's argument that the special procedures of Article 4 of the SCM Agreement are inapplicable to this dispute fails for a number of reasons.

33. First, India's arguments ignore the plain text of Article 4. Article 4.1 provides that: "[w]henever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member." Article 4.4 then provides that: "[i]f no mutually agreed solution has been reached within 30 days of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel." The threshold for invoking the procedures of Article 4 therefore is whether "a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member." Contrary to India's arguments, Article 4 does not require that there first be a determination that Article 27 does not apply. Here, the United States has properly invoked Article 4 because the United States "has reason to believe that a prohibited subsidy is being granted or maintained by" India.

34. India's claim that the U.S. statement of available evidence does not conform to Article 4.2 of the SCM Agreement is without merit. Article 4.2 of the SCM Agreement contains no obligation to provide a statement of evidence that "establishes that the measures are, in fact, subsidies" - that is, meet the legal definition of a subsidy contained in Article 1 of the SCM Agreement. That would be a legal argument, not a statement of available "evidence." As demonstrated in the U.S. First Written Submission, the evidence cited in the statement of available evidence is indeed evidence regarding the existence and nature of the subsidies in question. India does not identify a legal basis for its claim that the United States was required to present arguments applying evidence to the applicable legal standard. India again appears to confuse what is evidence with what is legal argument.

35. India requests again that the Panel amend and extend the adopted timetable and working procedures for this dispute to include a second substantive meeting because holding one substantive hearing allegedly is not in accordance with Article 12.10 of the DSU and India's "due process rights." However, the parties have had and will have adequate opportunity to present their arguments and to be heard in this proceeding. Importantly, the setting of one substantive meeting rather than two reflects the expedited nature of the proceedings under Articles 4.4 and 4.6 of the SCM Agreement and contributes towards meeting the deadline specified in the SCM Agreement. The Panel's adopted timetable and working procedures for this dispute are consistent with Article 12.10 of the DSU.

III. INDIA'S CHALLENGED EXPORT SUBSIDIES ARE INCONSISTENT WITH ARTICLE 3.1(a) AND 3.2 OF THE SCM AGREEMENT BECAUSE THEY ARE SUBSIDIES CONTINGENT UPON EXPORT PERFORMANCE

36. India argues that the measures at issue fall under the SCM Agreement's exemption for duty drawback systems. India's response fails to address the elements of the schemes that are at issue. As reflected in Annex I of the SCM Agreement, a requisite feature of a duty drawback program is that imported inputs are "consumed" in the production of the exported product (making normal allowance for waste). Accordingly, the challenged schemes differ from drawback, exemption, and remission programs contemplated by Footnote 1 and Annexes I-III of the SCM Agreement.

A. Export Oriented Units and Sector Specific Schemes

37. India argues that it does not provide a financial contribution to these Units because these schemes provide an exemption from customs duties that falls under Footnote 1, and therefore, there is no subsidy under the SCM Agreement Article 1.1.

38. This argument misses the mark because the EOU/EHTP/BTP schemes do not meet the requirements under Footnote 1 since they are not duty drawback schemes. SCM Annex II defines a duty drawback scheme as one where "import charges levied on inputs that are consumed in the production of the exported product ..." are remitted or drawn back. SCM Annex I(i) provides that the "remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product" is an export subsidy.

39. Before reaching the question of whether a remission was in excess of the import charges levied, one must first determine whether, as part of the drawback scheme, imported inputs were consumed in the production of an exported product. Footnote 1 does not apply to EOU/BTP/EHTP units because they fail to meet this requirement. Units face no restriction that imported duty-free goods be consumed in the export production process. The imported duty-free goods need only be imported "for approved activity."

40. India also argues that imported capital goods under the EOU/EHTP/BTP schemes are inputs because they are "consumed" by contributing to the value of the final product. India's argument is contrary to the text of the SCM Agreement. The definition of "inputs" at Footnote 61 of the SCM Agreement does not directly or implicitly contemplate capital goods. The footnote concerns "inputs" that are consumed in the production process. By their very nature, capital goods are not physically incorporated or consumed in the goods being manufactured during the production process.

41. Annex I(i) provides no help to India either. Annex I(i) does not refer to goods contributing to the final cost of exports, but to "imported inputs that are consumed in the production of the exported product (making normal allowance for waste)."

42. India also cites to Annex I(h) to argue that the exemption on excise duties applies to the EOU/BTP/EHTP schemes and falls squarely within the meaning of prior-stage cumulative indirect taxes referred to in Annex I(h) to the SCM Agreement. Similarly here, this provision is inapplicable because Annex I(h) requires that "the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product."

B. Merchandise Exports from India Scheme

43. Next, India claims the MEIS scrips fall under the "ambit" of Footnote 1 of the SCM Agreement, and therefore, the scrips are not a subsidy. To support this theory, India states that the scrips recipient only receives as a refund (in the form of scrips) the money the Unit paid in indirect taxes. As a result, India suggests, the MEIS scrips are a proper remission of duties or taxes not in excess of that accrued.

44. Footnote 1 and Annex I of the SCM Agreement do not apply to the MEIS because the exemption or remission of indirect taxes is irrelevant to the MEIS. There is no requirement for a scrips holder to tie the scrips it receives to imports of certain products, or that the products be inputs to the exported product for which the company received the scrips. The value of the scrips received is tied only to the value, country and product of export, and has no relationship to an exporter's imports.

45. In fact, an MEIS beneficiary may use the scrips to offset an export obligation for other programs such as the EPCG scheme described below. Scrips can be freely bought and sold and are financial instruments. Various online marketplaces facilitate the exchange of scrips, and companies may sell their scrips. Thus, the MEIS program is not an "exemption, remission or deferral" as contemplated by Footnote 1 and Annex I.

C. Export Promotion Capital Goods Scheme

46. India's central argument is that the EPCG scheme falls within the scope of Footnote 1 and Annex I of the SCM Agreement as a duty drawback system that is deemed not to be a subsidy.

47. India first points to Annex I(g) and claims the EPCG scheme is an exemption for various indirect taxes on capital goods. India is mistaken because Annex I(g) is inapplicable to the EPCG scheme. Annex I(g) deals with the "exemption or remission, in respect of the production and distribution of exported products, of indirect taxes." In the EPCG scheme, there is no requirement to use the capital good, for which the exemption or remission of indirect tax was received, in "the production and distribution of exported products," as is required in Annex I(g).

48. India also argues that the EPCG scheme is not a subsidy under Annex I(i). This statement is factually incorrect. Annex I(i) concerns import charges "levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste)." Capital equipment - which is the focus of the EPCG scheme - is distinct from inputs. Footnote 61 of the SCM Agreement limits the applicable inputs to those "inputs physically incorporated" and "consumed," a definition that does not apply to capital goods.

49. The references in Annex I, items (h) and (i), to a "normal allowance for waste" supports an interpretation that Annex I, items (h) and (i), do not contemplate or permit for capital goods to be considered as inputs. Capital goods are not "consumed" in the production process, and do not thereby result in wastage during production for which a normal allowance can be made.

50. In addition, while Indian companies must export to receive advantages under EPCG, there is no requirement that capital goods imported duty-free only be utilized for export production. Rather, the duty-free capital goods imported under EPCG may be used for any amount of production bound for the domestic market so long as the EPCG participant also meets its export obligation.

D. Special Economic Zones Scheme

51. India also claims that a positive NFE can be reached without exporting to other countries. However, despite there being a number of ways listed in the SEZ Rules for a company to increase its NFE, the definition of "export" in the SEZ Act, 2005 is relatively straightforward:

- Item (m) "export" means (i) taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise; or (ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or (iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone.

- Item (ii), regarding supplying goods from the DTA to a Unit or a Developer, would only apply to suppliers of SEZ Units - located in the Domestic Tariff Area and not the SEZ - and not to SEZ Units themselves. Thus, in the case of SEZ Units the SEZ Act defines export to cover two situations: SEZs "taking goods, or providing services, out of India," or providing goods or services to other SEZ units. In the case of the latter, these recipient Units then ultimately must either export those goods out of India (with or without further processing), or provide them to another SEZ Unit.

52. India claims that the U.S. evidence of export contingency in fact is insufficient. India first argues that the intent of the SEZ Act is not relevant to the Panel's analysis, but at no point disagrees with the evidence presented that the SEZ Act was enacted to promote exports from India. This policy rationale is useful evidence in considering whether the subsidy is tied to, or geared to induce, export performance.

53. India also errs in arguing that the SEZ application and approval processes are not in themselves tied to actual or anticipated exports. Consider the requirement to achieve a positive NFE. This requirement incentivizes an SEZ Unit to make export-market sales rather than domestic-market sales. Maintaining positive NFE is the critical requirement for being an SEZ Unit. The determination of whether an SEZ Unit has achieved positive NFE relies principally on the "Free on Board value of exports" by the SEZ Unit. Increased exports and the resulting higher export value will strengthen the likelihood of an SEZ Unit attaining positive NFE, meaning that an enterprise would be inclined to direct sales to the export market and support its effort to reach positive NFE. Thus, the granting of subsidies is tied to actual or anticipated exports, and the premise of this primary requirement of SEZ Units is to encourage exports.

54. India has also not addressed the fact that the SEZ Scheme structured the tax reduction benefit to induce exports by SEZ Units. SEZ Units are permitted to deduct from income tax liability 100% of profits from exports for the first five years, and then 50% of profits from exports during each of the subsequent five years. Any profits from domestic sales do not result in the same benefits to SEZ Units, raising again the question of the economic value to an SEZ Unit in pursuing domestic sales. Indeed, the structure of this tax reduction has a direct impact on the cost of a transaction to an export market, providing SEZ Units with greater flexibility to complete export sales. India tied the tax reduction entirely to export sales, creating a strong incentive for SEZ Units to export.

E. Duty Free Imports for Exporters Scheme

55. India argues that Articles 3.1(a) and 3.2 of the SCM Agreement do not apply to the DFIES because it is a duty drawback system under Footnote 1 of the SCM Agreement and Annex I(i) as "inputs consumed in the production of the export." India also argues that "duty exemptions are only provided on goods that are inputs to be used by manufacturer exporters."

56. As explained above, under DFIES, past export performance entitles the enterprise to an import duty exemption. In addition, while some of the products for which import duty exemptions may be applied can be inputs, it is not true for all of them.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT

57. After filing its Second Written Submission in November 2018, India enacted additional, or expanded, benefits under the MEIS and EPCG schemes. India's actions betray its statement that it is making efforts to "reduce the impact of the duty and tax exemptions on government revenue."

58. India cites to Annex II of the SCM Agreement to advocate that the United States, as the complaining party, bears the burden to undertake an "examination of the inputs consumed," "a quantitative analysis of the amounts and prices of the inputs consumed," and "an examination of whether excess remissions have occurred." Elsewhere, India argues that the United States must offer a "data-driven, technical argument" to show that duty-free imported inputs are not consumed under the challenged schemes.

59. India fails to mention that the section of Annex II it relies upon is one that is only applicable to a countervailing duty investigation. The plain language of the SCM Agreement shows that the guidelines of Annex II apply to countervailing duty investigations.

60. In any event, India has structured the schemes without any regard for whether duty-free products imported by scheme participants are consumed in the production of the exported good (EOU, EPCG, DFIES) or to quantify the existence and amount of any indirect tax liability borne by the exported product (MEIS). Thus, such a "quantitative analysis" of amounts and prices of inputs consumed and whether excess remission occurred would be futile because there is no duty drawback or remission scheme to begin with.

61. With regard to capital goods, India has repeatedly proposed that capital goods be included in the definition of "inputs" for purposes of the SCM Agreement and acknowledged in a WTO filing that "[t]hus capital goods and consumables have been left out even though they can be said to have been used to the extent of their depreciation and actual consumption." India's proposal was opposed and rejected. For instance, a 2001 Chairman's Report recalls that India's proposal "advocates including capital goods in the definition in Footnote 61 of inputs consumed in the production process." In other words, capital goods were not already included. Contrary to India's assertion that "capital goods fall squarely within the definition of 'inputs' in Footnote 61 of the SCM Agreement," the SCM Agreement's negotiating history for Footnote 61 and subsequent discussions show that the question of whether to include capital goods as "inputs" was deliberated and the proposal was rejected.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S QUESTIONS

U.S. RESPONSE TO PANEL QUESTION 35

62. The Appellate Body has applied a three-step approach that (i) identifies the tax treatment that applies to the income of the alleged subsidy recipients; (ii) identifies a benchmark for comparison; and (iii) compares the challenged tax treatment and the reasons for it with the benchmark tax treatment. In the second step, the Appellate Body has noted that determining a benchmark may require examining the "structure" and "organizing principles" of a Member's domestic tax system. Both the United States and India agreed at the substantive meeting that there is no need to examine the structure and organizing principles of India's domestic tax regime.

63. First, while a three-step approach can serve as a useful analytical tool in certain cases, it is unnecessary in this dispute under these facts. Second, while the applied import duty rate may vary by product, exporters participating in the challenged schemes, who receive blanket import duty exemptions, do not pay import duties, and similarly situated exporters in India, absent participation in the challenged scheme, do. Third, the "reasons for the challenged tax treatment" in the case of the challenged schemes are clear: a reward for export performance.

U.S. RESPONSE TO PANEL QUESTION 36

64. The Appellate Body reasoning in its report in *EU - PET (Pakistan)* is not particularly relevant to this dispute. *EU - PET (Pakistan)* began with the unchallenged premise that the scheme at issue was a duty drawback scheme. Here, India has asserted that the challenged schemes are proper duty drawback or remission schemes. The United States has demonstrated that the challenged Indian schemes are not proper duty drawback or remission schemes to begin with because the schemes are not limited to inputs consumed in exported products and/or do not even attempt to connect the alleged drawback or remission to the import charges or indirect taxes accrued.

U.S. RESPONSE TO PANEL QUESTION 41

65. Regardless of whether they operate on what India labels a "post-export" basis, duty drawback schemes must limit their scope to "imported inputs that are consumed in the production of the exported product" and connect the "remission or drawback of import charges" with "those [import charges] levied." The challenged Indian schemes fail to meet these fundamental elements.

66. As explained previously, the SCM Agreement envisions the connection described above to be based on a firm's actual experience, including actual import duty liability incurred and input consumption, and not on an aggregate, estimated or industry or product-wide rate. For instance, paragraph 2 of Annex II specifies that the analysis involves the amount that is "actually levied" on inputs that are consumed in the production of the exported product.

U.S. RESPONSE TO PANEL QUESTION 46

67. The elements that Members agreed are required for a proper remission or exemption scheme differ depending on whether the scheme concerns indirect taxes, cumulative indirect taxes, or import charges.

68. A remission or exemption scheme may fall within the scope of Annex I(g) if it contains the following elements, as reflected in the text of item (g): (1) permits remission or exemption for indirect taxes applied to exported products; (2) permits remission or exemption for only production and distribution-related indirect taxes; and (3) requires determining the indirect taxes actually levied on the production and distribution of like products sold for domestic consumption so as not to provide excessive remission or exemption.

69. A remission or exemption scheme may fall within the scope of Annex I(h) if the exemption, remission or deferral of prior-stage cumulative indirect taxes: (1) is tied to actual prior stage cumulative indirect tax liability; (2) is limited to goods and services used in the production of the exported product; (3) is tied to inputs, as defined in Footnote 61, consumed in the production of exported products; and (4) is determined on actual taxes levied on inputs that are consumed in the production of the exported product.

70. A remission or exemption scheme may fall within the scope of Annex I(i) if: (1) there is an input as defined in Footnote 61; (2) the input is imported (with the exception of certain home market inputs described in Annex I, item (i)) and Annex III; (3) the input is consumed in the production of the exported product; and (4) the remission or drawback of import charges is not in excess of those levied on the imported inputs.

U.S. RESPONSE TO PANEL QUESTION 69

71. Despite this common understanding and the SEZ scheme's primary focus on foreign "export," India focuses on narrow domestic means to improve an enterprise's NFE that purportedly negates the scheme's export contingency. Section 2(m) of the SEZ Act provides for a limited exception under (iii) for domestic sales, and Rule 53 differentiates between exports on the one hand, and a narrowly defined list of exceptions in the form of encouraged domestic sales, subject to special conditions, by which an SEZ unit may improve its NFE.

72. The availability of these limited exceptions as a secondary means for an SEZ unit to fulfill its NFE does not diminish the primary means for an SEZ unit to fulfill its net foreign exchange requirement - foreign export. India has not and cannot explain why the SEZ scheme only incentivizes exports by SEZ units and not sales to other SEZ units. Also, the export contingency of a scheme is not lost even if a small number of "exports" made domestically can count toward positive NFE or a small number of exporters can meet their NFE requirement predominantly through domestic sales.

73. India's own examination of the SEZ scheme supports the U.S. view. The Comptroller and Auditor General of India (CAG), in a report entitled "Performance of Special Economic Zones (SEZs)," analyzed exports from SEZ units based on the common understanding of "exports." While the Department of Commerce noted the NFE impact of certain DTA sales, the CAG concluded that the possibility of an SEZ unit fulfilling its NFE requirement without making physical exports was an unintended loophole incompatible with the SEZ scheme. The CAG emphasized that reliance by SEZ units on domestic sales defeated "the basic objective of the scheme of earning foreign exchange from overseas" through "actual physical exports to foreign countries…"

U.S. RESPONSE TO PANEL QUESTION 79

74. There is a glaring disconnect between the import duty actually levied on the imported inputs, and India's reward of exemption. The SCM Agreement, on its face, necessitates connecting "the remission or drawback of import charges" with "those levied on imported inputs that are consumed in the exported product." Under DFIES, the amount of duty exemption granted for exports is uniform across broad categories of exports based on the FOB value of exports, regardless of what inputs were used, whether the inputs were themselves imported duty-free, or whether the inputs were even imported. As a result, one cannot connect the actual amount of import duty levied on the imported inputs with the amount of the import duty exemption. This fact is unsurprising because the amount of the duty exemption is a reward contingent upon the exporter's export performance.

EXECUTIVE SUMMARY OF U.S. COMMENTS TO INDIA'S RESPONSES TO THE PANEL'S QUESTIONS

U.S. COMMENT ON INDIA'S RESPONSE TO PANEL QUESTION 35

75. India argues that a three-step approach and an inquiry into the "structure" and "organizing principles" of its tax system are unnecessary in this dispute. India argues that, for measures falling under Footnote 1, the Panel need only compare the "amount of remission of such duties or taxes and those which have accrued…." For these reasons, the three-step approach and inquiry into the "structure" and "organizing principles" of India's tax system is unnecessary.

76. This "excess remissions principle," on which India relies, is that "in the context of duty drawback schemes, the financial contribution element of the subsidy (i.e. government revenue forgone that is otherwise due) is limited to the excess remission or drawback of import charges on inputs... ." However, this comparison presumes that a scheme is a proper duty drawback scheme that attempts to relate remission of duties to those duties actually accrued. The challenged schemes do not even attempt to connect the amount of remission and the amount of duties or taxes actually accrued. Thus, the schemes fail to meet a fundamental requirement of a drawback scheme. The

challenged schemes also do not require exempted items to be consumed in production of the exported product, another fundamental requirement.

77. An inquiry into the "structure" and "organizing principles" of India's tax system is unnecessary. India provides: (1) a 100% exemption on duties or taxes under these schemes; (2) similarly-situated enterprises who do not participate in the schemes, all other things being equal, pay the duties or taxes from their income; and (3) the transparent reason for the challenged treatment is a reward for export performance. Under these facts, the "benchmark" treatment for comparison, the treatment of the income of a similarly situated non-scheme participant enterprise under Indian law, is readily identifiable.

78. Finally, to the extent the Panel finds a three-step approach appropriate in this proceeding, in the U.S. written submissions and responses to the Panel's questions, the United States has identified (i) the duty or tax treatment of the income that applies to the scheme participants and (ii) a benchmark for comparison. The United States then compares (iii) the challenged tax treatment and the reasons for it with the benchmark duty or tax treatment. This comparison shows that the challenged schemes result in India foregoing revenue and providing a financial contribution to scheme participants.

U.S. COMMENT ON INDIA'S RESPONSE TO PANEL QUESTION 38

79. India mistakenly applies the mandatory/discretionary distinction, which is a useful analytical tool for determining whether a measure irrespective of its application can be found WTO-inconsistent, to argue that the United States must establish that "the legislation [is] worded in such a manner as to preclude the possibility of imported inputs being consumed in the production of an exported product[], or, alternatively, the legislation [] explicitly prevent[s] the possibility of inputs being imported solely for the consumption of exported products." India misconstrues what will suffice to show the challenged measures are inconsistent with the SCM Agreement.

80. India erroneously contends that the United States must demonstrate how the "legislation [] explicitly prevent[s] or obstruct[s], either in i[t]s language or its operation, the fundamental aspects of a duty drawback program, in order for it to be held as inconsistent" with the SCM Agreement. But there is no basis in the SCM Agreement to require a complaining party to show that a measure could never operate in a WTO-inconsistent manner for it to be in breach.

81. To the contrary, if a complaining party can demonstrate that a measure will, in a defined circumstance, necessarily produce a WTO-inconsistent result, the measure may be found WTO-inconsistent "as such." That in other circumstances the measure may not necessarily produce a WTO-inconsistent result does not cure the inconsistency (for example, a measure that sets out a tariff in excess of a Member's binding, but only on Monday and not Tuesday-Friday). Similarly, the fact that the measures do not mandate, for example, the explicit preclusion of imported inputs being consumed in the production of the exported product does not mean that the challenged schemes do not confer export subsidies when domestic inputs are being consumed in the production of exported products. That is, there is no relevant "discretion" under the measure under the mandatory / discretionary distinction (the discretion not to engage in WTO-inconsistent behavior).

CONCLUSION

82. For the foregoing reasons, the United States respectfully requests that the Panel find that the measures at issue are export subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

I. INTRODUCTION

1. In the present dispute, the United States alleges that five domestic schemes maintained by India ("Challenged Schemes") are prohibited export subsidies under Art. 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The Challenged Schemes are (1) Export Oriented Units Scheme and sector specific schemes including Electronics Hardware Technology Parks Scheme and Bio-Technology Parks Scheme ("EOU Scheme"); (2) Merchandise Exports from India Scheme ("MEIS"); (3) Export Promotion Capital Goods Scheme ("EPCG Scheme"); (4) Special Economic Zones Scheme ("SEZ Scheme"); and (5) Duty Free Imports For Exporters Scheme ("DFIE").

2. India respectfully submits that Art. 3 of SCM Agreement is not applicable to India. Countries listed in Annex VII of the SCM Agreement are to receive the same treatment as accorded to developing countries as stipulated in Art. 27.2(b). Consequently, India has an 8-year phase out period after graduation (from the year 2017) from Annex VII(b) for phasing out any alleged export subsidy.

3. Further, India contends that the Challenged Schemes are not prohibited export subsidies as per Art. 3.1(a) of the SCM Agreement. The United States has mischaracterised and misunderstood the Challenged Schemes. Four of the challenged schemes are duty drawback or remission schemes, and the SEZ Scheme is not export contingent. None of the schemes challenged by the United States violate India's obligations under the SCM Agreement.

II. INDIA'S REQUEST FOR A PRELIMINARY RULING

4. Along with its first written submission, India made a request for a preliminary ruling wherein India contended that (A) the United States has failed to meet the specificity requirements in Art. 6.2 of the DSU and that consequently/as a consequence, the 'problem has not been presented clearly'; (B) the United States has erred in invoking the dispute pursuant to Art. 4 of the SCM Agreement, and the timelines therein are prejudicial to India; (C) the Statement of Available Evidence submitted by the United States does not meet the requirements of Art. 4.2 of the SCM Agreement (D) the failure to provide for a second substantive meeting is a violation of India's due process rights as couched in the DSU, particularly in Art. 12.10 of the DSU.

A. UNITED STATES HAS FAILED TO MEET THE SPECIFICITY REQUIREMENTS IN ART. 6.2 OF DSU

5. India underscores that in the present case, the United States has; (1) obscured the very meaning of the term 'measure' by failing to identify a measure at all, (2) failed to fulfil the specificity requirement in Art. 6.2 of the DSU; and (3) failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

6. Relying on the Panel report in *Australia – Apples (New Zealand),* India expresses its concerns that the panel request by the United States merely lists out legal instruments, particularly the ones that are "too extensive and exhaustive", but does not indicate/identify the specific measure within such instruments. For instance, the United States cites at Instrument 26 "*Income Tax Act, 1961,* as amended." - In citing the entire legal instrument, without indicating the precise measure within the Act that is at issue, nor identifying the relevant provisions within the said legislation, it appears that the United States is challenging the legal instrument in its entirety.

7. In the present case, the Panel Request has not provided sufficient clarity with respect to the legal basis of its complaint vis-à-vis the measures within the identified schemes. Moreover, United States in the Panel Request simply states that the identified schemes provide export subsidies in violation of Art. 3 of the SCM Agreement as the legal basis of the complaint.

B. THE UNITED STATES HAS ERRED IN INVOKING THE DISPUTE PURSUANT TO ART. 4 OF THE SCM AGREEMENT

8. Art. 27 of the SCM Agreement accords that a subset of developing country members are not subject to the procedure laid down in Art. 4 of the SCM Agreement. Art. 4 procedures are only applicable in the case of prohibited export subsidies,[1] and owing to the application of Art. 27.7, alleged export subsidies maintained by developing country members may only be challenged under Art. 7 and not Art. 4 of the SCM Agreement. The United States, without any demonstrable injury, has incorrectly invoked Art. 4 instead of following the Art. 7 procedure. India relies on the Panel Report in *Brazil - Aircraft,* wherein it was held that in order to invoke proceedings under Art. 4, the Complaining member would have to show non-conformity with paragraphs 2-5 of Art. 27.[2] India submits that the United States has failed to satisfy that burden. Therefore, the United States has erred in invoking the dispute pursuant to Art. 4 of the SCM Agreement.

C. IF ART. 4 APPLIES, UNITED STATES HAS FAILED TO MEET ITS OBLIGATIONS UNDER ART. 4.2 OF THE SCM AGREEMENT

9. Alternatively, if Art. 4 of the SCM Agreement applies in the present case, India submits that the requirements of Art. 4, specifically, the requirement to submit a 'Statement of Available Evidence' at the time of consultations under Art. 4.2 of the SCM Agreement − has not been met by the United States. The United States, in its request for consultations, does not provide any basis that establishes the character of the measures in the Challenged Schemes as a subsidy.[3]

10. India asserts that, at the very least, the statement of available evidence must have included specific provisions within the legislation that are relevant to the characterization of the measure as a prohibited subsidy.

11. Additionally, there is no substantive difference between the 'Request for Consultation' dated 14 March 2018, and the Request for Establishment of a Panel dated 18 May 2018. It is submitted that this disregards the substantive difference between a Statement of Available Evidence within the meaning of Art. 4.2 of the SCM Agreement, and the requirement to specify measures in the Request to Establish a Panel, as mandated by Art. 6.2 of the DSU.

D. THE FAILURE TO PROVIDE FOR A SECOND SUBSTANTIVE MEETING IS A VIOLATION OF INDIA'S DUE PROCESS RIGHTS UNDER ART. 12.10 OF THE DSU

12. The Appellate Body in its report in Argentina − Textiles & Apparel stated that 'It is also true, however that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel'[4] while referring to the first and the second substantive meeting with the Panel. The second substantive meeting, as per Paragraph 7 of Appendix 3 of the DSU, shall include but may not be limited to, the Formal Rebuttals.

13. India submits that the failure to grant a second substantive meeting has affected India's right to respond to the claims being made against it, since the proceedings do not present adequate opportunity and sufficient time for India to "prepare and present its argumentation" as mandated by Art. 12.10 of the DSU. A substantive meeting is an opportunity for parties to meet with the Panel, present their arguments, as well as better understand the claims being made.

14. Appendix 3 of the DSU supports the claim that the failure to provide for a second substantive meeting is indeed a denial of the right to be heard and adequate opportunity for a party to present its claims and defences. Appendix 3 of the DSU provides for two substantive meetings in the conduct of a dispute. While India understands that a panel is not compelled to adhere to the timetable and working procedures stipulated in Appendix 3 of the DSU, the Panel can deviate only after consulting the parties to the dispute.[5]

[1] Panel Report, *Indonesia − Autos*, para. 5.381.
[2] Panel Report, *Brazil − Aircraft*, paras. 7.54 and 7.57; Appellate Body, *Brazil − Aircraft*, para. 141.
[3] Appellate Body Report, *US − FSC*, para. 161.
[4] Appellate Body Report, *Argentina-Textiles and Apparel*, para. 79.
[5] Article 12.1 of the DSU. See also: *US − Shrimp (Ecuador),* a dispute pursuant to Article 6 of the DSU and Article 17 of the Anti-Dumping Agreement, where a second substantive meeting was foregone, but only upon a mutual agreement by both parties.

15. India is of the view that the present case does not present any extraordinary circumstances that would require a departure from the procedure provided in Appendix 3 of the DSU. Moreover, as witnessed from all the previous cases, including wherein Art. 4 of the SCM Agreement was invoked, the Panel provided the parties two separate substantive meetings, to adequately provide the Parties to present their submissions before the Panel. Moreover, India respectfully submits that Art. 4 of the SCM Agreement requires the timeline to be expedited, and does not mandate the deletion of procedural steps during the dispute settlement process.

16. Accordingly, India submits that the failure to provide for a second substantive meeting amounts to a denial of an opportunity to be heard and to respond, which is a violation of India's *due process* rights under the DSU and Art. 12.10 of the DSU.

III. AS INDIA BENEFITS FROM THE SPECIAL AND DIFFERENTIAL TREATMENT UNDER ART. 27 OF THE SCM AGREEMENT, THE PROHIBITION UNDER ART. 3 OF THE SCM AGREEMENT DOES NOT APPLY TO INDIA

17. Art. 27 of the SCM Agreement recognises the S&DT afforded to developing country members. India contends that Art. 27.2(b) of the SCM Agreement continues to apply to members who graduate from Annex VII(b).

18. The text of Annex VII(b) of the SCM Agreement instructs that countries included therein become subject to Art. 27.2(b) when their GNP per capita reaches $1000 per annum. Art. 27.2(b) provides a phase-out period of 8 years to the developing country members for prohibited export subsidies under Art. 3. India submits that the eight-year phase-out period in Art. 27.2(b) of the SCM Agreement should be granted to *all* Annex VII developing country members *when* they graduate from Annex VII. As explained below, such an interpretation is required by the general rules of treaty interpretation provided in Art. 31 of the Vienna Convention of the Law of Treaties ("VCLT"), and supported by the supplementary means of interpretation provided in Art. 32 of the VCLT.

19. As per Art. 31(1) of VCLT, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The principle of effectiveness has been read into Art. 31(1) of the VCLT,[6] and has been recognised as a cardinal rule of treaty interpretation by all international adjudicatory bodies, including the WTO Appellate Body.[7] Specifically, in *US − Gasoline*, the Appellate Body explained that '*[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility*'.[8] An effective interpretation of the treaty language guarantees that the text is not rendered useless, redundant, or even irrational.[9] A strictly literal interpretation of Art. 27.2(b), in isolation of the scheme of organization of Art. 27.2, Annex VII(b), and other provisions of Art. 27, deprives the Annex VII countries of the special treatment envisaged under Part VII of the SCM Agreement. More importantly, such an interpretation negates the principle of effectiveness.

20. The Panel in *Indonesia-Autos* stated that Art. 27.1 of the SCM Agreement is an integral part of the object and purpose of the SCM Agreement[10] and must be read in tandem with other provisions of Art. 27 and the Annexes. In addition to these provisions, Annex VII is instrumental in implementing the S&DT framework embedded in the SCM Agreement. Annex VII(b) reads as:

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[6] AB Report, *Japan Alcoholic Beverages II,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para 106.

[7] *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Separate Opinion of Judge Lauterpacht [1955] ICJ Report 90, at 104−105; AB Report, *US − Offset Act (Byrd Amendment)), WT/DS217/AB/R,* at para. 271; see also AB Report, *US- Gasoline*, *WT/DS2/AB/R* at 21; AB Report, *Japan − Alcoholic Beverages II*, *WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R*, at 106, 111; AB Report, *Korea − Dairy, WT/DS98/AB/R,*, at para 80; AB Report, *Canada − Dairy,* WT/DS103,113/AB/R, at para 133; AB Report, *Argentina− Footwear,* WT/DS121/AB/R, at para 81; AB Report, *US − Underwear*, WT/DS24/AB/R, at 24; AB Report, *United States − Section 211 Appropriations Act,* WT/DS176/AB/R, at paras 161, 338; AB Report, *US − Upland Cotton*, WT/DS267/AB/R, at para 549; AB Report, *EC − Chicken Cuts,* WT/DS269/AB/R, WT/DS286/AB/R, at para. 214. *See also* Panel Report, *US − Carbon Steel*, WT/DS213/R, at para. 8.29, see also paras 8.43 and 10.10 ('would yield irrational results').

[8] Panel Report, *US − Gambling,* WT/DS285/R, at para. 6.49, n. 605. The Panel justified its effective interpretation under the good faith principle in Article 31(1).

[9] Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body,* 21 EJIL 3 (2010).

[10] Panel Report, *Indonesia − Autos*, para 5.194.

> *"Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe."*

21. Therefore, a developing country member that graduates from Annex VII "*shall* be subject" to the provisions which are applicable to other developing country members in Art. 27.2(b). The mandatory nature of the provision is evident from the use of the word "*shall*". In other words, the *treatment* that is afforded to a developing country member under Art. 27.2(b) and a developing country member graduating from Annex VII(b) must necessarily be the same.

22. Art. 27.2 of the SCM Agreement serves to exclude, in a qualified or unqualified manner, certain developing countries from the scope of application of substantive obligations found in Art. 3 of the SCM Agreement, for a period of 8 years.[11] Accordingly, through Art. 27.2(b), the applicable *treatment* is an exemption from the prohibition on export subsidies for a period of eight years, i.e. an 8-year phase out period.

23. Annex VII(b) requires that the treatment afforded to a graduating member must be the same as that was afforded to a country originally falling within scope of Art. 27.2(b). The *treatment* is to be understood as an eight-year phase out period. Therefore, the prohibition on export subsidies does not apply to a country graduating from Annex VII, for a period of eight years, from the date when its GNP pe annum crosses $1000 mark, and the data is published by WTO Secretariat, i.e. when the country graduates from Annex VII.

24. India's interpretation of Art. 27.2 and Annex VII seeks to preserve the elements of Annex VII and the objectives of providing special treatment for Annex VII countries. India submits that the phrase "*… from the date of entry into force of the WTO Agreement"* is applicable only to developing country members that were originally within the scope of Art. 27.2(b). Accordingly, those developing country members graduating from Annex VII(b) must receive the same benefit which other developing countries have received, i.e. an "eight year" phase out period. The United States proposes such a narrow "literal interpretation" of Art. 27.2(b) of the SCM Agreement separated from the context of Annex VII(b), and places undue reliance on the phrase "*… from the date of entry into force of the WTO Agreement".* The United States claims that developing country members that graduate from Annex VII(b) are not entitled to the right in Art. 27.2(b) beyond 1 January 2003. However, such an interpretation defeats the very purpose of including two separate provisions, namely for (a) Annex VII countries, and (b) for other developing countries, and consequently renders Art. 27.2(b) inutile for Annex VII(b) members graduating beyond the said date.

25. As explained above, Annex VII(b) and Art. 27.1 are an integral part of the overall object and purpose of the SCM Agreement which recognises that subsidies play an integral role in the economic development of developing country members. The interpretation put forth by India takes into account this object and purpose, and does not render any part of the SCM Agreement inutile. Therefore, as per the general rules of interpretation provided in Art. 31 of the VCLT, an eight-year phase out period in Art. 27.2(b) of the SCM Agreement is available to all developing country members that graduate from Annex VII.

26. Further, the interpretation proposed by the United States results in absurdity when applied in the context of Art. 27.5 of the SCM Agreement. Art. 27.5 provides Annex VII countries with an eight-year phase-out period for export subsidies where a product has reached export competitiveness. However, as per the interpretation proposed by the United States, it does not provide any flexibility or a phase-out period for the wider export subsidies by the same Member. This results in a situation where subsidy program itself is unable to avail of the 8- year phase-out period stipulated in Art. 27.2(b), but one of the products, part of the subsidy program receives an eight-year phase-out period under Art. 27.5.

27. This interpretation is also supported by the text of Art. 27.4 of the SCM Agreement which obligates the developing country members which are subject to Art. 27.2(b) to progressively phase out the subsidies over a period of 8 years. The text of Art. 27.4 does not qualify this period until

[11] Panel Report, *Brazil – Aircraft*, para. 7.53.

1st January 2003, but rather provides a gradual phase-out period of 8 years, accounting for late graduates from Annex VII to benefit from the full term of 8 years. Therefore, to preserve the integrity of Art. 27, the Panel must interpret the provisions in the context in which they operate, i.e. in tandem with all the provisions of Art. 27.

28. Additionally, the supplementary means of interpretation provided in Art. 32 of the VCLT serve as further evidence of this interpretation of Art. 27.2(b) submitted by India. They are not *subsidiary* to the means of interpretation recognised in Art. 31, but supplementary.[12]

29. The list of supplementary means of interpretation identified in Art. 32 is not exhaustive, and that preparatory work of the treaty and the circumstances of its conclusion can be used to ascertain the common intention of the parties.[13] Accordingly, India underscores that the negotiation history of Art. 27 of the SCM Agreement is critical to the interpretation of the provision. As evidenced from the Draft Texts formulated by the Chairman of the Negotiating Group for the SCM Agreement based on the proposal submitted by the members,[14] text which led to the SCM Agreement, developing countries were provided with variable phase-out periods under Art. 27.2(b), in accordance to their development levels. Among the developing countries, a separate group of countries whose GNP per capita was less than $1,000 per annum were given the option to negotiate a phase-out period according to their development needs, upon crossing $1,000 GNP per annum.[15] That is, the drafters of the SCM Agreement intended not a reduction of a timeframe for phase-out period, but rather, to provide wider flexibilities to developing countries, even upon their graduation from Annex VII(b).

30. Therefore, India submits that the eight-year phase out period in Art. 27.2(b) of the SCM Agreement should be available to countries that graduate from Annex VII, and hence, the prohibition under Art. 3 of the SCM Agreement is not applicable to India.

IV. THE CHALLENGED SCHEMES ARE NOT PROHIBITED EXPORT SUBSIDIES AS PER ART. 3 OF THE SCM AGREEMENT

A. Export Oriented Units

31. The United States has argued that the exemption from customs and excise duties provided to companies in the EOU/EHTP/STP/BTP schemes ('EOU Scheme') constitutes "government revenue that is otherwise due [that] is foregone or not collected" within the meaning of Art. 1.1(a)(1)(ii) and is therefore a subsidy for the purposes of the SCM Agreement. The United States has contended that the EOU scheme is an export subsidy based on two defining features − one, that the program requires all participating enterprises ('Units') to export their entire production, and two, that it imposes a Net Foreign Exchange Requirement.[16] However, the United States has failed to view the scheme as a whole, rather, it has selectively culled out provisions of the Indian legislation in order to characterize the scheme as an export subsidy. In doing so, the United States has incorrectly relied on the Appellate Body report in the *Canada − Autos*, to assert that since the import duty exemptions are only available to units that export their entire production, the scheme is export contingent, and therefore a prohibited subsidy in violation of Art. 3.1(a) of the SCM Agreement.

32. India submits that the United States has misunderstood the object and functioning of the EOU Scheme. The EOU scheme presents a system through which India streamlines its domestic administrative and development-oriented policy objectives. The scheme is to be read in the context of the object of the scheme, which is to boost domestic manufacturing. The exclusive designation of units and the requirement to export their entire production under the EOU scheme creates, in a sense, a tax-free zone, which makes certain that the duty exemptions fall within the legal mandate of Footnote 1, Annex I and Annex II of the SCM Agreement, and are not excess in nature. Consequently, the EOU scheme is akin to a pre-authorized duty drawback or remission scheme, rather than an export subsidy.

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[12] MARK E. VILLAGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF THE TREATIES, 446, Internal Footnote "See the statements by Waddock in the ILC, YBILC 1966 ½ 206, para. 41, and at 270, para. 35."

[13] Appellate Body Report, *EC − Chicken Cuts,* para. 283.

[14] Negotiating Group on Subsidies and Countervailing Measures, "Draft Text by the Chairman," MTN.GNG/NG10/23, 7 November 1990, p. 25 (Ex. IN-04)

[15] Negotiating Group on Subsidies and Countervailing Measures, "Draft Text by the Chairman," MTN.GNG/NG10/23, 7 November 1990, p. 25 (Ex. IN-04).

[16] United States Second Written Submission, para. 78.

33. The incentive offered under the EOU scheme is an exemption on the payment of customs duties and additional duty, if any, on the import and/or procurement of all goods, required for manufacturing within the EOU unit. These exemptions are limited to customs and excise duties on those goods imported or procured for use as inputs in the manufacturing activity of the EOU Unit, i.e. "approved activity".[17] The only activity permitted by the Unit is manufacturing activity of products to be exported, and consequently, that the inputs imported or procured by the Unit are necessarily *only* used in the production of exported products. Therefore, the EOU Scheme can only be characterized as a pre-authorized duty drawback or remission scheme.

34. The scope and meaning of Footnote 1 has been clarified by the Appellate Body in *EU − PET (Pakistan)*, where it held that Footnote 1 deals with two situations: a) the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, and b) the remission of such duties or taxes in amounts not in excess of those which have accrued. Accordingly, neither of these two situations fall within the meaning of a 'subsidy' as defined by "government revenue foregone" in Art. 1.1(a)(1)(ii).[18] It follows that only those remissions of duties and taxes that are in excess of those which have accrued are deemed to be a subsidy.

35. India reiterates that these duty exemptions fall within the scope of Footnote 1 of the SCM Agreement, and are therefore not deemed to be a subsidy within the meaning of Art. 1 of the SCM Agreement. Compliance with Footnote 1 is further established through the provision in the scheme that regulates sales of goods by the Unit to the DTA. While the Unit must export its entire production − and this obligation must be met so as to ensure that the inputs being imported are used *only* in the production of exports − certain circumstances of sales to the DTA are permitted.[19] However, such DTA sales are limited in nature,[20] require pre-authorization,[21] and further, are subject to payment of duties on DTA sales as well as reversal of customs duties saved on imported raw materials.[22] The reversal of import duties demonstrates that where Units sell to the DTA, the custom duty exemption becomes inapplicable to them. Further, these duties are aggregated on the basis of Standard Input Output Norm (SION) norms or other norms established by the Norms Committee, to ensure that the amounts to be reversed are the amounts that were actually due.[23] Both of these provisions ensure that the exemption of duties is commensurate to the duties, and their quantities, applicable to the inputs consumed in the production of the exported product.

36. Further, the United States argues that the EOU scheme conditions benefits on export performance.[24] However, in doing so, the United States hinges its argument on export performance as opposed to consumption of inputs. The latter is the fulcrum of the issue, given that the EOU scheme is a duty remission.

37. The United States also argues that the duty exemptions are only available insofar as Units obtain and maintain a positive NFE, which is determined by subtracting the total value of imports from the total value of exports.[25] The United States wrongly alleges that the structure of the NFE requirement is sufficient evidence to establish export contingency.[26] The NFE equation is not indicative of export contingency but rather a function of basic business prudence. It merely requires that enterprises act prudently so as not to operate at a loss, and is a tool to ensure compliance with the Remission Principle.

[17] Foreign Trade Policy, 6.01(d)(i)(ii), (Ex. US-03).
[18] Appellate Body Report, *EU − PET (Pakistan)*, para. 5.97.
[19] Foreign Trade Policy, 6.00(a) (Ex. US-03).
[20] Foreign Trade Policy, 6.08 (Ex. US-03).
[21] Foreign Trade Policy, 6.08 and 6.09 (Ex. US-03); Aayat and Niryat Forms, ANF-6C (Ex. US-06).
[22] Foreign Trade Policy, 6.08(a)(v) (Ex. US-03).

"The DTA sale by EOU/EHTP/STP/BTP units shall be subject to payment of excise duty, if applicable and/or payment of GST and compensation cess along with reversal of duties of Custom leviable under First Schedule to the Customs Tariff Act, 1975 availed as exemption, if any on the inputs utilized for the purpose of manufacturing of such finished goods (including by-products, rejects, waste and scraps arising in the course of production, manufacture, processing or packaging of such goods). This reversal of Customs Duty would be as per prevailing SION norms or norms fixed by Norms Committee (where no SION norms are fixed)."

[23] Foreign Trade Policy, 6.08(a)(v) (Ex. US-03).
[24] United States Second Written Submission, para. 78.
[25] United States Second Written Submission, para. 100.
[26] United States Second Written Submission, para. 78.

38. India also notes the Panel's ruling in *Canada – Aircraft Credits and Guarantees* where it was held that the existence of an export subsidy first requires existence of a subsidy within the meaning of Art. 1 of the SCM Agreement. Since the EOU scheme falls within Footnote 1 of the SCM Agreement, it is deemed not to be a subsidy, and accordingly, the analysis of export contingency is not relevant.[27]

39. The United States has failed to establish that India grants or maintains prohibited export subsidies through the EOU and Sector Specific Schemes. India has demonstrated that the measures under the EOU and Sector Specific Schemes are not subsidies as per Art. 1 of the SCM Agreement, and are not contingent on export performance as per Art. 3.1(a) of the SCM Agreement. Therefore, it is submitted that the EOU and Sector Specific Schemes are not prohibited export subsidies as per Art. 3.1(a) and 3.2 of the SCM Agreement.

B. Merchandise Exports from India Scheme

40. The United States argues that through the MEIS, India grants a subsidy within the meaning of Art. 1.1(a) of the SCM Agreement which is contingent upon export performance, and is in violation of Art. 3.1(a) of the SCM Agreement. The United States mischaracterizes MEIS as a direct transfer of funds under Art. 1.1(a)(1)(i). The United States argues that MEIS scrips are financial claims available to participants, who can use them to pay for customs and excise duties, fees and that these scrips can be traded for cash.

41. India submits that MEIS is consistent with Art. 3.1(a) and 3.2 of the SCM Agreement since it is not a subsidy. India asserts that the correct characterization is that MEIS is a remission of indirect taxes under Footnote 1 of the SCM Agreement. MEIS refunds indirect taxes already paid by exporters on production, distribution of exported products and on inputs consumed in the production of the exported product. Instead of directly granting a monetary refund of such taxes, the Government of India indirectly refunds such taxes paid as MEIS Scrips. When the scrips are used to pay for basic customs duty and additional customs duty on import of inputs, central excise duty on domestically procured inputs and/or custom duties in case of a shortfall in export obligation ("Specified Uses"), the refund of the indirect taxes paid earlier, is actually received by the original recipient/exporter.
MEIS is not a direct transfer of funds:

42. India has advanced the following three-pronged argument, in support of its submission that MEIS is not a direct transfer of funds as per Art. 1.1(a)(1)(i). Firstly, MEIS is not a direct transfer of funds because it is not similar to a loan, grant or equity infusion. Secondly, the scope of direct transfer of funds is limited by Art. 1.1(a)(1)(ii). Thirdly, MEIS scrips are not financial claims available to the recipient. Instead, India submits that MEIS is a remission of indirect taxes already paid.
MEIS is a remission of indirect taxes, falling within Footnote 1:

43. Footnote 1 of the SCM Agreement attaches itself to Art. 1.1(a)(1)(ii) which is financial contribution in the form of government revenue foregone. By way of the deeming fiction created by Footnote 1, the remission of duties or taxes in amounts not in excess of those which have accrued, is deemed to not be a subsidy. Annex I(g), (h) and (i) complement this part of Footnote 1. The remissions under these illustrations are "subsidies" only if they are excess. Annex I(g) identifies the exemption or remission of indirect taxes in respect of the production and distribution of exported products when it is in excess, as an export subsidy. Annex I(h) also identifies indirect tax rebate schemes, which result in exemption, remission or deferral of prior-stage cumulative indirect taxes on inputs that are consumed in the production of the exported product in excess of such tax actually levied, as a form of export subsidy.

44. India submits that MEIS is akin to the transactions referred to in Annex I (g) and (h) and the remission is not in excess of the taxes accrued on the final exported product. MEIS offers a refund of indirect taxes paid by the exporter in respect of the production and distribution of the exported products such as indirect taxes paid on fuel and electricity. Further, MEIS is an indirect tax rebate scheme since it also offers a refund of prior-stage cumulative indirect taxes paid on inputs consumed in the production of exported products, such as indirect tax paid on fuel and other taxes and duties which are outside the ambit of Goods and Services Tax. Notably, remission of taxes includes the refund of taxes as per Footnote 58 appended to Annex I.

[27] India First Written Submission, para. 318 citing Panel Report, *Canada – Aircraft Credits and Guarantees,* para. 7.16.

45. The value of MEIS Scrips is calculated by multiplying the rate with the FOB value of export of the product, which consists of embedded indirect taxes. Since it is extremely cumbersome to calculate the precise amount of embedded taxes in the exported product, given India's complex tax regime, a refund which is approximate but less than the actual levy of duties and taxes, is provided to the exporter.[28]

46. India expressed its view that neither the 'uses' nor the 'value' of MEIS scrips, as contended by the United States, show that MEIS is a direct transfer of funds. The value and nature of the scrip is agnostic to the Specified Uses. For example, if the exporter uses a scrip to pay basic customs duty, he is using his indirect tax refund to pay for the basic customs duty to the extent of the value of the scrip. The 'value' remains the quantum of indirect tax refund offered by the government and the 'nature' remains a form of government revenue foregone as permitted by the Footnote 1 of the SCM Agreement.

47. The United States argues that because MEIS scrips are freely transferable and can be exchanged for cash, they constitute a direct transfer of funds. India clarifies that the policy doesn't provide for sale of scrip for cash and although scrips can be freely transferred to third parties without further permission from the Government, the MEIS scrips can still only be used for the limited Specified Uses enlisted in Paragraph 3.02 of the Foreign Trade Policy. The value of the scrip still corresponds to the remission of embedded indirect taxes already paid, qualifying as a transaction falling under Footnote 1 of the SCM Agreement.[29]

48. India has therefore demonstrated that the transactions of payment of indirect taxes which are embedded in the cost of exported product, subsequent issuance of MEIS Scrips against such exported products and utilization of the MEIS scrips for payment of Specified Uses, as a whole, amount to remission of indirect taxes as covered within Footnote 1 of the SCM Agreement.

49. Alternatively, India argues that scrips act as credit notes, which can be used for payment of duties (basic customs duty, additional customs duty) on imports, which also results only in remission of indirect taxes already paid. Notably, while maintaining that MEIS could be best characterized as a direct transfer of funds, in responding to the Panel's question, the United States has also acceded that MEIS could be characterized as government revenue foregone under Art. 1.1(a)(1)(ii) when the scrip is redeemed.[30]

50. India submits that MEIS is a remission of indirect taxes falling under Footnote 1 of the SCM Agreement and is therefore deemed to not be a subsidy. Since MEIS is not a subsidy, it cannot be a prohibited subsidy as per Art. 3 of the SCM Agreement. This negates the need for a benefit analysis. Hence, MEIS is not a prohibitive subsidy and is consistent India's obligation under Art. 3.1(a) and 3.2 of the SCM Agreement.

C. Export Promotion and Capital Goods Scheme

51. The EPCG scheme grants duty and tax exemptions on the import of capital goods used in the pre-production, production, and post-production of exported goods.[31] These exemptions are on indirect taxes, specifically customs duties, Integrated Goods and Services Tax, and Compensation Cess on capital goods used for pre-production, production, and post-production. India submits that such exemptions qualify under Footnote 1 of the SCM Agreement making the EPCG scheme a duty drawback, read with Annex I(g) and (i).

52. Analogous to other pre-authorized duty drawback schemes, the EPCG Scheme involves a detailed authorization process in order to ensure that the duty and tax exemptions are offered only to exporting entities and within the quantum of consumption of those imported inputs. An enterprise must apply for grant of authorization to the concerned Regional Authority, along with the submission of a nexus certificate from a Chartered Engineer and a Chartered Accountant, both of whom guarantee that the import of capital goods shall be used in the pre-production/production/post-production stage for manufacture of the export products.[32] India asserts that the requirement to use

[28] India's Responses to Written Questions Posed by the Panel, Question 60.
[29] India's Responses to Written Questions Posed by the Panel, Question 56.
[30] United States Responses to Written Questions Posed by the Panel, Questions 54 and 55.
[31] India First Written Submission, para. 296 citing Foreign Trade Policy 5.01(a) (Ex. US-03).
[32] Handbook of Procedures, 5.02 (Ex. US-05); Appendices and Aayat Niryat Forms, "Guidelines for Applicants," ANF 5B (Ex. US-06).

the imported capital goods only in the production of exported products is verified during the application process.

53. The United States argues that the EPCG scheme does not qualify as a duty drawback because capital goods are not inputs within the meaning of Footnote 61 and therefore, do not fall within the meaning of Annex I(g) and (i).[33] However, India disagrees. Capital goods necessarily falls within the ambit of Annex I(g) and (i). These goods are critical to the production of exported products, particularly in the case of developing countries.[34] This view has also been advocated by developing country Members at various occasions.[35]

54. India submits that the list provided in Footnote 61 is indicative, and not exhaustive. It includes inputs that are physically incorporated as well as catalysts, which undergo no permanent change, but remain inputs within the meaning of Footnote 61. Notably, even fuel is not "physically incorporated" but rather used in the process of manufacturing. Further, a duty drawback is meant to offset the cost impact of import duties on inputs incorporated in exported products. Given that capital goods necessarily contribute to the final cost of the exported product, India is of the view that capital goods fall within the meaning of inputs consumed in Footnote 61.

55. Considering that the EPCG scheme falls within the scope of Footnote 1 of the SCM Agreement, India submits since no subsidy is deemed to be found in the case of duty drawbacks, it follows that no benefit can be conferred. In the present case, the United States has failed to establish that the measures under the EPCG Scheme are "subsidies" within the meaning of Art. 1 of the SCM Agreement, or a prohibited export subsidy as per Art. 3.1(a) and 3.2 of the SCM Agreement.

D. The Special Economic Zones Scheme

56. The United States alleges that the SEZ Scheme is a prohibited export subsidy as per Art. 3 of the SCM Agreement. The United States argues that the alleged subsidies under the SEZ Scheme are export contingent "in law", and in the alternative argues that that they are export contingent "in fact". However, United States' arguments are coloured by their misunderstanding of the SEZ Scheme, and the United States fails to establish how the alleged subsidies under the SEZ Scheme meet the threshold laid down for export contingent "in law" or "in fact".

57. India first addresses the mischaracterisation of its domestic policy by the United States.The economic measures in the SEZ Scheme are designed to equip the SEZ Units with increased production capacity, resulting in additional economic activity, promotion of investments, and creation of employment opportunities. By merely reproducing provisions that refer to "export promotion",[36] the United States fails to understand the context in which the phrase is used, and in effect distorts the interpretation of the policy objective of the SEZ Scheme. The promotion of exports is merely one of the many indicators employed by the SEZ Scheme to assess the achievement of its overall objective of increased economic activity. This is materially different from the claim made by the United States that the purpose of the SEZ Scheme is to result in the promotion of exports. This distinction ensures that a condition of export performance is not imposed or mandated on SEZ Units, and the emphasis, instead, is on achieving the overall objective of the Scheme.

58. There are three substantive elements that are required to satisfy the threshold for export contingency under Art. 3.1(a) of the SCM Agreement.[37] The United States also implicitly recognises this standard.[38] First is "*granting* of a subsidy", i.e. whether the authority that is responsible for *granting* the subsidy takes into account the factor of export performance. Second, the *conditionality* of the subsidy, which requires that the subsidy be *dependent* on export performance of the recipient. Third, the subsidy is tied to *export performance* as understood in the SCM Agreement, i.e. the sale

[33] United States Second Written Submission, para. 119.

[34] See Committee on Subsidies and Countervailing Measures, "Chairman's Report on the Implementation-Related Issues referred to the Committee on Subsidies and Countervailing Measures in the 15 December 2000 Decision of the General Council," G/SCM/34, 3 August 2001.

[35] General Council, "Implementation-Related Issues and Concerns- Decision of 15 December 2000", WT/L/384, 19 December 2000, para. 6.3 (Ex.-IN-09).

[36] United States First Written Submission para 80 and 83; United States Second Written Submission para. 134.

[37] Appellate Body Report, *Canada – Aircraft*, paras. 169-172; Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.678.

[38] United States Second Written Submissions, para. 138.

of goods beyond the territorial jurisdiction of the Member state. However, the United States fails to recognise these distinct substantive elements, and consequently fails to establish how the SEZ Scheme falls within the scope of prohibited export subsidies.

The Alleged Subsidies under the SEZ Scheme are not export contingent "in law"

59. In order to establish *de jure* export contingency, the United States erroneously relies on the application process for SEZ Units, the process of review and approval of the applications, and the monitoring process of the SEZ Units.[39] However, in elaborating each of these procedures, the United States has failed to reproduce the entirety of the concerned provisions and, consequently merely creates an illusion of export contingency.

60. In determining whether a particular measure satisfies the threshold for *de jure* export contingency, the Appellate Body in *Canada Autos* has invoked the "but for" test.[40] The burden on the complainant is to establish the *de jure* export contingency, through the words of the measures themselves, that the alleged subsidies under the SEZ Scheme are not available to an SEZ Unit *but for* the exports undertaken by it.

61. The United States primarily relies on the positive NFE requirement provided in the review of applications and approval process, and the monitoring data collected from the SEZ Units.[41] In effect, United States argues that an SEZ Unit would not satisfy the positive NFE requirement unless it engages in export of goods. India respectfully disagrees, and submits that the United States' application of the "but for" test is over-simplistic. A unit in SEZ may achieve positive NFE without exporting to other countries.

62. The positive NFE requirement is one of the tools employed by the SEZ Scheme to ensure that the SEZ Units are effectively utilizing the resources at their disposal and efficiently contributing to production activity. The formula for calculation of the NFE earnings of an SEZ Unit is provided in Rule 53 of the SEZ Rules, and reads "A − B > 0". "A" has been defined as the sum of the FOB value of exports, *and* the value of the products in the situations listed therein, while "B" has been defined as the sum of the CIF value of all inputs listed therein. The emphasis in the present case is on two factors: the use of the term "exports" in "A"; and the additional factors taken into account in calculating the value of "A".

63. India submits that the definition of "exports" under the SEZ Scheme is different from the meaning of exports as envisaged under the SCM Agreement. Exports under the SCM Agreement is physical export of goods outside the territory of the member state. Whereas, in the SEZ Scheme, exports includes the supply of goods/services to another member state as well as the Indian territory, including the supply of goods/services from one SEZ Unit to another SEZ Unit or Developer within the same or different SEZ.[42] Consequently, the condition of "export" under the SEZ Scheme is wider than "export performance" under Art. 3.1(a) of the SCM Agreement.[43] Accordingly, in order to establish that the SEZ Scheme is "export contingent", a higher threshold (than mere reference to the term "exports") would have to be shown to satisfy the "but for" test. This threshold would have to specifically account *only* for exports outside the territory of India by a Unit situated in the SEZ, which is a free trade zone.

64. The second factor concerns the equation for calculating the NFE requirement by the SEZ Units. The United States asserts that "an enterprise *must* export to meet these requirements".[44] However, the United States has abandoned this position altogether and recognized that a positive NFE requirement can be achieved by an SEZ Unit even without engaging in exports as understood by the SCM Agreement.[45] This recognizes that a positive NFE balance can be achieved by enterprises even without engaging in any physical exports outside the territory of India. Therefore, this does not lend support to the claims raised by the United States that the NFE requirement satisfies the "but for" test for export contingency.

[39] United States First Written Submission para. 89 − 102.
[40] Appellate Body Report, *Canada − Autos*, para. 104.
[41] United States Second Written Submission para.147 - 150.
[42] Section 2(m) of the Special Economic Zones Act, 2005.
[43] India First Written Submission para. 345 − 347.
[44] United States First Written Submission para. 124.
[45] United States Second Written Submission, para. 159.

65. Furthermore, India humbly submits that the United States has failed to put forth sufficient evidence to show how the words/legal text of the SEZ Scheme, either explicitly or by necessary implication, results in export contingency. In responding to the questions posed by the Panel, the United States has relied on the Report of the Comptroller and Auditor General of India (CAG) on the Performance of Special Economic Zones, for the year 2012 - 2013.[46] It is pertinent to note that instead of lending support to the United States' claim, the Report affirms that that the SEZ Scheme does not require the SEZ Units to undertake physical exports in order to satisfy the positive NFE requirement.

The Alleged Subsidies under the SEZ Scheme are not export contingent "in fact"

66. The United States alternatively seeks to establish that the alleged subsidies under the SEZ Scheme are export contingent in fact. However, in doing so, the United States has expanded the scope of Art. 3.1(a) and Footnote 4 of the SCM Agreement. The United States argues that "*(a) subsidy granted by a Member with the expectation of exportation meets the standard of contingent "in fact*"".[47] India submits that such a standard renders Footnote 4 of the SCM Agreement ineffective. The appropriate standard is whether there exists a relationship of conditionality or dependence between the granting of the subsidy and the actual or anticipated export. This is distinct from the United States' argument which is satisfied by ascertaining "expectations" of exports on the part of the granting authority. The Appellate Body in *EC- Large Civil Aircrafts* was mindful of this distinction, and limited the understanding of export contingency in fact to the former.[48]

67. It is necessary to reiterate that although the legal standard for *de facto* and *de jure* is the same,[49] the evidence required to establish *de facto* export contingency is necessarily different.

68. The evidence produced by the United States fails to meet its burden to establish contingency of export performance. The United States has erred in relying unofficial statements available on various websites regarding the SEZ Scheme. The United States themselves have relied on the Report of the Appellate Body in *EC- Large Civil Aircrafts*[50] which categorically warns against placing undue reliance on such statements,[51] and lends little support as to the evidentiary value of such statements.

69. Further, the United States attempts to revive their arguments relating to the positive NFE requirement, and claims that the requirement incentivises an SEZ Unit to make export-market sales over domestic market sales.[52] However, there is no distinction made between SEZ Units who achieve the positive NFE requirement by DTA sales and those that achieve them by exports as understood under the SCM Agreement, so as to incentivise one over the other.

70. Therefore, India submits that the United States has not provided adequate evidence to supplement its claim that the alleged subsidies under the SEZ Scheme are export contingent *in law* or *in fact*. Therefore, it is submitted that the SEZ Scheme is not a prohibited export subsidy, either in law or in fact, as per Art. 3.1(a) and 3.2 of the SCM Agreement.

Given that the SEZ Scheme is not export contingent, it is not necessary to make any additional findings

71. The United States has also argued in length on how the economic measures under the SEZ Scheme meet the threshold of "subsidies" under Art. 1 of the SCM Agreement.[53] However, United States has failed to establish that such alleged subsidies are export contingent "in law" or "in fact", India submits that the Panel may not address these arguments at this stage. If the present dispute can be resolved by determining the arguments raised by the United States regarding export

[46] Report of the Comptroller and Auditor General of India "Performance of Special Economic Zones for the Year 2012-13" (Ex. US- 67).

[47] United States First Written Submission, para 130.

[48] Appellate Body Report, *EC - Large Civil Aircraft*, paras. 1049 and 1050; *See also* Appellate Body Report, *Canada – Aircraft*, para. 173. To recall, the second sentence provides that "*{t}he mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of {Article 3.1 of the SCM Agreement}".*

[49] Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.365; Panel Report, *US – FSC (Article 21.5 – EC),* paras. 8.54-8.56.

[50] United States Second Written Submission, para. 155, fn. 198.

[51] Appellate Body Report, *EC- Large Civil Aircraft,* para. 1051.

[52] United States First Written Submission para. 136.

[53] United States First Written Submission para. 106 - 120.

contingency, it is submitted that the determination on whether the measures are subsidies as per Art. 1 of the SCM Agreement need not be undertaken.

E. Duty Free Imports for Exporters Scheme

72. The DFIE is a grouping of individual duty stipulations provided in Customs Notification 50/2017, which is a government regulation that identifies the range of goods that India imports and specifies the commensurate applied duty rate. DFIE authorizes import duty exemptions on specific inputs being imported for use in the manufacture of an exported product. The DFIE operates in the manner of the pre-authorized duty drawback model discussed earlier, in that it only provides this duty exemption to eligible enterprises, subject to strict scrutiny by concerned authorities.

73. In order to import inputs, the eligible exporters must, at the time of import, apply for an Import Certificate, that stipulates the quantum and value of the inputs sought to be imported.[54] In this manner, the DFIE is two-tiered −as a first step it mandates the pre-authorization of eligible enterprises, and subsequently also requires issuance of a certificate each time an eligible exporter seeks to import inputs. The scheme incorporates scrutiny at two different points, ensuring that only enterprises that export their products are seeking exemption under the scheme,[55] and that the duty exemption is offered only on a declared quantum of imported inputs, as required in the manufacture of exports. The Export Promotion Councils ("EPC") are responsible for the administration of the application process to identify and designate the beneficiaries to the scheme. The streamlined method through which the EPC authorizes the exporter as eligible is necessary to ensure that only the duty-free exemption is consistent with Footnote 1 of the SCM Agreement. For example, in the case of leather garment exporters, enterprises are required to submit applications to the Leather EPC.[56] Leather garment exporters that qualify are issued an Export Performance Certificate which they must produce in order to apply for an Import Certificate needed to import inputs on a duty-free basis.[57] Therefore, in its essence, this form of a pre-authorized duty drawback/ substitution drawback falls within Footnote 1 of the SCM Agreement.

74. The United States argues that the DFIE is not a duty drawback within the meaning of Footnote 1 and Annex I(i) of the SCM Agreement because the scheme allegedly grants import duty exemption for past export performance.[58] However, such an approach adopts an export contingency argument and tries to establish it as financial contribution. In any case, the allegation is a misinterpretation of the legislation, as the exemptions provided under the scheme do not hinge on export performance. The scheme merely aggregates the value of the duty exemption on the basis of past export values and volume.

75. Having established that the DFIE falls within the scope of Footnote 1 of the SCM Agreement, India submits that DFIE is not a subsidy, it follows that no benefit can be conferred. The United States has failed to establish that the measures under the DFIE are "subsidies" within the meaning of Art. 1 of the SCM Agreement, and has failed to prove that the DFIE is an export subsidy as per Art. 3.1(a) and 3.2 of the SCM Agreement.

V. CONCLUSION

76. For the reasons stated above, India requests the Panel to conclude India continues to benefit from the 8-year phase out period under Art. 27 of the SCM Agreement, and none of the challenged schemes are in violation of Art. 3.1(a) and Art. 3.2 of the SCM Agreement.

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[54] Council for Leather Exporters Guidelines, p. 6-7 (Ex. IN-11).
[55] Council for Leather Exporters Guidelines p. 7 (Ex. IN-11).
[56] Council for Leather Exporters Guidelines, Annexure-I (Ex. IN-11).
[57] Council for Leather Exporters Guidelines, p. 7 (Ex. IN-11).
[58] United States Second Written Submission, para. 166.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. Introduction

1. Brazil provides the following executive summary of its participation during the panel proceedings in this dispute.

II. The proper interpretation of Article 27 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)

2. Article 27 of the SCM Agreement contains rules on special and differential treatment of developing country Members. In particular, Article 27.2, in conjunction with Annex VII of the SCM Agreement, regulates the applicability of the prohibition of subsidies contingent on export performance contained in Article 3.1(a) of the SCM Agreement to developing countries.

3. In Brazil's view, the ordinary meaning of the terms contained in Article 27.2(b) leaves no margin for doubt when it comes to establishing the time period given to developing country Members: "eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4". Brazil thus finds that the proper interpretation of Annex VII in conjunction with Article 27.2(b) of the SCM Agreement is that once the GDP per capita of a developing country Member listed in Annex VII reaches US$1,000.00 it immediately becomes subject to Article 27.2(b).

4. Brazil notes that consideration of the objective and purpose Article 27.2(b) of the SCM Agreement also confirms the interpretation yielded by the ordinary meaning of the terms used therein. Brazil acknowledges that the object and purpose of Article 27.2 of the SCM Agreement is to provide developing country Members with some flexibility in terms of time to adjust their subsidy policies to the prohibition of export contingent subsidies. Brazil also acknowledges that the objective and purpose of Annex VII is to provide additional flexibility for certain categories of Members.

5. In this context, a harmonious interpretation that gives meaning to all provisions of Article 27 and of Annex VII of the SCM Agreement leads to the following three conclusions. First, developing country Members in general enjoyed a flexibility adjustment period of eight years from the date of entry into force of the WTO Agreement, in accordance with Article 27.2(b). Second, least-developed countries were granted a flexibility that is open-ended, since, in accordance with literal (a) of Annex VII, the provisions of paragraph 1(a) of Article 3 of the SCM Agreement do not apply to WTO Members designated as LDCs by the United Nations. Third, Annex VII also contains another category of Members that lies between the previous two categories in terms of added flexibility – those listed under literal (b).

6. Consideration of the remainder of Article 27 as immediate context confirms the interpretation described above. Article 27.4 serves to limit, not expand the flexibility granted by Article 27.2. It provides that developing country Members shall phase out their export subsidies, preferably in a progressive manner, during the eight-year period established in Article 27.2. It is noteworthy that the lack of a starting point to the eight-year period mentioned in the first sentence of Article 27.4 is, in Brazil's view, simply a consequence of the fact that said provision is referring to the specific time-period stipulated in Article 27.2. This Article, in turn, clearly states the starting point as being the date of entry into force of the WTO Agreement. Article 27.5 also sets limits rather than expands the flexibilities granted by Article 27.2. It operates to reduce the flexibility of Members regarding products in which they have achieved export competitiveness status (as defined in Article 27.6 of the SCM Agreement). It is only applicable while Member countries are still excluded from the application of Article 3.1(a) by virtue of Article 27.2, not after.

III. The applicability of Article 4 of the SCM Agreement in disputes involving developing country members

7. In Brazil's view, the moment and the manner of assessing whether Article 4 of the SCM Agreement is applicable in a dispute involving developing country Members that invoke Article 27.7 of the same Agreement is an issue to be dealt with on a case-by-case basis.

8. Brazil notes that Article 4 of the SCM Agreement establishes both substantive and procedural obligations. The latter are applicable from the consultations request up to the implementation of the recommendations and rulings of the Dispute Settlement Body (DSB). In this sense, some provisions, such as the establishment of a panel at the first DSB meeting (Article 4.4) will apply at the very beginning of proceedings; other provisions, such as the removal of the inconsistent subsidies "without delay" under Article 4.7, will only give rise to obligations if, after the end of panel proceedings (and a possible appeal), a finding of inconsistency is issued.

9. Because obligations have specific requirements and will apply at different moments of the dispute, the relationship between Article 27.7 and Article 4 will likely come into play multiple times at different stages during the proceedings. Brazil also notes, in this regard, that procedural rules contained in Article 4 of the SCM Agreement are likely to come into play earlier than more substantive obligations.

10. At the same time, the specific characteristics of each dispute and the context in which Article 27.7 claims are made can be relevant to determining the appropriate moment at which to assess the relationship between Article 27 and Article 4 of the SCM Agreement. In this context, Brazil's position is that a final determination regarding the applicability of Article 27.7 of the SCM Agreement, which, in some cases, will only be made at a later stage of the dispute (possibly even on appeal) cannot always be a necessary condition for an assessment of whether provisions of Article 4 of the SCM Agreement of a more procedural nature should apply.

IV. The decision by the Panel not to have a Second Substantive Meeting with the Parties

11. As a third party, Brazil did not take part in the organizational meetings, but it would appear from India's First Written Submission that India did not agree with the decision to conduct only one substantive meeting between the Parties and the Panel[1]. In this regard, Brazil's position is that while foregoing a second substantive meeting with the Parties may be admissible in certain circumstances, agreement between the Parties is an important element to consider when pondering deviation from the procedures established in Appendix 3, especially in the case of disputes involving developing country Members.

V. Statement of Available Evidence

12. In response to questions posed by the Panel, Brazil argued that, in its view, Article 4.2 of the SCM Agreement and Article 4.4 of the DSU impose distinct and cumulative obligations on complainants pursuing claims of prohibited subsidies under Article 3 of the SCM Agreement. While Article 4.4 of the DSU requires Members to identify, in their consultation requests, "the measures at issue" and give an "indication of the legal basis for the complaint", Article 4.2 of the SCM Agreement requires Members pursuing claims of prohibited subsidies to include, in their consultations request, a "statement of available evidence". Because there is no conflict between the provisions of Article 4.4 of the DSU and Article 4.2 of the SCM Agreement, it is clear to Brazil that both must be applied simultaneously.

13. However, Brazil believes that the fact that Article 4.2 of the SCM Agreement establishes a distinct and additional requirement for consultations requests involving claims of prohibited subsidies does not mean that the first proposition presented by the Panel must necessarily be incorrect. It is not inconceivable, in Brazil's view, that a legal instrument, and therefore, its mention in a consultations request, may at once achieve the objectives of both Article 4.4 of the DSU and Article 4.2 of the SCM Agreement. It may serve to identify a measure of the responding Member and as evidence that a subsidy is being granted or maintained by the respondent that is contingent either on export performance or on the use of domestic over imported goods. Brazil notes, in this

[1] India, First Written Submission, para. 105-116.

context, that in disputes involving *de jure* claims of prohibited subsidies, it is particularly likely, that mention of legal instruments, norms and regulations may suffice to, simultaneously, identify the measure at issue for the purposes of Article 4.4 of the DSU and serve as evidence of the existence and nature of the subsidy in question within the meaning of Article 4.2 of the SCM Agreement.

14. Another issue is whether the use of the adjective "available" in Article 4.2 of the SCM Agreement means that the complainant must present all evidence available to it. In Brazil's view, what the obligation in Article 4.2 entails is a duty to provide, in good faith, a statement of evidence which a Party has available to it with regard to the existence and nature of the subsidy in question. The purpose of this statement is, to "provide a responding Member with a better understanding of the matter in dispute and serve as the basis for consultations".

VI. Financial contribution

15. In Brazil's view, a measure that contains some components that are inconsistent with the Covered Agreements is inconsistent only to the extent of those components. Therefore, if a measure is found inconsistent because one of its aspects cannot benefit from the shelter of footnote 1 of the SCM Agreement, the respondent may achieve compliance by amending or substituting the challenged measure in a manner that eliminates that inconsistency with the Covered Agreements.

16. When a financial contribution takes the form of government revenue otherwise due that is foregone or not collected, it is Brazil's view that there is a requirement to conduct a "three-step test" which includes an examination of the structure of the domestic tax system and its organizing principles, in order to ascertain whether a financial contribution was granted. Moreover, Brazil does not consider that the existence of a ceiling for the tax exemptions or remissions granted by a hypothetical measure is sufficient to establish that such an scheme no longer falls under footnote 1 of the SCM Agreement by virtue of it not providing exemptions or remissions for the specified inputs "as a whole". Whether a scheme actually results in remissions or exemptions which are in "excess of" and therefore inconsistent with the SCM Agreement is a factual matter to be addressed on a case-by-case basis.

VII. Exceptions, derogations and burden of proof

17. In Brazil's view, when dealing with exceptions, Members, panels and the Appellate Body are facing a potential justification for what would otherwise be a measure that is inconsistent with the Covered Agreements. Exceptions, therefore, result from the acknowledgement by Members that certain circumstances require legitimate deviation from the established norms. Derogations, however, are not justifications. They instead act to limit the scope of application of other provisions and, in so doing, help to clarify the boundaries of Members' rights and obligations under the Covered Agreements. The distinction is significant, among other things, for the determination of the proper order of analysis in specific disputes.

18. Brazil notes that while characterizing a provision as an exception has a clear consequence for the determination of the burden of proof, the implications of the characterization of a provision as a derogation are less clear. In any case, in Brazil's view, the rules normally applicable to the determination of the burden of proof under the WTO dispute settlement system are equally applicable in relation to provisions containing derogation. Moreover, a proper determination of the burden of proof regarding derogations may require an examination on a case-by-case basis.

19. That notwithstanding and regardless of the characterization of a provision as a derogation or as an exception, Brazil notes that, in previous disputes, panels have placed on the respondent the burden of proof regarding provisions which contained language that was very similar to the one adopted in footnote 1 of the SCM Agreement. For instance, in *China − Raw Materials*, the Panel concluded that: "the burden is on the respondent (China in this case) to demonstrate that the conditions of Article XI:2(a) are met in order to demonstrate that no inconsistency arises under Article XI:1".[2]

20. Language contained in the second paragraph of item (k) of Annex I to the SCM Agreement resembles that which is found in footnote 1 of the SCM Agreement. The second paragraph of item (k) contains the following sentence: "an export credit practice which is in conformity with those

[2] Panel Report − *China − Raw Materials* − para 7.213.

provisions shall not be considered an export subsidy prohibited by this Agreement.[3]" This is similar to the formula "shall not be deemed to be" used in footnote 1. Brazil notes that the panel in *Brazil – Aircraft (21.5 – Canada II)*[4] also placed on the respondent the burden of proof regarding the second paragraph of item (k) of the SCM Agreement.

21. Finally, Brazil also notes that none of the parties in this dispute made specific claims regarding the question of burden of proof in footnote 1. Therefore, in Brazil's view, this is not an issue before the Panel.

[3] Emphasis added.
[4] Panel Report – *Brazil – Aircraft (21.5 Canada II)*, paras. 5.61-5.63.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. ARTICLE 27.2 SPECIAL AND DIFFERENTIAL TREATMENT

A. Article 27.2 of the SCM Agreement

1. Article 27.2 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) provides for special and differential treatment (S&DT) applicable to certain developing country Members, which excludes them from the application of the Article 3.1(a) prohibition for export subsidies for a certain period of time. This S&DT applies to three categories of developing countries, under different conditions: (1) the least developed countries referred to in Annex VII(a); (2) the developing countries listed in Annex VII(b); and (3) the other developing countries not referred to in Annex VII.

2. Article 27.2(a) exempts the developing countries listed in Annex VII(b), including India, from the application of Article 3.1(a) until their GNP per capita reaches $1,000. When this condition is met, these developing countries become subject to the provisions applicable to other developing countries according to 27.2(b).

3. Pursuant to Article 27.2(b), the Article 3.1(a) prohibition does not apply to "other developing countries for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4"[1].

4. In Canada's view, the ordinary meaning of Article 27.2(b) is clear that the period of eight years applies from "the date of entry into force of the WTO Agreement". Furthermore, the "date of entry into force of the WTO Agreement" is a fixed date, according to Article XIV of the Marrakesh Agreement Establishing the World Trade Organization (i.e. the WTO Agreement). The WTO Agreement clearly entered into force on 1 January 1995.

5. Canada's position is supported by the Appellate Body's interpretation of Article 27.2(b). In *Brazil – Aircraft*, the Appellate Body found as follows:

> The ordinary meaning of the text of Article 27.2(b) is clear. For a period of eight years after the date of entry into force of the WTO Agreement, the prohibition on export subsidies in paragraph 1(a) of Article 3 of the SCM Agreement does not apply to developing country Members described in Article 27.2(b) – as long as they comply with the provisions of Article 27.4. […] *During the transitional period from 1 January 1995 to 1 January 2003*, certain developing country Members are entitled to the non-application of Article 3.1(a), provided that they comply with the specific obligations set forth in Article 27.4. Put another way, when a developing country Member complies with the conditions in Article 27.4, a claim of violation of Article 3.1(a) cannot be entertained during the transitional period, because the export subsidy prohibition in Article 3 simply does not apply to that developing country Member[2].

6. This jurisprudence confirms that the starting point of the eight year transitional period was the date of entry into force of the WTO Agreement, i.e. 1 January 1995, and not the date a given developing country Member graduates from paragraph (b) of Annex VII. Thus, the transitional period in Article 27.2(b) expired on 1 January 2003, in any event.

[1] Canada notes that in 2001, pursuant to Article 27.4 of the SCM Agreement, the Committee on Subsidies and Countervailing Measures established procedures for granting extensions to the transition period under Article 27.4 for certain developing country members beyond the original 8-year period (G/SCM/39). These procedures provided that Members enumerated in Annex VII(b) who had not yet reached the GNP per capita threshold could reserve their rights to make use of this extension process. It does not appear that India reserved its rights to benefit from the Article 27.4 extension process.

[2] Appellate Body Report, *Brazil – Aircraft,* para. 139 [emphasis added].

7. When the GNP per capita of a developing country Member listed in Annex VII(b) reaches $1,000, it becomes subject to the limited S&DT of Article 27.2(b). Because the period of application of this S&DT clause expired on 1 January 2003, subject to an extension having been granted, any developing country Member who graduates from Annex VII(b) after this date immediately becomes subject to the export subsidies prohibition of Article 3.1(a). In the present case, and in accordance with this mechanism, India is now subject to Article 3.1(a) as there is no debate that it has graduated from Annex VII(b).

8. This view is further strengthened by the language of Annex VII(b), which states, in relevant part that: [India] shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita had reached $1,000 per annum […]. Because the transitional period of paragraph 2(b) of Article 27 expired on 1 January 2003, the "provisions which are applicable to other developing country Members" are the export subsidies disciplines of Article 3.1(a). As such, these disciplines are now applicable to India.

B. Article 27.4 of the SCM Agreement

9. The purpose of Article 27.4 is to set out the conditions according to which developing country Members may be exempted from the application of Article 3.1(a), pursuant to Article 27.2. Therefore, the two occurrences of "the eight-year period" in Article 27.4, in the first and third sentences, refer to the same eight-year period defined in Article 27.2(b).

10. The third sentence of Article 27.4 gives developing country Members the opportunity to request an extension to maintain export subsidies beyond the expiry date of the eight-year period, provided that they enter into consultations with the SCM Committee not later than one year before the expiry of this eight-year period. Thus, developing country Members were required to enter into consultations not later than one year before 1 January 2003; meaning before 1 January 2002.

11. The "Procedures for extensions under Article 27.4 for certain developing country members"[3] ("Procedures") confirm this ordinary meaning, because they provide in Article 1(a) that Members seeking an extension must enter into consultations with the Committee on the basis of documents submitted no later than 31 December 2001. Moreover, Articles 1(c) and 2 of the Procedures provide that the extensions may be granted starting in calendar year 2003, which corresponds to the first year after the end of the eight-year period.

12. Canada considers that the third sentence of Article 27.4 and WTO Members' practice in applying these treaty terms confirm the ordinary meaning of the terms "for a period of eight years from the date of entry into force of the WTO Agreement" as referring to a period delimited by fixed start and end dates, respectively 1 January 1995 and 1 January 2003.

II. STATEMENT OF AVAILABLE EVIDENCE

13. The scope of "the statement of available evidence" required under Article 4.2 is defined by "the existence and nature of the subsidy in question", as indicated by the terms "with regard to". Therefore, the ordinary meaning of Article 4.2 is that a complainant can limit its statement of available evidence to the evidence necessary to demonstrate the existence and nature of the subsidy.

14. To require a complainant to state all evidence available to it at the time of its request for consultations would render inutile the terms "with regard to the existence and nature of the subsidy in question". Thus, this interpretation should be rejected.

III. FINANCIAL CONTRIBUTION

15. The text of footnote 1 of the SCM Agreement read in conjunction with Annex I(i) and (h) makes it clear that this provision is concerned with duties or taxes in the form of "import charges" on inputs that are consumed in the production of goods destined for export[4]. The text refers to an exemption applied to "an exported product" and to a remission or drawback applied to "imported

[3] G/SCM/39, November 20, 2001.
[4] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.98.

inputs" consumed in the production of "the exported product". This rule is clearly linked to the exported product itself and the duties and taxes applied to such a product as well as the duties and taxes applied to the inputs consumed in the exported product's production, meaning the transactions themselves. It does not allow for a general reduction of the tax burden of an exporter, as this would not meet the specific requirements of footnote 1 and the applicable Annexes.

16. With respect to duty exemptions on the importation of inputs, footnote 1 applies when these inputs are consumed in the production of a product which is subsequently exported[5]. The "exported product" in question is the one which was produced using the imported inputs subject to the duty exemption. If a Member decides to impose a limit or ceiling on the amount of duty exemptions that may be provided, this should not prevent exemptions from being applied in accordance with footnote 1 to imported inputs which are consumed in the production of exported goods up to the level of that ceiling, provided that the legal conditions in Annexes I through III are satisfied to the extent that they are applicable.

17. With respect to a scheme that exempts specified goods from customs duties and other indirect taxes while the same goods are subject to duties or taxes outside the challenged scheme, a panel cannot look at a tax measure or scheme in isolation. In the context of a scheme that exempts goods from duties and taxes, it must be determined whether an amount that would otherwise be due has been foregone or not collected by reference to some type of benchmark for comparison. This necessary process of comparing the tax treatment to an appropriate benchmark is essentially what is being referred to as the "three-step test". Considering the breadth and complexity of domestic tax systems, which generally include a multitude of tax rates and exceptions, a careful examination and analysis of the tax program in the context of the broader tax system should be done. If the evidence of a particular case shows that additional programs, taxes, duties, or exceptions may be relevant to or interact with a challenged scheme, it would be necessary for a panel to examine this evidence, taking into account the structure and organizing principles of the domestic tax system.

IV. BENEFIT FROM GOVERNMENT REVENUE FORGONE

18. As a general rule, revenue foregone will confer a benefit to the recipient. The fact that a government does not collect tax from an entity when it would normally have done so confers a benefit to that entity. This does not mean that the concepts of "financial contribution" and "benefit" are conflated. A financial contribution, in the form of revenue foregone, will first have to be identified. Once it has been identified, the question arises as to whether that financial contribution confers a benefit. The fact that the response to this question will, as a general rule, be in the affirmative when revenue foregone is at issue, does not amount to the conflation of "financial contribution" and "benefit".

19. A simple example which illustrates this point is that of a financial contribution in the form of a grant. A grant is considered to be a direct transfer of funds under Article 1.1(a)(1)(i) of the SCM Agreement. By its nature, a grant by a government confers a benefit to the recipient, in the full amount of the grant, as it consists of money being freely given to the recipient that it could not have obtained on the market. Arriving at that conclusion does not mean that the legal elements of financial contribution and benefit are wrongly conflated. It is simply a consequence of the nature of the financial contribution which confers a benefit *per se*.

V. EXCEPTIONS, DEROGATIONS AND BURDEN

20. As recognized by the Appellate Body in *US − Wool Shirts and Blouses*, the burden of proof rests upon the party, whether the complainant or the respondent, who asserts the affirmative of a particular claim or defense. When a party provides sufficient evidence to support its claim or defense, the burden of proof then shifts to the other party[6].

21. The purpose of footnote 1 of the SCM Agreement is to refine the scope of the definition of a particular financial contribution, by preventing certain types of measures to be characterized as revenue foregone.

[5] Ibid., para. 7.37.
[6] Appellate Body Report, *US − Wool Shirts and Blouses*, at para. 335.

22. Therefore, in making an affirmative claim that a measure is a subsidy within the meaning of Article 1.1, a complainant does not necessarily need to address footnote 1. Indeed, if a complainant demonstrates that the measure at issue meets all the definitional criteria of a subsidy set out in Article 1.1, it has met its prima facie burden of proof, which then shifts to the respondent to rebut.

23. Canada recalls that the burden of proof relies on the party making an affirmative claim or defense. This results from the impossibility for a party to prove a claim in the negative.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF EGYPT

Mr. Chairman, Members of the Panel,

1. Egypt thanks you for the opportunity to present its views in this dispute.

2. Egypt has provided a written submission that focuses on some key issues of systemic interest regarding the interpretation and application of Articles 3.1(a), 3.2, 27 and Annex VII of the SCM Agreement.

3. Today, Egypt will focus on the issue raised by the parties relating to the application of Article 27 and Annex VII to the SCM Agreement. As the Panel is aware, these provisions concern the Special and Differential Treatment of Developing Country Members.

4. The United States contends that India no longer qualifies for the exception provided in Article 27.2(a) on the grounds that India's Gross National Product (GNP) has exceeded US$1,000 based on the recent years for which data are available.[1]

5. As an initial matter, Egypt observes that developing countries falling within the scope of Article 27.2(b) of the SCM Agreement were granted a transitional period of eight years from the date of the entry into force of the *WTO Agreement* – i.e. from 1 January 1995 to 1 January 2003.

6. An equivalent transitional period should be available to those developing country Members that have recently graduated from the Annex VII list. It is important to recall that these developing country Members were listed in Annex VII on account of its lower level of economic development. On graduation, these developing countries have reached the threshold of US$1,000 annual GNP per capita; yet, the fact that some developing countries have (barely) exceeded that threshold does not imply that they have reached a comparable level of economic development *vis-à-vis* more advanced developing countries, let alone developed countries.

7. Accordingly, a proper interpretation of Annex VII to the SCM Agreement may not leave recently graduated developing countries in a situation where they are immediately required to eliminate their export subsidies. This would be both unfair and unreasonable. Just as more advanced developing countries had an eight-year phase-out period, so too recently graduated developing countries should avail themselves of an equivalent transitional period to allow for a smooth application of the prohibition set out in Article 3.1(a) of the SCM Agreement.

8. Moreover, recently graduated developing country Members may enjoy the opportunity provided for in Article 27.4 to enter into consultations with the SCM Committee which will determine whether an extension of the eight years period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question.

9. Egypt thus invites the Panel to interpret Article 27.2(a) and Annex VII to the SCM Agreement in the light of the second recital of the preamble of the WTO Agreement that recognizes the "need for positive efforts designed to ensure that developing countries … secure a share in the growth in international trade commensurate with the needs of their economic development". Pursuant to this mandate, Article 27.2(a) and Annex VII to the SCM Agreement may not leave developing countries unprotected upon graduation from Annex VII. Rather, these developing countries must be afforded a transitional period progressively to eliminate their export subsidies.

10. In closing, Egypt's written submission and this oral statement have focused on a few specific issues raised in this dispute. This should not be regarded as an indication that Egypt considers that the issues it has not addressed are not important. Nor does it indicate agreement, or otherwise, with any particular argument of the parties or third parties in this dispute.

[1] United States' first written submission, para. 26.

11. Egypt again thanks the Chairman and Members of the Panel for this opportunity to present its views in this dispute.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. INTRODUCTION

1. The European Union exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

2. OBSERVATIONS OF THE EUROPEAN UNION

2.1. WHETHER THERE IS A "GRADUATION" PERIOD ENVISAGED IN ARTICLE 27.2(B)

2. The wording of Articles 27.2 (b) and 27.4 of the SCM Agreement clearly does not support the interpretation provided by India.

3. To begin with, Articles 27.2(b) and 27.4 refer to exempting certain developing countries from the prohibition in Article 3.1(a), in the form of phasing out the respective subsidies, preferably in a progressive manner, "for a period of eight years from the date of entry into force of the WTO Agreement". Annex VII of the SCM Agreement provides that India "shall be subject to [...] paragraph 2(b) of Article 27 when GNP per capita has reached $1000 per annum".

4. It clearly follows from the above that should India have reached the $1000 per annum GNP per capita in the first 8 years from the date of entry into force of the WTO Agreement (1 January 1995), then it could have benefited from the exemption in Articles 27.2(b) and 27.4 for the remainder of the 8 year period.

5. This means that once a developing country has graduated out of Annex VII, Article 27.2 (b) and 27.4 apply to them. Hence, such countries have to comply with the prohibition of export subsidies after a period of 8 years from the entry into force of the WTO Agreement.

6. India's alleged understanding of Articles 27.2 (b) and 27.4 of the SCM Agreement i.e. that the phasing out period for countries graduating out of Annex VII would start from the year when they graduate cannot be reconciled with the wording of the Agreement. Annex VII (b) states that from the graduation the provision applicable to other developing countries according to Article 27.2 (b) becomes applicable, without adapting the content of those provisions or indicating that they should be applied *mutatis mutandis*.

7. Not granting a full eight year transition period to countries graduating from Annex VII at a much later date after 1 January 1995 is intentional, as those countries should have been aware of their positive economic development so that their graduation and the subsequent application of Article 3.1 (b) should not come as a surprise to them. This is even more so as graduation only occurs once the US $1000 GNP threshold has been exceeded for three consecutive years.

8. The extensions referred to in the third sentence of Article 27.4 refer to periods of time beyond the 8 year period, but such extensions do not have an impact on the interpretation of the starting date of the 8 year period, which is the date of entry into force of the WTO Agreement. In this respect, both the first and third sentences of Article 27.4 use the definite article ("the") when referring to "the eight-year period" and must therefore be referring to something that has already been identified. That something can only be "the" eight-year period referred to in Article 27.2(b), as is expressly stated in the first sentence of Article 27.4. Article 27.2 states unequivocally that the eight-year period starts on the date of entry into force of the WTO Agreement. Therefore, whilst India would benefit from the exemption in Article 27.2(a) and Annex VII as long as it remained below the GNP threshold, when that threshold was reached India's obligations and rights, like other developing country Members, were rather controlled by Article 27.2(b). Thus, India could have benefitted from

the exemption in Article 27.2(b) during the eight-year period, but once that period expired, India, like other developing countries, became subject to the obligation in Article 3.1(a). Interpreting this 8 year phasing out period as starting in the case of developing countries included in Annex VII from the year in which they graduate and not from the date of the entry into force of the WTO Agreement (as India would have it) would go *contra legem* and no means of interpretation would be able to lead to such a result.

9. The European Union considers that recourse to Article 32 of the Vienna Convention is not necessary or appropriate in the present case, as the Panel does not need confirmation of the meaning of the relevant terms in Article 27.4 and the meaning of those terms is not ambiguous or obscure.

10. For the reasons above, the interpretation suggested by India according to which developing countries that graduate out of Annex VII profit from an eight year extendable transition period from the time of graduation is not supported by a faithful reading of the Agreement.

11. Furthermore, the WTO Membership decided in the 2001 Decision on "Implementation-Related Issues and Concerns," that Annex VII includes the Members that are listed therein until their GNP per capita reaches US $1,000 in constant 1990 dollars for three consecutive years. These three consecutive years were also provided in order to address concerns of the kind expressed by India, namely that such developing countries would need a transition period to adjust (India reached the threshold in 2013, 2014, 2015 and 2016).

12. While such language was included in a Ministerial Declaration, language suggested by India and a small group of like-minded countries going against the very text of the SCM Agreement was rejected by the Membership (Negotiating Group on Rules, Amendment to Article 27.2 and 27.4 of ASCM in relation to Developing Countries Covered Under Annex VII- Communication from the Plurinational State of Bolivia, Egypt, Honduras, India and Sri Lanka). *A contrario*, the fact that such language was never adopted by the WTO Membership confirms that what India is asking for in its submissions actually amounts to expect the Panel to add to or diminish the rights and obligations of the Parties, contrary to Article 3.2 of the DSU.

13. Thus, India was obliged at least as of July 2017 to terminate any export subsidy schemes, according to Articles 3.1 (a) and 3.2 of the SCM Agreement.

2.2. WITH RESPECT TO THE BURDEN OF PROOF

14. The European Union at this stage of the proceedings, after the parties have already exchanged two sets of written submissions, there is already a good deal of evidence before the Panel. This places both the Panel and the third parties in a good evidentiary position.

15. The European Union would be cautious against a mechanistic delimitation between the effects on the burden of proof of provisions which are in the nature of a derogation and the effects of those that are in the nature of an exception.

16. There is a well-known legal principle in pretty much every legal system under the sun which says that the one who makes a positive affirmation before a court of justice bears the burden of proving it (*onus probandi incumbit actori*). The Appellate Body did not re-invent the wheel in *US - Wool Shirts and Blouses*. This principle is valid in the interpretation of the covered agreements, including the SCM Agreement.

17. The European Union also agrees with the longstanding practice that the party invoking an affirmative defence bears the burden of making its case and that it is not up to the complainant to second-guess the kind of arguments the respondent may put forward.

18. However, there are cases, and in particular certain SCM cases, when by its very nature not all the information which may be relevant is in the hands of the complainant. Rather, such information is in the custody of the Member whose measures are challenged. This distribution of available evidence needs to be taken into account when determining the respective duties of the parties to a dispute with regard to the gathering of evidence and its presentation to a panel.

19. Keeping the above considerations in mind, the European Union turns now to footnote 1 of the SCM Agreement. We already know that "footnote 1 indicates when certain measures will not constitute a subsidy". The language which is used ("not deemed"), juxtaposed to the language of Article 1.1 ("deemed") suggests that this footnote is a mere continuation of the definition of what constitutes and what does not constitute a subsidy for the purpose of the SCM Agreement. It can be compared to Article III:8(a) of GATT 1994, which is a derogation limiting the scope of the national treatment obligation.

20. Thus, footnote 1 of the SCM Agreement is rather in the nature of a derogation and not in the nature of an affirmative defence, as it is the case, for instance, with the general and security exceptions in Articles XX and XXI of GATT 1994.

21. This being said, in the circumstances of the SCM Agreement and of this particular case, the European Union considers that the existing exchange between the parties enables the Panel to make an objective assessment of the matter before it, including with regard to footnote 1 and the relevant portions of Annexes I to III of the SCM Agreement.

22. Furthermore, we point out that footnote 1 is part of the definition of a subsidy. Definitional provisions do not have to be expressly cited in consultations requests or panel requests. Rather, when a claim is made under, for example, Article 3.1(a), it is implicit that the complainant is asserting that the measure is a subsidy. The situation would be different if the "derogation" in question would limit and frame the obligation. In such a case, the "derogation" would have to be cited in the consultations request and panel request in order to be within the panel's terms of reference. If not cited, the panel would be unable to determine the claim, since the scope of the obligation would simply not have been corrected stated by the complainant.

2.3. WITH RESPECT TO THE STATEMENT OF AVAILABLE EVIDENCE

23. *First*, the adequacy of the statement of available evidence must be determined on a case by case basis.

24. *Second*, in the case of prohibited subsidies it may, indeed, often occur that the legal instruments that serve to identify the measures at issue also provide evidence of the existence of the subsidies and of their nature as subsidies.

25. *Third*, the European Union would emphasize the word "available". The evidence should be in the public domain and thus available to the complainant at that very early stage of the proceedings, when drafting a consultations request. It should not be made impossible to write consultations requests compliant with Article 4.2 of the SCM Agreement because some information is in the custody of the Member adopting the contested measures. Furthermore, during consultations Members usually ask for and receive clarifications with regard to the measures at issue, in order to improve their understanding and to attempt to obtain satisfactory adjustment of the matter.

26. In conclusion, it cannot be excluded that in certain cases the listing of the legal instruments containing the measures at issue will satisfy at the same time both the conditions in Article 4.2 of the SCM Agreement and in Article 4.4 of the DSU.

27. The text of Article 4.2 does not use the words "statement of all available evidence", but instead refers to "statement of available evidence".

28. Thus, the complainant is under an obligation to state only the evidence "available", and only to the extent that such evidence is able to serve the purpose of clarifying "the existence and nature" of the subsidy in question.

29. A complainant is required to provide evidence of facts that it asserts. In a de jure case the facts are the terms actually used in the measure at issue and the evidence is the text of that measure. Thus, no controversy should normally arise. However, in a de facto case complainant and defendant may have different views about the relevance and weight to be given to certain facts. In the opinion of the European Union, a complainant is not required to include in its "statement of available evidence" facts that it considers irrelevant. Even if they are subsequently found to be relevant, that would not invalidate the statement of available evidence or the claim.

30. Furthermore, the European Union considers that it is for the defendant to bring forward evidence of facts that it seeks to rely on for the purposes of rebutting a de facto claim. There is no obligation on the complainant to include such evidence in its "statement of available evidence". Thus, for example, if there would be a press release in which the granting authority would assert that the measure is not contingent upon export, that would be something for the defendant to rely on and adduce if it would so wish. The absence of such evidence from the statement of available evidence would not invalidate the statement or the claim. A complainant cannot be expected to anticipate what a defendant might wish to seek to rely on. Article 4.2 only requires "a" statement of available evidence. Use of the indefinite article supports the view that the statement may be tailored to the purposes of the complainant, that is, that it need only contain the evidence of the facts that the complainant seeks to rely on.

31. Finally, the European Union considers that it is also possible that, during the course of the exchange of arguments, the complainant wishes to refer to additional facts in order to rebut representations being made by the defendant, and to adduce supporting evidence for those additional facts. That such additional evidence would not be referred to in the statement of available evidence would not invalidate the statement or the claim. This would also be consistent with Article 7.2 of the SCM Agreement, which contains similar wording.

32. Only if there would be a complete absence of a statement of available evidence, or a statement that would be manifestly devoid of substance and incapable of supporting the claim, would the European Union see a procedural defect capable of vitiating the claim.

2.4. WHETHER ELEMENTS OF THE FIVE PROGRAMMES CONSTITUTE PROHIBITED SUBSIDIES

33. The European Union starts by recalling that for a subsidy to qualify as a prohibited export subsidy under the SCM Agreement three conditions should be met: (i) there must be a financial contribution by a government, (ii) conferring a benefit and (iii) being contingent upon export performance.

34. The European Union disagrees with India. The same facts and evidence may be relevant both for the determination of financial contribution and the determination of benefit. However, the two concepts remain legally distinct and are not conflated.

35. The European Union notes that in the present case companies under the Export Oriented Units and Sector Specific Schemes (EOU & SSS) and the special economic zones (SEZ) programme are required to achieve a positive Net Foreign Exchange (NFE). Furthermore, all goods produced pursuant to the EOU requirements may be destined for export. Monitoring is in place so as to ensure the fulfilment of the export condition. Failure to comply with the terms of the agreement between companies and the state may result in penal action in the case of EOU & SSS and SEZ.

36. In exchange, participating Indian companies are exempted from customs and excise duties under the EOU & SSS, while SEZ Units are entitled to a corporate income tax deduction of export earnings, exemptions from customs duty on goods imported into the SEZ, exemptions from export duties and exemptions from India's Integrated Goods and Services Tax.

37. The scenario when a Member has a scheme exempting from import duties both (1) inputs that are consumed in the production of exported products, and (2) goods that cannot qualify as "inputs that are consumed in the production of the exported product" under Annex I(i) may be of particular interest in the context of Part V of the SCM Agreement, where it is necessary to calculate the amount of the subsidy in order to calculate the rate of the countervailing duty, and hence where it is necessary to understand whether the amount of the subsidy is to be calculated by reference to the entire scheme, or only the component that falls outside footnote 1. Is it of less immediate interest in the context of Part II of the SCM Agreement because, in any event, an unsuccessful defendant will have to bring the measure into conformity with its obligations under the SCM Agreement, and this is so irrespective of whether or not the "measure" is considered to be the scheme as a whole, or only the component that falls outside the scope of footnote 1. This Panel may therefore not have to engage with this issue or do so in any detail.

38. The Appellate Body in PET found that in the context of duty drawback schemes, the financial contribution element of the subsidy (i.e. the government revenue foregone that is otherwise due) is

limited to the excess remission or drawback of import charges and does not encompass the entire amount of the remission or drawback of import charges.

39. The above interpretation would be pertinent only to the extent that the respective Indian schemes can be qualified as duty drawback schemes at all.

40. Thus, in an abstract scenario like the one invoked above, the part of the scheme which does not conform to footnote 1/Annexes II and III of the SCM Agreement would not fall under the carve out of footnote 1 (e.g. capital goods that are not 'consumed' within the meaning of the SCM Agreement). In other words, the components outside footnote 1 could amount to prohibited export subsidies. In the European Union's view, a Member cannot rely on footnote 1 to include elements exogenous to the true nature of the measures envisaged under footnote 1. Such elements or components which do not belong to footnote 1 could be assessed with regard to their conformity with the SCM Agreement.

41. In this respect, a panel could examine whether the design, structure and expected operation of such a scheme could lead to a legal characterisation as a duty drawback scheme under the SCM Agreement.

42. In that respect, the European Union recalls that the Appellate Body has previously held that the characterisation of a measure under a Member's municipal law is not dispositive (*US - Large Civil Aircraft (2nd complaint), Canada - Renewable Energy / Canada - Feed-in Tariff Program, Indonesia - Iron or Steel Products).*

43. A duty drawback system aims at refunding import duties paid (or to be paid in case of import substitution drawbacks) on imports of raw materials when those raw materials are incorporated into exported finished products. It also presupposes a verification system assessing whether expenses on raw materials that are consumed are indeed linked to exported products (e.g. excluding import duties paid on raw materials incorporated in domestically sold processed products) etc. Furthermore, there may be such circumstances that the scheme does not only suffer from an improper verification system, but it is rather a question of the very design of that scheme.

44. In a case where the design, structure and expected operation of a scheme leads to the conclusion that it cannot be characterized as a duty drawback scheme under the SCM Agreement, the entire scheme falls outside the scope of footnote 1. If the assessment indicates that the scheme is designed and operates in a manner that its footnote 1 compliant components could be severed from the non-compliant components, then only the non-compliant components would fall outside the scope of footnote 1.

45. Neither footnote 1, which refers to Annexes I to III, nor Annex I, nor Annex II, paragraphs 1 and 2, nor the introductory paragraph of Annex III are limited to countervailing duty investigations. The fact that provisions are "technical in nature" or "data driven" does not release a panel from its obligation to make an objective assessment of the matter before it, including an objective assessment of the facts, pursuant to Article 11 of the DSU.

46. The Panel should apply the normal burden of proof rules. To the extent that India is making affirmative factual assertions, India should have already brought forward evidence in support of those assertions. This is particularly so when the relevant facts and evidence are under the sole control of India. To the extent that India has failed to provide the necessary factual clarifications or evidence, the Panel should consider making use of Article 13 of the DSU in order to require India to provide the necessary information. In the absence of a response or complete response from India the Panel should draw reasonable inferences based on the information available to it.

47. In the case of footnote 1 a proper duty drawback scheme will not constitute a prohibited subsidy. According to the destination principle, formulated in the context of border tax adjustments, a product destined for export could be exempted from domestic taxes or given a rebate (or remission) by the country of export, and then taxed by the country of import.

48. Footnote 1 can be considered an expression of the destination principle in the context of the SCM Agreement. However, specific rules to the SCM Agreement clarify that there has to be a certain correlation between the exemptions/remissions and the consumption of e.g. imported inputs as per

Annexes I to III. Any system which by design or in its implementation fails to respect this correlation will amount to an export subsidy.

3. CONCLUSIONS

49. The European Union hopes that its contribution in the present case will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the SCM Agreement.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. *De facto* export contingency under Article 3.1(a) of the SCM Agreement

1. While Japan does not wish to take a specific position on the facts of the present case, Japan would like to emphasize that, first, subsidies contingent in fact upon export performance should be determined by examining how a subsidy's design and structure contribute to the existence of an incentive for a recipient to favor exports over domestic sales. In this regard, it is Japan's position, supported by WTO jurisprudence, that the export orientation of a recipient cannot be the sole supporting fact of a finding of export contingency. For example, in the present case, the fact that an enterprise's application to be an SEZ unit must include the anticipated FOB value of exports for the first five years of operation is not in and of itself an indication of the export contingency of the subsidies. Second, Japan considers that subjective statements made by government officials with regard to the reason why the subsidies were granted, alone cannot prove the export contingency of the subsidies. Accordingly, the Panel should focus on the subsidy itself and on the objective evidence surrounding the granting of the subsidy, as is required by the Appellate Body.

II. Special and differential treatment under Article 27 of the SCM Agreement

a) Articles 27.2(b), 27.4 and Annex VII(b) of the SCM Agreement

2. Japan disagrees with India's argument that Article 27.2 of the SCM Agreement is "meant to provide for an 8 year phase out period for any late Annex VII graduating country".[1] Article 27.2(b) of the SCM Agreement expressly stipulates that developing country Members that are not part of Annex VII are under an obligation to phase out their subsidies within an eight-year period "from the date of entry into force of the WTO Agreement". Articles 27.2(b) and 27.4 apply to Members that are not part of Annex VII for a maximum period of eight years after the entry into force of the WTO Agreement, i.e. until 2003. This means that Annex VII Members who graduate after 2003 can no longer benefit from Article 27.2(b) and by implication from Article 27.4.

3. Japan is mindful of the fact that a country graduating from Annex VII does not have the necessary means to remove its subsidies overnight. Nonetheless, Japan submits that these concerns have been accommodated through the extension mechanism provided for in Article 27.4 which allowed Annex VII countries that were not able to phase out their subsidies in due time, that is before 2003, to request extension periods prior to the expiration of the eight-year phase-out period, and through the 2001 Decision on "Implementation-Related Issues and Concerns", according to which a Member will not graduate from Annex VII unless their GNP per capita reaches US $1000 for three consecutive years.[2]

b) Article 27.5 of the SCM Agreement

4. The second sentence of Article 27.5 obliges Members that are allowed to maintain their subsidies by virtue of being part of Annex VII to phase out these subsidies for products in which they reach export competitiveness. If a Member graduates from Annex VII, it shall be "subject to the provisions of paragraph 1(a) of Article 3", "according to paragraph 2(b) of Article 27", as set out in Annex VII itself. Thus, by logical implication, there is no room to apply the second sentence of Article 27.5 to a country who has already graduated from Annex VII. The wording of the second sentence of Article 27.5 supports this view, as it applies only to developing country Members that are "referred to in Annex VII and which has reached export competitiveness".

[1] India's First Written Submission, para. 188.

[2] Decision adopted at the Doha WTO Ministerial Conference, Fourth Session, "Implementation-Related Issues and Concerns, paras 10.1 and 10.4 - Decision of 14 November 2001" WT/MIN(01)/17 (20 November 2001) and various addenda thereto.

III. Burden of proof

5. Japan submits that while the burden of proof for a *prima facie* case is on the complaining party, the respondent party with exclusive access to the details of the challenged measures should have an obligation to cooperate in the context of litigation. Japan considers that a complaining party should not be disadvantaged by the non-cooperation of the respondent. This position is supported by the Appellate Body in *US − Large Civil Aircraft (2nd complaint)* which has recognized that when one party has relevant evidence in its sole possession, the burden of adducing evidence must fall on that party.[3] Furthermore, the panel in *Argentina − Textiles and Apparel* stressed "the requirement for *collaboration* of the parties in the presentation of the *facts and evidence* to the panel and especially the role of the respondent in that process", adding that "the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession".[4]

6. With regard to the question of whether the burden of proof depends on the characterization of a provision as a derogation or an exception, the Appellate Body noted that "the characterization of the provision as a derogation does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision".[5] In Japan's view, who has a burden of proof for a *prima facie* case on a particular provision or part of a provision should not be determined *categorically* depending on whether it is a derogation or an exception.

IV. Government revenue foregone under Article 1.1(a)(1)(ii) of the SCM Agreement

a) Examination of whether government revenue that is otherwise due has been foregone

7. When examining a claim under Article 1.1(a)(1)(ii) of the SCM Agreement, a "three-step test" articulated by the Appellate Body[6] should be applied in order to fully comprehend the structure and principles of a Member's tax system. A complainant should not be placed at a disadvantage vis-à-vis a respondent in cases where the latter chooses not to disclose, or avoid the provision of, necessary information for the complainant's case.

8. The Appellate Body further explained that in light of the variety and complexity of domestic tax systems, an examination under Article 1.1(a)(1)(ii) "must be sufficiently flexible to adjust to the complexities of a Member's domestic rules of taxation".[7] Japan is therefore of the view that such an examination should involve a comprehensive assessment of a Member's tax system when applying the "three-step test" established by and consistently reaffirmed in WTO jurisprudence.

b) Benefit analysis in cases of foregone government revenue otherwise due

9. Japan is of the view that a benefit is conferred whenever government revenue otherwise due is foregone for the purposes of Article 1.1(a)(1)(ii) of the SCM Agreement. In accordance with standing case-law, Japan considers that in cases of foregone government revenue otherwise due, unless it falls within the scope of Footnote 1 of the SCM Agreement, the conferral of a benefit for the purposes of the SCM Agreement requires little, if any, further examination. The very word "foregone" suggests that the government has given up an entitlement to raise the revenue that it could otherwise have raised, which the market could not have possibly had. In other words, a comparison with the terms that would have been "available to the recipient on the market"[8] would thus make no sense.

[3] Appellate Body Report, *US − Large Civil Aircraft (2nd complaint),* para. 1139 (emphasis added).
[4] Panel Report, *Argentina − Textiles and Apparel*, para. 6.40 (emphasis added).
[5] Appellate Body Reports, *Canada − Renewable Energy / Canada − Feed-in Tariff Program*, para. 5.56.
[6] See, e.g. Appellate Body Reports, *Brazil - Taxation*, paras. 5.162 and 5.196; *US − Large Civil Aircraft (2nd complaint)*, paras. 812-814.
[7] Appellate Body Report, *Brazil − Taxation* para. 5.162, quoting Appellate Body Report, *US − FSC (Article 21.5 − EC)*, fn. 66 to para. 91.
[8] Panel Report, *Canada − Aircraft,* para. 9.112; see also Appellate Body Report, *Canada − Aircraft*, paras. 154 and 157; Panel Report, *Brazil − Aircraft*, para. 7.24; Panel Report, *Korea − Commercial Vessels*, para. 7.427 ("[T]here will be a 'benefit' if a financial contribution is made available on terms more favourable than those that the recipient could obtain on the market").

V. Statement of available evidence under Article 4.2 of the SCM Agreement

10. While the Appellate Body has explained that the additional requirement of Article 4.2 of the SCM Agreement is distinct from and not satisfied by the compliance with Article 4.4 of the DSU,[9] it would be illogical to expect that this was meant to refer to more than the available evidence that goes towards identifying the existence and the character or nature of the measure as a subsidy.[10] A Member should only have to identify a measure in light of the limited available evidence that will allow it to characterize the existence and nature of the measure as a subsidy.

11. Furthermore, given that "[t]he purpose of consultation shall be to clarify the facts" according to the second sentence of Article 4.3 of the SCM Agreement, and "the requirement to submit a statement of available evidence applies in the earliest stages of WTO dispute settlement, and that the requirement is to provide a 'statement' of the evidence and not the evidence itself",[11] Japan is of the view that the complainant should only supply the evidence that is necessary and sufficient with regard to the existence and nature of the alleged subsidy. Indeed, in order to comply with the requirements of Article 4.2 of the SCM Agreement in particular, the statement of evidence need not comprise "all evidence" but rather only that which is needed to assess the existence and nature of a measure as a subsidy.

[9] Appellate Body Report, *US – FSC*, para. 161.
[10] Panel Report, *US – Upland Cotton*, para. 7.88.
[11] Appellate Body Report, *US – Upland Cotton*, para. 308.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SRI LANKA

Mr. Chairman,

Thank you for the opportunity to present Sri Lanka's position as a third party to this dispute. We believe that this dispute, and the panel's decision, will have a direct impact on the interests and on key elements of the economic and development policies of Annex VII graduating countries. The stakes are equally high for all other Annex VII countries as well as the least-developed countries (LDCs) that, one hopefully not so distant day, will graduate from their LDC status to Annex VII status. In other words, what this panel will rule in this dispute has significant implications for approximately one entire third of the WTO Membership − and it is the poorest third of the WTO Membership.

The question is simple, but fundamental. Is it equitable that low-income developing countries should be deprived of the very same transition period that higher-income developing countries enjoyed for their export promotion policies for twenty years of the WTO's history? Should they be deprived of a transition period to adjust their economies and government policies to a new categorical and consequential prohibition on export promotion, which is an extremely important tool of industrial policy? Should low-income developing countries be, in this regard, placed in a worse position than higher-income developing countries?

It is evident that the answer to these questions should be "no"; it is obviously not equitable to treat poorer countries less favourably than wealthier countries. This is also a fundamental principle which has long been embodied in the WTO system − the principle of special and differential (S&D) treatment for developing countries.

Mr. Chairman, members of the panel,

It hardly needs recalling that trade plays a fundamental role in the development needs of developing countries. The United Nations Sustainable Development Goals of 2015 recognize the key role of trade as a mean of sustainable development in developing countries, in order to eradicate poverty and to address social imbalances. But the contribution of trade to GDP is still relatively low in many developing countries. For instance, the average export to GDP ratio of Annex VII countries is still below the world average of 37% and, according to World Bank statistics, has declined by 17.2% since 1995. Developing countries desperately need to diversify their products and geographical markets for their trade-led development. Attracting foreign or domestic investments to export-oriented industries is therefore a crucial development strategy for these countries, and government incentives to that effect are vital, and consistency and predictability are essential.

Mr. Chairman, members of the panel,

Your interpretation of the SCM Agreement should reflect these realities. And indeed, it is perfectly possible − indeed, compelling − to interpret the language of the relevant provisions of the SCM Agreement before you in exactly that way, using the standard interpretative tools of the *Vienna Convention*.

In legal terms, you have been requested to determine whether countries that have graduated from Annex VII should be granted the same period of 8 years to eliminate the existing export subsidies that was granted in 1995 to all non-Annex VII developing countries, pursuant to Article 27.2(b).

The 8-year period referred to in Article 27.2(b) was and remains applicable to all developing countries <u>when the prohibition of export subsidies becomes applicable to them</u>. Article 27.2(b) includes the phrase "from the date of entry into force of the WTO Agreement". However, that phrase must be understood in a broader sense, in exactly the sense it must have been understood by the drafters − <u>as referring to the point in time when the Article 3.1(a) prohibition would "kick in" for any given developing country</u>.

For countries other than those listed in Annex VII, that "kicking in" point in time was in 1995 when the WTO Agreement entered into force. That is why Article 27.2(b) explicitly refers to the entry into force of the WTO Agreement.

But for the Annex VII countries that now "emerge" from Annex VII, that point in time is precisely when they lose the Annex VII protective shield. In other words, that point in time is the moment of their graduation. The reason why Article 27.2(b) does not state that explicitly is simple: Annex VII countries were not subject to the Article 3.1(a) prohibition at the time of entry into force of the WTO Agreement, and so there was no need to provide for a carve-out for them. The countries that needed a carve-out were those in principle subject to the Article 3.1(a) prohibition, and they needed that carve-out to apply immediately, in 1995.

Had the drafters wished to deny graduating Annex VII economies the Article 27.2(b) phase-out period, they would have presumably stated so explicitly. But they did not do so. Hence, the applicability of the transition period referred to in Article 27.2(b) to now-graduating Annex VII countries from the time of their graduation, is implicit in the wording of the provision. There are other instances in the SCM Agreement of such implicit regulations compelled by simple logic. For instance, there is no explicit provision which states that an LDC graduates from its LDC status would fall under the group of countries in Annex VII with a per capita income of below 1,000 USD. But would anybody doubt that this would be the case?

The legal view put forward by Sri Lanka is also fully consistent with the logic of other S&D provisions of the SCM Agreement such as Article 27.5, which stipulates an 8-year phase-out period for individual products of Annex VII countries for which export competitiveness has been achieved. Clearly, this 8-year period did not begin in 1995; rather, it begins anytime – after 1995, today or in the future – when export competitiveness for that product has been achieved. The drafters went to great length to "cushion" the blow of the export subsidy prohibition when it comes to *one individual product*, by granting an 8-year phase out period. Does it then make sense that the same drafters would have denied the same "cushion" *to the entire economy, and the full panoply of all products*, of an Annex VII country when its economy as a whole graduates from Annex VII?

Sri Lanka accepts that the string of extensions granted by the SCM Committee under Article 27.4 beyond the original 8-year period – until 2013, with an effective ending date of 2015 – should not apply to newly-graduated countries. Thus, Sri Lanka is not asking that graduating Annex VII countries be granted a phase-out period of 20 years. These extensions were granted for the countries, and specific subsidy programmes, to which Article 27.2(b) and 27.4 were applicable at the point in time when these extensions were granted. However, that cannot mean that the basic, original 8-year transition period does not apply to newly-graduated countries today.

Mr. Chairman, members of the Panel,

Thank you for your attention to my statement. We have confidence that your interpretation of the SCM Agreement in this dispute will reflect both the clear wording as well as the sound and compelling policy arguments we have put before you today.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THAILAND

I. INTRODUCTION

1. Thailand appreciates the opportunity to present its views as a third party in this dispute.

2. In this oral statement, Thailand will focus its comments on the interpretation of Article 27 of the Agreement on Subsidies and Countervailing Measure ("SCM Agreement") and its application to developing countries Members graduating from Annex VII(b) of the SCM Agreement.

II. THE INTERPRETATION AND APPLICATION OF EXPORT SUBSIDIES DISCIPLINES TO GRADUATED ANNEX VII(B) MEMBERS

3. The United States asserts that India no longer qualifies for the exception to the prohibition of export subsidies since India's GNP per capita has reached $1,000 for three consecutive years.[1] India, on the other hand, argues that the harmonious reading of Article 27.2(b) and Annex VII(b) of the SCM Agreement demonstrates that India is entitled to eight additional years to phase out the alleged export subsidies from the point of its graduation.[2]

4. At the outset, Thailand reiterates the importance of special and differential treatment in assisting less developed country Members to integrate fully into the international trading system. To this end, special and differential treatment provisions are an integral part of WTO Agreements, providing, *inter alia*, exemptions or delays from implementing multilateral trade rules so as to allow greater policy space for less developed country Members in a manner commensurate with their development needs.

5. Having said that, Thailand notes that the interpretation of special and differential treatment provisions is subject to the same "general rule of interpretation" applicable to all legal provisions under the WTO covered agreements.[3] In particular, the WTO provisions must be read in good faith in accordance with their ordinary meaning in the context and in the light of the treaty's object and purpose.[4]

6. Thailand considers that the general rule of interpretation does not support India's reading of Article 27.2(b) and Annex VII(b) of the SCM Agreement. In Thailand's view, these provisions do not grant Members graduating from Annex VII(b) an extra eight-year phase-out period from the point of their graduation, for the following reasons.

7. Annex VII(b) of the SCM Agreement states that developing countries listed therein "shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 *when* GNP per capita has reached $1,000 per annum".[5] Article 27.2(b) stipulates "a period of eight years *from the date of entry into force of the WTO Agreement*" during which other developing country Members are exempted from the prohibition of export subsidies.[6]

8. Thailand is of the view that the ordinary meaning of the terms contained in these provisions is clear and leaves no ambiguity. As soon as the GNP per capita of a Member listed in Annex VII(b) reaches $1,000, that Member becomes subject to the disciplines in Article 27.2(b). Since the eight-year period from the date of entry into force of the WTO Agreement in that Article lapsed on 1 January 2003, graduated Annex VII(b) countries are currently prohibited from using export subsidies like other developing countries. Article 27.2(b) makes no reference to other particular

[1] The United States' first written submission, para 26.
[2] India's first written submission, paras 155-188.
[3] Article 31 of the Vienna Convention of the Law of Treaties. *See* Appellate Body Report, *US – Gasoline*, p.17.
[4] Article 31 of the Vienna Convention of the Law of Treaties.
[5] Annex VII(b) of the SCM Agreement (emphasis added).
[6] Article 27.2(b) of the SCM Agreement (emphasis added).

points of time for the exemption period, nor does it distinguish between graduated Annex VII(b) countries and other developing countries.

9. From Thailand's perspective, the fact that Article 27.4 "does not restrict the application of the 8 year period from the date of entry into force of the WTO Agreement" does not imply a special phase-out period for graduated Annex VII(b) Members.[7] The reference to "*the* eight-year period" in Article 27.4 indicates the drafters' intention that it refers to the same eight-year period starting from the date of entry into force of the WTO Agreement as appears in Article 27.2(b). Indeed, a formulation akin to "*a* period of eight years" contained in Article 27.5 could have been used if another specific point of time had been intended. Accordingly, Thailand considers that neither Article 27.2(b) nor Article 27.4 leaves a room to read into these provisions an eight-year phase-out period from the point of graduation.

10. It is worth highlighting that, compared to other developing countries, Members listed in Annex VII(b) are granted more preferential treatment in respect of subsidies disciplines. Annex VII(b) Members are exempted from the elimination of export subsidies for an indefinite period and without a phase-out obligation, as long as their GNP per capita are below $1000. Thus, this group of developing country Members enjoys greater flexibility as to whether they wish to voluntarily remove export subsidies gradually in a manner corresponding to their development, or to eliminate prohibited subsidies right upon the graduation. Even in the latter scenario, it seems unlikely that graduated Annex VII(b) Members are expected to withdraw export subsidies "overnight"[8], since the graduation would only occur when their GNP per capita reach $1,000 "for three consecutive years".[9] The preferential treatment described here reflects the "concession offered in Annex VII(b)"[10]. This is not invalidated in any way by the clear and unambiguous ordinary meaning of the terms of Article 27.2(b) described earlier.

11. Lastly, Thailand notes that the assertion that graduated Annex VII(b) Members are entitled to an eight-year period to maintain export subsidies starting from the point of graduation is difficult to reconcile with subsequent agreements or practices of WTO Membership.

12. The WTO Ministerial Conference agreed on 20 November 2001 to extend the transition period under Article 27.2(b) of the SCM Agreement to the year 2007 for certain subsidy programmes pursuant to the agreed Procedures for Extensions under Article 27.4 for Certain Developing Country Members.[11] The Procedures provides that, for an Annex VII(b) Member that has reserved rights and subsequently reaches the development threshold during the period of 2003-2007, that Member is entitled to an extension "for the remainder of the period [2003-2007]"[12]. On 27 July 2007, the General Council adopted similar procedures which allows Annex VII(b) Members graduating during the period 2008-2015 to have an extension "for the remainder of that period" after the graduation.[13]

13. These further underscore the fact that graduated Annex VII(b) Members do not have eight additional years from the point of their graduation to phase out export subsidies. Otherwise, it would have been pointless for WTO Membership to specifically grant graduated Annex VII(b) Members the transition periods referred to in these procedures, if Annex VII(b) Members had already have a right to maintain export subsidies for another eight years after their graduation. Based on the procedures mentioned-above, WTO Membership appears to share the views that the eight-year period in Article 27.4 ends on 1 January 2003, and that export subsidies maintained thereafter by developing country Members, including graduated Annex VII(b) Members, are subject to conditions which permit only certain eligible subsidies and within the prescribed timeframe.

[7] India's first written submission, para 162.
[8] India's first written submission, paras 177, 186, 187.
[9] Doha Ministerial Conference, Decision of 14 November 2001 on Implementation-Related Issues and Concerns, WT/MIN(01)/17, 20 November 2001, para. 10.1.
[10] India's first written submission, para 159.
[11] Doha Ministerial Conference, Decision of 14 November 2001 on Implementation-Related Issues and Concerns, WT/MIN(01)/17, 20 November 2001, para. 10.6; Committee on Subsidies and Countervailing Measures, Procedures for Extensions under Article 27.4 for Certain Developing Country Members, G/SCM/39, 20 November 2001.
[12] Committee on Subsidies and Countervailing Measures, Procedures for Extensions under Article 27.4 for Certain Developing Country Members, G/SCM/39, 20 November 2001, paras 6(b)-(c).
[13] General Council, Decision of 27 July 2007 on Article 27.4 of the Agreement on Subsidies and Countervailing Measures, WT/L/691, para 5(b).

III. CONCLUSION

14. For the reasons set out above, while Thailand recognizes the role of special and differential treatment in response to development needs, we do not consider that the general rule of interpretation is able to accommodate the reading that graduated Annex VII(b) Members have an additional eight years after the point of graduation to phase out prohibited export subsidies.

15. This concludes Thailand's oral statement. Thailand thanks the Panel for the consideration of its views.

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ANNEX D

PRELIMINARY RULINGS AND OTHER COMMUNICATIONS FROM THE PANEL TO THE PARTIES

ANNEX D-1

COMMUNICATION DATED 22 JANUARY 2019 FROM THE PANEL TO THE PARTIES CONCERNING THE ISSUES OF A SINGLE SUBSTANTIVE MEETING AND A PARTIALLY OPEN MEETING

22 January 2019

COMMUNICATION FROM THE PANEL ON THE WORKING PROCEDURES AND TIMETABLE

1 INTRODUCTION

1.1. This communication addresses two requests by the parties relating to the Panel's Working Procedures and timetable.

1.2. First, the Panel's Working Procedures and timetable provide for a single substantive meeting with the parties, while reserving the possibility to hold additional meetings as required. In a number of submissions, India asked the Panel to hold two substantive meetings with the parties as contemplated by Appendix 3 to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In response, the Panel confirmed its earlier decision and indicated that it would communicate its reasons in due course. In this communication, the Panel sets out the reasons for its earlier decision (section 2).

1.3. Second, the United States requested that the Panel hold a partially open meeting, making its oral statement and answers in the course of the panel meeting available for public viewing, although the oral statement and answers of the other party would not be available for public viewing. The Panel has decided to decline the United States' request for a partially open meeting (section 3).

2 SINGLE MEETING

2.1 Introduction

2.1. As set out in the Working Procedures and timetable adopted in this case, the Panel decided to hold one substantive meeting with the parties, after both parties filed their respective first and second written submissions.[1] The Panel reserved the right to reassess the situation and hold additional meetings with the parties as required.[2] In response to submissions by India, the Panel confirmed that it would proceed with the Working Procedures and timetable as adopted[3], and indicated that it would communicate the reasons for its decision in due course.[4]

2.2. Below, the Panel sets out the reasons for its earlier decision (section 2.4), after recalling the procedural background and arguments of the parties and third parties (section 2.2), and the applicable legal standard (section 2.3).

2.2 Procedural background and main arguments of the parties and third parties

2.3. On 3 August 2018, the Chairperson of the Panel, on behalf of the Panel, held a meeting with the parties to obtain their views in preparation of the Panel's draft Working Procedures and timetable, particularly considering the need to reconcile competing considerations, namely, the provision for accelerated procedures in Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the obligation to provide special and differential treatment to developing country Members, and resource constraints in the Secretariat. At that meeting, the

[1] Working Procedures (22 August 2018), paras. 3, 5, and 15-16; and timetable (22 August 2018).
[2] Timetable (22 August 2018), fn 1; Communication dated 9 October 2018 from the Panel to the parties and third parties; and Communication dated 19 October 2018 from the Panel to the parties and third parties.
[3] Communication dated 9 October 2018 from the Panel to the parties and third parties; and Communication dated 19 October 2018 from the Panel to the parties and third parties.
[4] Communication dated 19 October 2018 from the Panel to the parties and third parties.

United States proposed that the Panel hold a single meeting with the parties in this case, a proposal which India opposed.

2.4. As a means to balance the competing obligations and constraints in the particular circumstances of this case, in its draft Working Procedures and timetable sent to the parties on 8 August 2018, the Panel proposed holding a single meeting with the parties, after the filing of both parties' first and second written submissions[5], and reserved the right to schedule further meetings with the parties as required.[6] On 22 August 2018, the Panel adopted these draft Working Procedures and timetable. In response to submissions by India, on 9 and 19 October 2018 the Panel confirmed that it would proceed with the adopted Working Procedures and timetable, while reserving the right to schedule additional meetings as necessary.[7] On 19 October 2018, the Panel indicated that it would communicate the reasons supporting its decisions in due course.[8]

2.5. India objected to the Panel's approach in its comments on the draft Working Procedures and timetable[9], comments on the United States' comments[10], first written submission[11], and in communications dated 5 October and 16 October 2018[12], and sought a preliminary ruling from the Panel that an additional substantive meeting with the parties should be held before the filing of the second written submissions.[13]

2.6. In its own communications, the United States took the view that the Panel could hold a single substantive meeting with the parties, or even decide the case entirely on the basis of the parties' written submissions, without holding any substantive meeting with the parties.[14] The United States set out its arguments on the matter in its comments on the draft Working Procedures and timetable[15], comments on India's comments[16], and second written submission.[17]

2.7. Brazil commented on this matter in its third-party submission.

2.8. India argued that the Panel was required to hold two substantive meetings with the parties, in order to comply with its obligation to ensure due process, and in order to comply with Article 12.10 of the DSU. It argued that holding a single meeting with the parties would deprive India of a fair opportunity to present its arguments adequately and defend itself[18]; that the case was complex and required adequate time for oral argumentation[19]; that the DSU envisages two distinguishable stages in panel proceedings, each with a substantive panel meeting with the parties[20]; that the right to be heard in the context of proceedings conducted in a balanced and orderly manner, according to

[5] Draft Working Procedures (8 August 2018), paras. 3, 5, and 15-16; Draft timetable (8 August 2018).
[6] Draft timetable (8 August 2018), fn 1.
[7] Communication dated 9 October 2018 from the Panel to the parties and third parties; Communication dated 19 October 2018 from the Panel to the parties and third parties.
[8] Communication dated 19 October 2018 from the Panel to the parties and third parties.
[9] Communication dated 14 August 2018 from India to the Chairperson of the Panel, paras. 1-2 and 5-7.
[10] Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 1-15.
[11] India's first written submission, paras. 16-18 and 105-116.
[12] Communication dated 5 October 2018 from India to the Chairperson of the Panel; Communication dated 16 October 2018 from India to the Chairperson of the Panel.
[13] India's first written submission, paras. 18 and 105-115; Communication dated 5 October 2018 from India to the Chairperson of the Panel, pp. 1-4. See also Communication dated 16 October 2018 from India to the Chairperson of the Panel, p. 2.
[14] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 4-7; Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, para. 1.
[15] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 1-7.
[16] Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, paras. 1-8.
[17] United States' second written submission, paras. 45-52.
[18] Communication dated 14 August 2018 from India to the Chairperson of the Panel, para. 2; India's first written submission, paras. 106, 111, and 114; and Communication dated 5 October 2018 from India to the Chairperson of the Panel, pp. 2-3.
[19] Communication dated 14 August 2018 from India to the Chairperson of the Panel, paras. 2 and 5; Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 5-6.
[20] Communication dated 14 August 2018 from India to the Chairperson of the Panel, paras. 6-7; Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 11. See also, Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 12-13; and India's first written submission, para. 109.

established rules, is part of due process[21]; that Article 12.10 of the DSU requires panels to afford developing country respondents sufficient time to prepare and present their argumentation[22]; that, in the past, panels in proceedings governed by Article 4 of the SCM Agreement had held two substantive meetings with the parties[23]; that Article 21.5 proceedings, in which panels hold a single substantive meeting with the parties, are of a different nature from original panel proceedings[24]; that in the other cases where panels had held a single meeting with the parties, they had done so with the Agreement of the parties[25]; and that resource constraints in the Secretariat could not trump parties' due process rights.[26]

2.9. The United States argued that Article 4 of the SCM Agreement requires expedited proceedings, unless parties agree otherwise[27]; that its claims were "focused" and required neither two panel meetings with the parties nor one[28]; that Article 12.1 of the DSU allows panels to depart from Appendix 3 of the DSU, and that in proceedings under Article 21.5 of the DSU, where the overall timeframe is the same as that provided for in Article 4.6 of the SCM Agreement, panels routinely hold a single meeting with the parties[29]; that Article 12.10 of the DSU did not justify a departure from Article 4.6 of the DSU[30]; and that in any event the timetable provided enough opportunity for India to be heard.[31]

2.10. In its third-party submission, Brazil observed that Appendix 3 of the DSU provides for two substantive panel meetings with the parties, with the second meeting devoted to rebuttals[32]; that the Agreement of the parties is an important element to consider when deciding to deviate from Appendix 3, as there is otherwise a risk that due process will be affected[33]; that the opportunity to participate in a second substantive panel meeting is an important aspect of giving a developing country respondent sufficient time to prepare and present its argumentation as required by Article 12.10 of the DSU[34]; and that Article 4.12 of the SCM Agreement envisages halving time periods, not skipping procedural steps.[35]

2.3 The applicable legal standard

2.11. The Working Procedures in Appendix 3 of the DSU envisage a process consisting of a first exchange of written submissions, followed by a first substantive panel meeting with the parties, and a second exchange of written submissions, followed by a second substantive panel meeting with the parties.[36]

2.12. Thus, the Working Procedures in Appendix 3 contemplate two "main stages in a proceeding before a panel".[37] The first stage is devoted to each party setting out its case in chief, and the second

[21] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 11; India's first written submission, para. 105.

[22] Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 2-4; India's first written submission, paras. 18-19; and Communication dated 5 October 2018 from India to the Chairperson of the Panel, p. 2.

[23] Communication dated 14 August 2018 from India to the Chairperson of the Panel, para. 7; India's first written submission, para. 110; and Communication dated 5 October 2018 from India to the Chairperson of the Panel, p. 3.

[24] Communication dated 16 October 2018 from India to the Chairperson of the Panel, p. 1.

[25] Communication dated 14 August 2018 from India to the Chairperson of the Panel, para. 7; Communication dated 16 October 2018 from India to the Chairperson of the Panel, p. 1.

[26] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 12.

[27] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 2 and 4-6; Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, paras. 1-3 and 7; and United States' second written submission, paras. 45-46 and 50.

[28] Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, paras. 1-2.

[29] Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, para. 6; United States' second written submission, para. 47.

[30] United States' second written submission, para. 49.

[31] United States' second written submission, paras. 50-51.

[32] Brazil's third-party submission, para. 29.

[33] Brazil's third-party submission, paras. 28 and 30.

[34] Brazil's third-party submission, para. 31.

[35] Brazil's third-party submission, para. 32.

[36] Dispute Settlement Understanding, Appendix 3, paras. 5-10 and 12.

[37] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 149. See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 79.

stage is "designed to permit the rebuttal by each party of the arguments and evidence submitted by the other parties".[38] Appendix 3 envisages that each of these two stages include written submissions and a substantive meeting.

2.13. Article 12.1 of the DSU provides that "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute". Thus, panels enjoy relatively broad discretion to depart from the procedures in Appendix 3, after consulting the parties, as part of their "ample and extensive authority to undertake and to control the [panel] process … [which] is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU".[39] This discretion, while broad, is not unlimited. Its exercise cannot entail the violation of other provisions of the DSU[40], including the due process requirement embedded in Article 11 of the DSU, and other provisions such as Article 12.10 of the DSU.

2.14. Departing from the procedures in Appendix 3 would violate due process, for example, if it deprived parties of "an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules".[41]

2.15. Further, departing from the procedures in Appendix 3 would violate Article 12.10 of the DSU if by doing so a panel failed to "accord sufficient time to the [responding] developing country Member to prepare and present its argumentation".[42]

2.16. Articles 4.2 to 4.12 of the SCM Agreement are special or additional rules listed in Appendix 2 of the DSU. Pursuant to Article 1.2 of the DSU, such special or additional rules apply together with the DSU, except to the extent there is a conflict.[43]

2.17. Article 4.6 of the SCM Agreement provides that the panel report shall be issued within 90 days of the date of the establishment of the panel's terms of reference.[44] This is half the time envisaged in Article 12.8 of the DSU for ordinary panel proceedings.

2.18. To reconcile this reduced timeframe with the procedural steps envisaged by the DSU, Article 4.12 of the SCM Agreement provides that for disputes under Article 4 of the SCM Agreement, "time-periods applicable under the DSU … shall be half the time prescribed therein". That is, Article 4.12 provides for halving the time-periods applicable to each step in the proceedings.

2.4 The reasons for the Panel's decision in this case

2.19. The Panel chose to depart from Appendix 3 of the DSU, by scheduling only one substantive meeting with the parties, to be held after both parties filed their respective first and second written submissions.[45] The Panel reserved its right to schedule additional meetings with the parties if required.[46]

2.20. The Panel's choice was motivated by the need to reconcile competing considerations. First, the Panel is bound by the provision for abbreviated proceedings in Article 4 of the SCM Agreement. Second, the Panel is bound by the requirement in Article 12.10 of the DSU that it accord sufficient time for a developing country respondent to prepare and present its argumentation. The Panel abided by this requirement, in particular, by allowing four weeks for India to prepare its first written submission following the United States' first written submission, and four weeks for India to prepare its second written submission following the United States' second written submission. The Panel's timetable also provided for more than two months between the filing of submissions and the

[38] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 149.
[39] Appellate Body Report, *US – Shrimp*, para. 106. As regards fixing the timetable, Article 12.3 of the DSU provides that it is for panellists to do so, after consulting the parties to the dispute.
[40] See, e.g. Appellate Body Report, *India – Patents (US)*, para. 92.
[41] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.
[42] Dispute Settlement Understanding, Article 12.10.
[43] Appellate Body Report, *Guatemala – Cement*, para. 65.
[44] Footnote 6 to the SCM Agreement provides that the time periods set out in Article 4 "may be extended by mutual Agreement".
[45] See fn 1 above.
[46] See fn 2 above.

substantive meeting with the parties. Third, in seeking to comply with Article 4 of the SCM Agreement and Article 12.10 of the DSU, the Panel had to take into account resource constraints in the Secretariat.

2.21. After consulting the parties during the organizational meeting, as a means of balancing the considerations described above in the particular circumstances of this case, the Panel proposed Working Procedures and a timetable that envisaged a single panel meeting with the parties. The parties, as set out above, had opposite views on the matter. The United States proposed a single panel meeting and suggested that the Panel could even decide the dispute without any substantive meeting with the parties; India opposed the proposal and asked the Panel to hold two substantive meetings as contemplated in Appendix 3 to the DSU. In the circumstances of this case, the Panel decided to proceed with only one substantive meeting, while reserving the right to hold further substantive meetings with the parties if required.

3 PARTIALLY OPEN MEETING

3.1 Introduction

3.1. The United States requests that the Panel make its meeting with the parties either entirely open to public viewing or, in the event that India objects to this request, partially open, by making the oral statement and answers of the United States in the course of the meeting available for public viewing. India objects both to an open meeting and to a partially open meeting, and asks that the Panel meet with the parties in closed session.

3.2. Given that India did object to the United States' request, the remaining question before the Panel is whether to meet with the parties in closed session, or in a partially open session. Holding a partially open Panel meeting would involve making the oral statement and answers of only one of the parties (the United States) in the course of the Panel meeting available for public viewing, despite the fact that the other party to the dispute (India) opposes the request for an open meeting and does not consent to making its own oral statement and answers available for public viewing.

3.3. Below, the panel recalls the procedural background and arguments of the parties and third parties (section 3.2), and sets out the applicable legal standard (section 3.3) and its decision in this case (section 3.4).

3.2 Procedural background and main arguments of the parties and third parties

3.4. On 8 August 2018, the Panel transmitted the draft Working Procedures to the parties, pursuant to which the Panel would "meet in closed session".[47] On 14 August 2018, the United States requested the Panel to provide for the meeting(s) with the parties to be "open … to the public, either in whole or in part".[48] On 17 August 2018, India "completely oppose[d]" the United States' request.[49]

3.5. In the Working Procedures adopted on 22 August 2018, the Panel indicated that it would "revert to this issue in due course before the date of [its] meeting" with the parties.[50]

3.6. On 3 January 2019, the Panel invited third parties to express their views on the matter of holding a partially open meeting. Third parties submitted their views on 11 January 2019.

3.7. The United States argued that opening panel meetings to the public serves to heighten public confidence in the system[51]; that it is done in other international adjudicatory systems[52]; that the

[47] Draft Working Procedures (8 August 2018), para. 10.

[48] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, para. 18. See also, ibid. paras. 11-17, and Annex, Additional Working Procedures for the Panel: Open Meetings.

[49] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 21. See also, ibid. paras. 22-26.

[50] Working Procedures (22 August 2018), para. 10.

[51] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 12-13.

[52] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, para. 14.

United States has a right, under Article 18.2 of the DSU, to disclose its statements to the public, and that the United States was in essence seeking the Panel's assistance to be able to disclose its statements "contemporaneously with their utterance"[53]; and that the reasoning that led the Appellate Body in *US − Continued Suspension* to open its hearing to the public should lead this Panel to hold a partially open meeting in this case.[54]

3.8. India responded that, under Article 18.2, the United States has a right to disclose its own position only to the extent that it does not affect India's right to confidentiality[55]; that a party's right to disclose its own statements under Article 18.2 does not extend to opening panel proceedings to the public[56]; that Appendix 3 to the DSU envisages that panels meet with the parties in closed session[57]; that partially open hearings could affect the efficiency of panel proceedings[58]; and that the only applicable procedures are those established in the WTO Agreements and jurisprudence.[59]

3.9. Among the third parties, five answered the Panel's question whether the DSU "does not allow, gives discretion to, or requires a panel to accept" a request for a partially open meeting.[60] Canada, China, the European Union and Japan indicated that, under the DSU, it is within panels' discretion to decide on such a request[61], and Thailand noted that panels have "some discretion" to depart from the procedures in Appendix 3 to the DSU.[62] As to how to exercise that discretion, China and Thailand expressed deep concerns about granting a request for a partially open meeting in the absence of the consent of both parties to the dispute[63], whereas Canada and the European Union took the view that a party that does not want to make its own statements available for public viewing cannot prevent another party from doing so, provided its own right to confidentiality is respected.[64]

3.3 The applicable legal standard

3.10. Appendix 3 of the DSU provides, at paragraph 2, that "[t]he panel shall meet in closed session", and that parties and interested parties "shall be present at the meetings only when invited by the panel to appear before it". Article 12.1 of the DSU provides that "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute."

3.11. Thus, the default rule set out in the DSU is for panels to meet in closed sessions.[65] At the same time, under Article 12.1, panels may depart from Appendix 3 after consulting the parties,

[53] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, para. 15.

[54] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 16-17.

[55] Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 21 and 23.

[56] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 24.

[57] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 22.

[58] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 24.

[59] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 25.

[60] Communication dated 3 January 2019 from the Panel to the third parties, question 2. In addition to seeking third parties' view on this matter, the Panel asked the third parties whether they would wish to make their own statements and answers available to the public in the event a partially open meeting were held. (Ibid. question 1). Four third parties indicated that they would, four indicated that they would not, one answered that the question was premature, and one did not submit an answer.

[61] Communication dated 11 January 2019 from Canada to the Chairperson of the Panel; Communication dated 11 January 2019 from China to the Chairperson of the Panel; Communication dated 11 January 2019 from the European Union to the Chairperson of the Panel; and Communication dated 11 January 2019 from Japan to the Chairperson of the Panel.

[62] Communication dated 11 January 2019 from Thailand to the Chairperson of the Panel.

[63] Communication dated 11 January 2019 from China to the Chairperson of the Panel; Communication dated 11 January 2019 from Thailand to the Chairperson of the Panel.

[64] Communication dated 11 January 2019 from Canada to the Chairperson of the Panel, pp. 1-2; Communication dated 11 January 2019 from the European Union to the Chairperson of the Panel, p. 2. Japan noted that Article 18.2 of the DSU recognizes that the DSU does not prevent a party from disclosing statements of its own position to the public. (Communication dated 11 January 2019 from Japan to the Chairperson of the Panel).

[65] See, e.g. Panel Report, *US − Continued Suspension*, para. 7.50:

> The Panel understands [paragraph 2 of Appendix 3] to mean that it shall always meet *in camera*, whether or not the parties and/or interested parties have been invited to appear before it. No reference is made in that provision to other Members or to the general public.
> (emphasis original)

which is part of panels' "ample and extensive authority to undertake and to control the [panel] process … [which] is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU".[66]

3.12. A panel's discretion to depart from the Working Procedures in Appendix 3 has limits. In particular, it "does not extend to modifying the substantive provisions of the DSU"[67], including the provisions regarding confidentiality set out in Article 18.2 of the DSU, and the due process requirement embedded in Article 11 of the DSU.[68]

3.13. The second sentence of Article 18.2 of the DSU recognizes that the DSU does not preclude a Member "from disclosing statements of its own position to the public". At the same time, the third sentence of Article 18.2 requires Members to "treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential". Therefore, Members' right to make their "statements of their own position" public, under the second sentence, finds its limit in their duty to maintain the confidentiality of information designated by other Members as confidential, under the third sentence. Panels and the Appellate Body have read these two provisions as referring not only to written submissions, but also to the statements of Members during hearings.[69]

3.14. Turning to due process, this is "a fundamental principle of WTO dispute settlement" which "finds reflection in the provisions of the DSU", and is "intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard … in the context of proceedings conducted in a balanced and orderly manner".[70]

3.15. Thus, panels have discretion, pursuant to Article 12.1 of the DSU, to depart from Appendix 3 and open their substantive meetings with the parties to the public, provided they consult the parties to the dispute, and provided they do not infringe other provisions of the DSU, including the requirement to afford due process, and the provisions of Article 18.2 of the DSU.

3.4 Whether to grant a partially open hearing in this case

3.16. As set out above, Article 12.1 gives discretion to panels to depart from Appendix 3, which otherwise provides for meetings "in closed session". To date, with the exception of three proceedings, all in the same dispute[71], WTO adjudicators have only opened substantive meetings for public viewing when all parties to the dispute in question agreed.[72] In the present case, one of

[66] Appellate Body Report, *US − Shrimp*, para. 106.

[67] Appellate Body Report, *India − Patents (US)*, para. 92.

[68] A WTO adjudicator must also ensure the prompt settlement of disputes pursuant to Article 3.3 of the DSU, and "the careful and efficient discharge, or the integrity, of the adjudicative function". (Panel Reports, *US − Tuna II (Mexico) (Article 21.5 − US) / US − Tuna II (Mexico) (Article 21.5 − Mexico II)*, para. 7.31). See also, ibid. paras. 7.28-7.30.

[69] See, e.g. Panel Report, *US − Continued Suspension*, para. 7.50; and Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 4 (discussing the opening of appellate hearings to the public).

[70] Appellate Body Report, *Thailand − Cigarettes (Philippines)*, para. 147.

[71] Panel Reports, *US − Tuna II (Mexico) (Article 21.5 − US) / US − Tuna II (Mexico) (Article 21.5 − Mexico II)*, paras. 7.16-7.31; and Decision by the Arbitrator, *US − Tuna II (Mexico) (Article 22.6 − US)*, paras. 2.17-2.31. On appeal, the Appellate Body found it unnecessary to rule on the issue, while indicating that this did not constitute an endorsement of the panel's decision to hold a partially open meeting. (Appellate Body Reports, *US − Tuna II (Mexico) (Article 21.5 − US) / US − Tuna II (Mexico) (Article 21.5 − Mexico II)*, para. 6.320 and fn 901). These three proceedings, like the present case, involved a request for a partially open meeting. In *US − Upland Cotton (Article 21.5 − Brazil)* and *US − OCTG (Korea)*, the same type of request was rejected. (Panel Reports, *US − Upland Cotton (Article 21.5 − Brazil)*, para. 8.20; and *US − OCTG (Korea)*, Annex E-1, paras. 1.2 and 3.1-3.4).

[72] See, e.g. Panel Report, *US − Continued Suspension*, para. 7.50. With reference to the partly different legal framework applying to appellate proceedings, see also, e.g. Appellate Body Reports, *US − Continued Suspension*, Annex IV; and *US − COOL (Article 21.5 − Canada and Mexico)*, paras. 1.22-1.23. The question of the consent of all parties to the dispute has been treated differently from that of the consent of third parties: panels and the Appellate Body have consistently held that objections from third parties did not preclude the opening to public viewing of those parts of a hearing that did not involve the objecting third parties. (See e.g. Panel Report, *US − Continued Suspension*, para. 7.40; and Appellate Body Reports, *Canada − Continued Suspension*, Annex IV, paras. 6, 7, and 9; *US − Continued Suspension*, Annex IV, paras. 6, 7, and 9; and *US − Continued Zeroing*, Annex III, para. 6). In *Canada − Continued Suspension* and *US − Continued Suspension*, the Appellate Body distinguished the "relationship between the participants and the Appellate Body" from the "relationship between the third participants and the Appellate Body", and reasoned

the two parties has vigorously objected to opening the hearing to public viewing, in whole or in part. In view of these considerations, the Panel has decided to decline the United States' request that it depart from the rule in Appendix 3, paragraph 2, of the DSU.

that third participants cannot invoke confidentiality "as it applies to their relationship with the Appellate Body" to "bar the lifting of confidentiality … in the relationship between the participants and the Appellate Body". (Appellate Body Reports, *Canada – Continued Suspension*, Annex IV, paras. 6-7; *US – Continued Suspension*, Annex IV, paras. 6-7).

ANNEX D-2

COMMUNICATION DATED 22 JANUARY 2019 FROM THE PANEL TO THE PARTIES CONCERNING THE PANEL'S TERMS OF REFERENCE, THE APPLICABILITY OF ARTICLE 4 OF THE SCM AGREEMENT AND THE STATEMENT OF AVAILABLE EVIDENCE

22 January 2019

PRELIMINARY RULING BY THE PANEL

1 INTRODUCTION

1.1. In this communication, the Panel addresses three preliminary ruling requests by India. India requested the Panel to rule (a) that the United States' request for the establishment of the Panel does not meet the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU); (b) that the provisions of Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) cannot, at this stage, apply to the dispute before the Panel; and (c) that the statement of available evidence in the United States' request for consultations does not meet the requirements of Article 4.2 of the SCM Agreement.

1.2. For the reasons set out below, the Panel rules that the United States' request for the establishment of the Panel meets the requirements of Article 6.2 of the DSU (section 2).

1.3. The Panel declines to rule at this stage that Article 4 of the SCM Agreement does not apply to this dispute and instead defers its decision on this matter (section 3). The Panel also declines to rule at this stage on whether the statement of available evidence meets the requirements of Article 4.2 of the SCM Agreement and instead defers its decision on this matter (section 4).

2 TERMS OF REFERENCE

2.1 Introduction

2.1. In its first written submission, India has sought a preliminary ruling from the Panel that the United States' panel request does not meet the requirements of Article 6.2 of the DSU. India has challenged the sufficiency of the panel request in its entirety. According to India, for all measures and claims, the panel request (a) fails to identify the specific measures at issue; and (b) fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[1]

2.2. We will begin our consideration of India's request by recalling the applicable legal standard under Article 6.2 of the DSU (section 2.2). We will then apply that legal standard to the panel request in this case (section 2.3), beginning from whether the panel request properly identifies the specific measures at issue (section 2.3.1), and turning then to whether it sets out a sufficient summary of the legal basis of the complaint (section 2.3.2).

2.2 The applicable legal standard under Article 6.2 of the DSU

2.3. Article 6.2 of the DSU sets out the requirements applying to requests for the establishment of a panel. The sufficiency of a panel request, judged according to the standard set out in Article 6.2, is one of those issues of such a "fundamental nature" that panels must deal with them and satisfy themselves that they have the authority to proceed, even, "if necessary, on their own motion".[2]

[1] India's first written submission, para. 19; see also ibid. paras. 16 and 20-70.

[2] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36. See also, e.g. Appellate Body Reports, *US – Carbon Steel*, para. 123; and *EC – Large Civil Aircraft*, para. 791.

2.4. Article 6.2 of the DSU provides, in relevant part, that panel requests:

> [S]hall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2.5. Accordingly, Article 6.2 "sets out two principal requirements: (i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[3] Together, the measures and the claims identified in the panel request form "the matter referred to the DSB" under Article 7.1 of the DSU.[4]

2.6. Article 6.2 serves the fundamental functions of "establishing and delimiting the panel's jurisdiction and serving the due process objective of notifying the respondent and third parties of the nature of the case".[5] The need for these two functions to be fulfilled is the very reason why it is "important that a panel request be sufficiently precise".[6]

2.7. The specific measure at issue is "the object of the challenge, namely, the measure that is alleged to be causing the violation of an obligation contained in a covered Agreement".[7] The requirement to identify the specific measures at issue "means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request"[8]; further, "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity as to indicate the nature of the measure and the gist of what is at issue."[9]

2.8. Assessing whether a request identifies the specific measures at issue "may depend on the particular context in which those measures exist and operate", and "involves, by necessity, a case-by-case analysis since it may require examining the extent to which those measures are capable of being precisely identified".[10] For example, whether a measure is identified with sufficient specificity may "depend on the extent to which that measure is specified in the public domain".[11]

2.9. Whether a panel request identifies a measure with sufficient specificity is not necessarily dependent on how multi-faceted the measure at issue is, or on how lengthy the relevant legal instruments are.

2.10. In *EC − Bananas III*, the Appellate Body agreed with the panel that the European Communities' regime for the importation of bananas, a complex measure, had been identified with sufficient specificity by the language in the panel request that referred to "a regime for the importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures,

[3] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.12. See also, e.g. Appellate Body Reports, *Argentina − Import Measures*, para. 5.39; *EC and certain member States − Large Civil Aircraft*, para. 639; *US − Continued Zeroing*, para. 160; *EC − Selected Customs Matters*, para. 129; and *US − Carbon Steel*, para. 125.

[4] Appellate Body Report, *Argentina − Import Measures*, para. 5.39. See also, e.g. Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 639.

[5] Appellate Body Report, *Argentina − Import Measures*, para. 5.39 (referring to Appellate Body Report, *US − Countervailing and Anti-Dumping Measures (China)*, paras. 4.6-4.7). See also, e.g. Appellate Body Reports, *EC and certain member States − Large Civil Aircraft*, paras. 639-640; *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 108; *EC − Selected Customs Matters*, para. 130; *EC − Computer Equipment*, para. 68 (observing that whether the terms it was examining were sufficiently specific under Article 6.2 depended "upon whether they satisfy the purposes of the requirements of that provision"); and *US − Continued Zeroing*, para. 161; and Panel Report, *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EC)*, para. 7.374.

[6] Appellate Body Report, *EC − Bananas III*, para. 142.

[7] Appellate Body Report, *EC − Selected Customs Matters*, para. 130. See also, e.g. Appellate Body Report, *Argentina − Import Measures*, para. 5.40.

[8] Appellate Body Report, *US − Continued Zeroing*, para. 168.

[9] Appellate Body Report, *US − Continued Zeroing*, para. 169.

[10] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 641. See also Appellate Body Report, *Argentina − Import Measures*, para. 5.41.

[11] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 648. See also, ibid. paras. 646-647.

including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime".[12]

2.11. In *EC – Selected Customs Matters*, the United States had challenged four European Communities' regulations that "cumulatively contain[ed], literally, thousands of different provisions … relate[d] to a vast array of different customs areas, and [could] entail administration in a multitude of diverse ways"[13], as well as their implementing measures and other related measures. The panel request "ma[de] it clear that the United States [did] not challenge … the substantive content of [those] legal instruments … but their administration collectively".[14] The Appellate Body found that, with regard to the four identified regulations, "the specificity requirement in Article 6.2 of the DSU … [was] met", because "[f]or each of these instruments, a specific citation is provided", and "the panel request indicate[d] clearly that the United States was challenging the manner in which these legal instruments are administered collectively".[15]

2.12. As to what may constitute a "measure" identified in the panel request, "[a]s long as the specificity requirements of Article 6.2 are met, [there is] no reason why a Member should be precluded from setting out in a panel request 'any act or omission' attributable to another Member as the measure at issue."[16] Article 6.2 "does not impose any additional requirement … that a complainant must, in its request for establishment of a panel, demonstrate that the identified measure at issue … *can violate* … the relevant obligation".[17]

2.13. Turning now to the legal basis of the complaint, i.e. the claims[18], this "pertains to the specific provision of the covered Agreement that contains the obligation alleged to be violated".[19] The brief summary of the legal basis must "aim[] to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[20] This summary must be "sufficient to present the problem clearly", in particular so that the respondent knows "what case it has to answer, and what violations have been alleged so that it can begin preparing its defense", and so that third parties are "informed of the legal basis of the complaint".[21] For the summary of the legal basis to present the problem clearly the panel request must, in particular, "'plainly connect' the challenged measure(s) with the provision(s) claimed to have been infringed such that a respondent can 'know what case it has to answer, and … begin preparing its defence'".[22]

2.14. As a "minimum prerequisite", to provide a brief summary of the legal basis the complainant must identify "the treaty provisions claimed to have been violated by the respondent".[23] There may be situations where such identification of the treaty provisions is enough[24], but this will "not always be enough".[25] For example, it may not be enough "where the Articles listed establish not one single, distinct obligation, but rather multiple obligations".[26] The question "whether the mere listing of the Articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis … tak[ing] into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request

[12] Appellate Body Report, *EC – Bananas III*, para. 140.
[13] Panel Report, *EC – Selected Customs Matters*, para. 7.30.
[14] Appellate Body Report, *EC – Selected Customs Matters*, para. 151.
[15] Appellate Body Report, *EC – Selected Customs Matters*, para. 152. The Appellate Body conversely found that "the phrase 'implementing measures and other related measures' [did] not 'identify the specific measures at issue' as required in Article 6.2 of the DSU". (Ibid. fn 369).
[16] Appellate Body Report, *EC – Selected Customs Matters*, para. 133.
[17] Appellate Body Report, *Australia – Apples*, para. 423. (emphasis original)
[18] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.
[19] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.
[20] Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (emphasis original)
[21] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[22] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162); see also, e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.39; and *China – Raw Materials*, para. 226.
[23] Appellate Body Reports, *Korea – Dairy*, para. 124; *EC – Bananas III*, para. 142. See also, e.g. Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14.
[24] See, e.g. Appellate Body Report, *EC – Bananas III*, para. 141.
[25] Appellate Body Report, *Korea – Dairy*, para. 124.
[26] Appellate Body Report, *Korea – Dairy*, para. 124. See also, e.g. Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.14-5.15.

simply listed the provisions claimed to have been violated."[27] A respondent alleging that a "mere listing of articles" in the panel request "prejudiced its ability to defend itself" may have to corroborate that allegation with "supporting particulars" as to how that was the case.[28]

2.15. The legal basis of the complaint, i.e. the claims, must be distinguished from the complainant's arguments, which need not be set out in the panel request.[29] The legal basis of the complaint refers to "a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular Agreement".[30] In contrast, the arguments are "adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision … [and] are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties".[31]

2.16. In a prior dispute involving claims under Articles 3.1(b) and 3.2 of the SCM Agreement, the panel expressed the view that "an explanation about … the type of subsidy at issue … the granting or maintaining of that subsidy, the use of domestic over imported goods, and the notion of contingency" would be "the … subject matter of the *arguments*".[32]

2.17. In assessing the sufficiency of the panel request, a panel must "ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".[33] Ensuring compliance with the spirit of Article 6.2 of the DSU requires ensuring the panel request fulfils its two purposes, which, to recall, are to define the jurisdiction of the panel and to "serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response".[34]

2.18. The assessment of the sufficiency of the panel request must be based on the panel request on its face, read as a whole, on the basis of the language used[35], and "as it existed at the time of its filing".[36] Therefore, defects in the panel request cannot be cured by the parties' subsequent submissions[37], although "subsequent events in [the] panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request".[38]

2.19. The requirement to assess the sufficiency of the panel request on the face of the measure does not mean that the panel is precluded from including in its assessment documents that are referenced in the panel request, but whose text is not reproduced in the panel request itself. As the Appellate Body has explained:

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[27] Appellate Body Report, *Korea − Dairy*, para. 127.

[28] Appellate Body Report, *Korea − Dairy*, para. 131.

[29] Appellate Body Reports, *EC − Selected Customs Matters*, para. 153; *Korea − Dairy*, paras. 123 and 139; and *EC − Bananas III*, para. 141.

[30] Appellate Body Report, *Korea − Dairy*, para. 139. See also, e.g. Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.14; and Communication from the Panel dated 25 May 2012, *Canada − Renewable Energy / Canada − Feed-in Tariff Program*, para. 20.

[31] Appellate Body Report, *Korea − Dairy*, para. 139. See also, e.g. Panel Report, *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EC)*, para. 7.381.

[32] Communication from the Panel dated 25 May 2012, *Canada − Renewable Energy / Canada − Feed-in Tariff Program*, para. 22. (emphasis original)

[33] Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 108 (referring to Appellate Body Reports, *EC − Bananas III*, para. 142; *US − Continued Zeroing*, para. 161; *US − Carbon Steel*, para. 127; *US − Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; and *China − China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.13).

[34] Appellate Body Report, *US − Continued Zeroing*, para. 161. See also para. 2.6 above.

[35] Appellate Body Reports, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 108 (referring to Appellate Body Reports, *EC − Bananas III*, para. 142; *US − Continued Zeroing*, para. 161; *US − Carbon Steel*, para. 127; *US − Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169); and *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.13.

[36] Appellate Body Report, *Argentina − Import Measures*, para. 5.42.

[37] Appellate Body Reports, *Argentina − Import Measures*, para. 5.42; *EC and certain member States − Large Civil Aircraft*, para. 642; and Panel Report, *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EC)*, para. 7.375.

[38] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 642. See also, e.g. Appellate Body Report, *Argentina − Import Measures*, para. 5.42; and Panel Report, *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EC)*, para. 7.375.

> The term "on its face" … must not be so strictly construed as to preclude automatically reference to sources that are identified in its text, but the contents of which are accessible outside the panel request document itself.
>
> It is common practice, for example, for panel requests identifying legislation, regulations, or other similar instruments as measures at issue to provide information that enables the respondent and potential third parties to access the text of the measures themselves, rather than to copy the entire text of these instruments into the body of the panel requests, or to attach them as annexes. Such information may consist of the title, date of enactment or entry into force, the official number of the law or regulation, and the citation to the government regulatory bulletin in which it was published.
>
> …
>
> So long as a panel request seeks to identify the specific measure at issue through reference to a source where that measure's contents may readily be found and accessed, such contents may be the subject of scrutiny in assessing whether that request identifies the specific measures at issue within the meaning of, and in conformity with, Article 6.2 of the DSU.[39]

2.20. Having recalled the standard set out in Article 6.2 of the DSU, we now turn to applying it to the panel request before us.

2.3 Whether the United States' panel request meets the applicable legal standard

2.21. To recall, India argues that the panel request fails to identify the specific measures at issue and fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly[40], thus failing to fulfil the requirements of Article 6.2 of the DSU. We discuss, first, whether the panel request identifies the specific measures at issue as required by Article 6.2 (section 2.3.1); and, second, whether the panel request provides a summary of the legal basis meeting the requirements of Article 6.2 (section 2.3.2).

2.22. Before doing so, we recall that the assessment of the sufficiency of the panel request must be based on the panel request on its face, read as a whole[41], but that this includes the text of legal instruments that are referenced in the panel request through "information that enables the respondent and potential third parties to access the text of the measures themselves".[42]

2.23. The United States' panel request identifies twenty-five legal instruments[43] by reference to their title and date, as well as, in most cases, the issuing authority and, in some cases, the citation to a legal gazette or other repository where the legal instrument can be found. As the Panel has verified, these references are sufficient to locate and access the text of the measures themselves.[44] The Panel has therefore included the text of these legal instruments in its assessment of the sufficiency of the panel request.

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[39] Appellate Body Report, *Argentina – Import Measures*, paras. 5.48-5.49 and 5.51. See also, ibid. para. 5.57.

[40] India's first written submission, para. 19. See also, ibid. paras. 20-70.

[41] Appellate Body Reports, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108 (referring to Appellate Body Reports, *EC – Bananas III*, para. 142; *US – Continued Zeroing*, para. 161; *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169); and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13.

[42] Appellate Body Report, *Argentina – Import Measures*, paras. 5.48-5.51. See also, ibid. para. 5.57.

[43] Instruments Nos. 1-5, 7-15, and 17-27 (items 6 and 16 are cross-references to Instruments Nos. 1-5).

[44] The Panel located these legal instruments by conducting a simple web search for the identifiers provided in the panel request. Annex A to this preliminary ruling lists the web pages at which the Panel was able to access the referenced legal instruments; for ease of reference, in a separate column, Annex A also indicates which exhibits, if any, correspond to these legal instruments. Equally, for ease of reference, the corresponding exhibit, if any, is indicated in the relevant footnotes.

2.3.1 Whether the United States' panel request identifies the specific measures at issue

2.24. The description of the measures that the United States provided in its panel request comprises two parts. First, the panel request states that it "appears that India provides export subsidies through" five named programmes, which the United States lists in its request.[45] Second, the panel request explains that "[t]he export subsidies provided through these programs are reflected in legal instruments that include [those listed in the panel request], operating separately or collectively, as well as any amendments, or successor, replacement, or implementing measures"[46], and it goes on to list such legal instruments for each of the five programmes. The panel request, therefore (a) indicates that the measures appear to be export subsidies; (b) states the name of the programmes under which the alleged export subsidies are provided; and (c) cites a number of legal instruments that, operating separately or collectively, reflect those alleged subsidies.

2.25. We now examine, for each program, whether the panel request sufficiently identified the measure at issue.

2.3.1.1 The First Programme: Export Oriented Units Scheme and sector specific schemes, including Electronics Hardware Technology Park Scheme and Bio-Technology Parks Scheme

2.26. The first programme through which, according to the panel request, India "appears … [to] provide[] export subsidies" is described, in that request, as "Export Oriented Units Scheme and sector specific schemes, including Electronics Hardware Technology Park Scheme and Bio-Technology Parks Scheme"[47] (the First Programme). The panel request lists five instruments in connection with this programme, as "legal instruments" in which the measure is "reflected … operating separately or collectively".[48] These five instruments are listed as Nos. 1-5.[49]

2.27. Instrument No. 1 is described as "*Foreign Trade Policy [1st April 2015 − 31st March 2020]* (Ministry of Commerce and Industry, Notification 01/2015-2020, April 1, 2015), as modified by *Foreign Trade Policy [1st April, 2015-31st March, 2020] Mid-Term Review, Updated As On 5th December, 2017* (Ministry of Commerce and Industry, Notification 41/2015-2020, December 5, 2017)" (FTP). It is a lengthy and multifaceted document, setting out provisions relating to trade that range, just by way of example, from trade facilitation to complaints from foreign buyers regarding the quality of products exported from India.[50]

2.28. Chapter 6 of the FTP, however, provides specifically for the measures comprising the First Programme. Chapter 6 is entitled "Export Oriented Units (EOUs), Electronics Hardware Technology Park (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs)". This corresponds largely with the name of the schemes listed by the United States as the First Programme, except that (a) the United States' panel request refers to "sector-specific schemes, including" those named in the request; and (b) chapter 6 of the FTP covers a fourth scheme, namely, "Software Technology Parks", which is not named in the panel request.

2.29. Chapter 6 of the FTP comprises 29 sections, four of which are no longer in force.[51] Section 6.00 explains that "[u]nits undertaking to export their entire production of goods and services (except permissible sales in DTA [(domestic tariff area)]) may be set up under" the schemes provided for in that chapter, and sets forth the schemes' objectives. Section 6.08 sets forth exceptions to the requirement that "the entire production" of units under the schemes in chapter 6 be exported.

2.30. Section 6.01 addresses "Export and Import of Goods". It sets forth rules on (a) what the units established under these schemes may export, import or procure, and under what conditions;

[45] United States' panel request, p. 1.
[46] United States' panel request, p. 1.
[47] United States' panel request, p. 1.
[48] United States' panel request, p. 1.
[49] United States' panel request, p. 1.
[50] Foreign Trade Policy, (Exhibit USA-3), chapter 1b, section 2.06 and chapter 8, respectively.
[51] Sections 6.06 and 6.26-6.28 are marked "deleted".

(b) exemptions from duties and taxes for import or procurement of goods[52]; and (c) the applicability of the "State Trading regime" to EOU manufacturing units.[53]

2.31. Sections 6.02 and 6.03 bring the importation of second hand capital goods and the leasing of capital goods within the remit of the schemes in chapter 6. Section 6.16 provides that units may be set up under these schemes also for reconditioning, repair, and re-engineering, but that certain provisions of chapter 6 shall not apply to these activities.

2.32. Section 6.04 sets out a net foreign exchange earnings requirement for units under the schemes in chapter 6; section 6.09 lists "supplies effected from" such units that count for fulfilment of the positive net foreign exchange requirement; and section 6.10 explains that such units may export through others subject to certain conditions.

2.33. Section 6.11 sets forth "benefits", "exemption[s]" and other entitlements of units under the schemes in chapter 6 for supplies from the domestic tariff area. And section 6.12 provides for "Other Entitlements" of units under the schemes in chapter 6. There are six such other entitlements, of rather varying nature.

2.34. Section 6.05 provides for the process of application and approval of units under the schemes in chapter 6; section 6.18 provides for leaving the schemes; section 6.19 provides for conversion of units from a scheme to another and from domestic tariff area units into units under one of the schemes; section 6.20 contains provisions on monitoring of the net foreign exchange requirement; section 6.24 envisages implementing powers; and section 6.25 provides for "Revival of Sick Units".

2.35. Chapter 6 also sets forth rules on (a) transfer of manufactured goods between units (section 6.13); (b) subcontracting of production processes (section 6.14); (c) material that units were unable to use and capital goods that have become "obsolete/surplus" (section 6.15); (d) replacement/repair goods (section 6.17); (e) export through exhibitions and the like (section 6.21); (f) personal carriage of goods (section 6.22); and (g) imports and exports by post (section 6.23).

2.36. Thus, as a whole, chapter 6 sets out (a) the conditions for setting up units under the four schemes named in this chapter, three of which are the schemes named in the panel request; (b) rules on what these units may and may not do and the extent to which the entitlements vary depending on certain circumstances; (c) the "entitlements" of these units; and (d) rules for the programme's administration. Therefore, chapter 6 describes a relatively cohesive regime regarding the programme named in the panel request.

2.37. Instrument No. 2, "Appendices and Aayat Niryat Forms"[54], sets forth numerous forms for the administration of schemes provided for in the FTP, including those in chapter 6 of the FTP, as well as more detail on the schemes set out in chapter 6 of the FTP such as approval criteria, and miscellaneous provisions, e.g. on sale of surplus power.[55]

2.38. Instrument No. 3 bears the Handbook of Procedures, as revised pursuant to section 1.03 of the FTP, which sets out procedures to be followed in the implementation of, among others, the FTP.[56] Chapter 6 of the Handbook of Procedures bears almost exactly the same title as chapter 6 of the FTP, namely, "Export Oriented Units (EOUs), Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs), Scheme [sic] and Bio-Technology Parks (BTPs)". To recall, these schemes, except for the Software Technology Parks Scheme, are those named in the panel request as comprising the First Programme.

2.39. Chapter 6 of the Handbook of Procedures sets out more detailed rules than those in the FTP on the requirements that units must comply with in order to benefit from the schemes, as well as rules on the administration of the programme, including on the approval process, competent authorities, and timeframes to decide upon applications. This chapter does not appear to provide

[52] Foreign Trade Policy, (Exhibit USA-3), subsections 6.01(d)(ii), (d)(iii), (f), and (k).
[53] Foreign Trade Policy, (Exhibit USA-3), subsection 6.01(e).
[54] Appendices and Aayat Niryat forms, (Exhibit USA-6).
[55] "No duty shall be required to be paid on sale of surplus power from an EOU unit to another EOU/SEZ unit". (Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6B, para. 4(ii)).
[56] Handbook of Procedures, (Exhibit USA-5), p. 1; Foreign Trade Policy, (Exhibit USA-3), section 1.03.

more detail about the entitlements of units under the schemes, although it does provide that "[a]pplication for grant of all entitlements may be made to the DC [(Development Commissioner)] concerned".[57]

2.40. Instrument No. 4 amends some of the "sector-specific requirements for EOUs" in appendix 6B (to the FTP), which is part of Instrument No. 2. The amendment relates to the eligibility under EOU schemes of activities pertaining to the reprocessing of textiles. Instrument No. 5 removes the bond requirement from certain provisions relating to the schemes comprising the First Programme.[58]

2.41. Thus, the panel request identifies the alleged export subsidies comprising the first measure through a combination of (a) the names of the programmes under which the alleged subsidies are provided; and (b) the legal instruments reflecting the alleged subsidies. While some of these legal instruments are broad, the combination of the programmes' names and the legal instruments identifies the relevant portions of those legal instruments. Further, the legal instruments set out the manner of operation of the programmes, including conditions of eligibility, manner of administration, and entitlements under each programme.

2.42. Chapter 6 of Instrument No. 1, the FTP, describes not one, but a number of entitlements available to units under the schemes named in this chapter.[59] This raises the question of whether the complainant should have singled out each entitlement in its panel request in order to identify the measure at issue. India argues that "the precise incentive offered within the 'scheme' … must be considered as the measure at issue".[60] India also argues that the panel request is akin to the portion of the panel request in *Australia − Apples* that was held by that panel to be outside its terms of reference.[61]

2.43. In *Australia − Apples*, New Zealand's panel request challenged "measures specified in and required by Australia pursuant to the *Final import risk analysis report for apples from New Zealand* [(FIRA)]", and, "[i]n particular," a list of 17 specific requirements.[62] The list of measures was followed by a listing of several provisions of the SPS Agreement alleged to be violated.[63] The panel in that case found that, while the 17 requirements had been identified with sufficient specificity to fall within its terms of reference, "given the length and complexity of Australia's *FIRA* … the broad reference in New Zealand's panel request to the 'measures specified in and required by Australia pursuant to the [FIRA]' fail[ed] to satisfy the requirement of sufficient clarity in the identification of the … measure[]".[64]

2.44. However, the situation in the present case is not the same as that of the "broad reference" in *Australia − Apples*. In the present case, the complainant has explained that it is challenging export subsidies under three named programmes, and has listed legal instruments in which those subsidies are reflected. This is not the same as referring to "measures specified in and required by [a Member] pursuant to a [risk analysis]"[65], because the latter formulation leaves entirely open the type of measures that could be "specified and required", mentioning only that the measures will have some connection ("specified in", or "required … pursuant to") to the risk analysis in question.

2.45. In the case before the Panel, the complainant has challenged, in its panel request, alleged subsidies provided under a set of three named programmes, whose names in the panel request correspond to those in the legislation referenced in that request. The referenced legislation appears to set out a relatively cohesive and comprehensive regime for these programmes. Given the text of the panel request and of the referenced legislation, the fact that these programmes envisage not one entitlement, but several entitlements for participating units does not entail that the measure has not been sufficiently identified. To borrow the words of the Appellate Body in *EC − Bananas III*, subject to our consideration of India's further arguments, below, the panel request appears to

[57] Handbook of Procedures, (Exhibit USA-5), section 6.18.

[58] These provisions are set out in the Handbook of Procedures comprising Instrument No. 3 (Exhibit USA-5), and in the Appendices comprising Instrument No. 2 (Exhibit USA-6).

[59] These entitlements are set out in FTP, sections 6.01, 6.11, and 6.12, as just described. (Foreign Trade Policy, (Exhibit USA-3)).

[60] India's first written submission, para. 34.

[61] India's first written submission, para. 40.

[62] Request for the establishment of a panel by New Zealand, *Australia − Apples*, WT/DS367/5, p. 1.

[63] Request for the establishment of a panel by New Zealand, *Australia − Apples*, WT/DS367/5, p. 3.

[64] Preliminary ruling by the Panel, *Australia − Apples*, WT/DS367/7, paras. 8-9.

[65] Preliminary ruling by the Panel, *Australia − Apples*, WT/DS367/7, para. 9.

"contain[] sufficient identification of the specific measures at issue to fulfil the requirements of Article 6.2 of the DSU".[66]

2.46. India also argues that for all measures, including the alleged subsidies under the First Programme, the panel request merely "list[s] the identified Schemes", "stipulate[s] the title of each programme … and thereafter, provides only a list of legal instruments that have implemented the Identified Program".[67] According to India, this means that the request "does not clarify whether the challenged measure is the alleged 'scheme' … or the 'legal instruments'".[68] The United States responds that it has identified the measures "by the very name India itself calls each measure"[69], and has taken "the additional step of referencing legal instruments to facilitate … understanding of the measures subject to the dispute".[70]

2.47. India's description does not correspond to the text of the panel request. The panel request explains that India "provides export subsidies through"[71] the programmes that are named in the panel request, and it then continues to explain that "[t]he export subsidies provided through these programs are reflected in legal instruments that include" those listed in the panel request.[72] Thus, the panel request does clarify the relationship between the programmes, or schemes, and the cited legal instruments.

2.48. Based on its view that the panel request can only be challenging *either* the scheme *or* the legal instrument, India further argues that the panel request is insufficient in either case, i.e. whether the United States "seeks to challenge the 'schemes'"[73], or whether the United States "claims that the cited 'legal instrument' are the measures at issue".[74]

2.49. According to India, if the object of the United States' challenge are the schemes, the United States failed to identify "the precise measure within the 'scheme' that is deemed to violate Articles 3.1(a) and 3.2 of the SCM Agreement", particularly as the "'schemes' are policy programmes that" have multiple objectives.[75] Instead, the United States "merely cited the name of the programmes".[76] Alternatively, India continues, if the object of the United States challenge is the legal instruments, then the request does not provide sufficient clarity because the legal instruments "are protracted/extensive in nature" and the United States failed to identify "the specific paragraph or provision within such legal instruments".[77]

2.50. India seeks to separate the various elements of the panel request and read them in isolation. However, a panel request must be assessed "as a whole".[78] When reading the panel request as a whole, the very combination of those elements permits the identification of the measures at issue, as set out above.[79] The fact that the panel request lists the programme names allows the identification of the relevant portions of the cited legal instruments; and the identification of the legal instruments provides greater specificity and precision in the identification of the programmes.

2.51. In a similar vein, India indicates that the panel request "merely" lists legal instruments.[80] However, the panel request does not merely list legal instruments. As described above, the panel request sets forth programme names, explains that the programmes are reflected in certain legal

[66] Appellate Body Report, *EC − Bananas III*, para. 140.
[67] India's first written submission, para. 32.
[68] India's first written submission, para. 33.
[69] United States' second written submission, para. 18. See also, ibid. para. 13.
[70] United States' second written submission, para. 13. See also, ibid. para. 18. The United States further notes that there is "no specific requirement in Article 6.2 concerning the manner … for identifying a specific measure at issue[,] [provided] its content is adequately described in the Panel request". (ibid. para. 17 (quoting Panel Report, *US − FSC (Article 21.5 − EC II)*, para. 7.82)).
[71] United States' panel request, p. 1.
[72] United States' panel request, p. 1.
[73] India's first written submission, para. 34.
[74] India's first written submission, para. 35.
[75] India's first written submission, para. 34.
[76] India's first written submission, para. 34.
[77] India's first written submission, para. 35.
[78] See para. 2.18 above.
[79] See paras. 2.26- 2.41 above.
[80] India's first written submission, paras. 38 and 41.

instruments, and then lists legal instruments in which provisions relating to those programmes can be found.

2.52. India further notes that Instruments Nos. 1, 2, and 3 are referred to in connection with three programmes, namely the First Programme, Second Programme and Third Programme listed in the panel request. According to India, first, this "suggest[s] that the same measures are being challenged with regards to three different schemes".[81] Second, these instruments "implement a variety of India's policy objectives"[82], the United States fails to indicate "the specific measure within"[83] these instruments that it is challenging, and yet it "is absurd" to conceive that the United States would challenge them "in their entirety".[84]

2.53. These arguments appear to have their foundation in the fact of parsing, and viewing in isolation, the various elements of the panel request. While it is true that Instruments Nos. 1, 2, and 3 are multifaceted, the panel request indicates the names of the programmes under which the alleged export subsidies are provided, and these names allow the identification of the portions of the cited legal instruments that are relevant to each of the challenged measures. Similarly, when the programme names and the legal instruments are considered together, the reason why Instruments Nos. 1, 2, and 3 are cited as instruments "reflect[ing]"[85] three programmes also becomes apparent: these instruments contain distinct portions (in Instruments Nos. 1 and 3, distinct chapters) devoted to each of the programmes.

2.54. Thus, based on the text of the panel request and the instruments reflected therein, the Panel concludes that the panel request sufficiently identifies the alleged export subsidies comprising the first measure, and allegedly provided under named programmes, through a combination of (a) the names of the programmes under which the alleged subsidies are provided; and (b) the legal instruments reflecting those alleged subsidies. In this way, the panel request meets the requirement in Article 6.2 of the DSU to "identify the specific measures at issue".

2.3.1.2 The Second Programme: Merchandise Exports from India Scheme

2.55. The second programme through which, according to the panel request, India "appears … [to] provide[] export subsidies" is described, in that request, as "Merchandise Exports from India Scheme"[86] (the Second Programme). The panel request lists 14 instruments in connection with this programme, as "legal instruments" in which the measure is "reflected … operating separately or collectively".[87] These five instruments are listed as Nos. 1-5 and 7-15.[88]

2.56. Instrument No. 1 is the FTP. As noted above, the FTP is broad and multifaceted. However, the FTP bears a chapter on "Exports from India Schemes"[89], which explains that there shall be two such schemes, one for merchandise exports and one for services exports.[90] The scheme "for exports of Merchandise" is the "Merchandise Exports from India Scheme (MEIS)"[91], i.e. the programme named in the panel request. The FTP provides for this programme in sections 3.00 to 3.06, and 3.14 to 3.24, of chapter 3.[92]

2.57. These provisions set out (a) the objective of the scheme (sections 3.00 and 3.03); (b) the "Nature of Rewards" (section 3.02); (c) the conditions for eligibility; (d) the manners in which the rewards can be utilized; (e) the "Privileges of Status Holders" under the Scheme (section 3.24) and conditions for grant of such status; and (f) rules relating to the administration of the scheme.

[81] India's first written submission, para. 43.
[82] India's first written submission, para. 45.
[83] India's first written submission, para. 46.
[84] India's first written submission, para. 48.
[85] United States' panel request, p. 1.
[86] United States' panel request, pp. 1-2.
[87] United States' panel request, p. 1.
[88] United States' panel request, p. 2.
[89] Foreign Trade Policy, (Exhibit USA-3), chapter 3.
[90] Foreign Trade Policy, (Exhibit USA-3), section 3.01.
[91] Foreign Trade Policy, (Exhibit USA-3), section 3.01.
[92] Sections 3.03-3.06 pertain solely to the Merchandise Exports from India Scheme. Sections 3.00-3.02 and 3.14-3.24 relate to both this scheme and the "Service Exports from India Scheme".

2.58. In particular, section 3.02, on "Nature of Rewards", explains that "Duty Credit Scrips shall be granted as rewards under MEIS" and "shall be freely transferable", and goes on to describe the three types of uses to which these duty credit scrips can be put[93], i.e. payment of customs duties on certain goods, payment of excise duties on certain goods, and payment of certain other dues such as application fees and value shortfalls in export obligation.[94]

2.59. Section 3.04 of the FTP, on "Entitlement under MEIS", explains that "exports of [certain goods to certain markets] shall be rewarded under MEIS". As we will see shortly, the relevant goods and markets are set out in Instrument No. 7 and its amendments.

2.60. Instrument No. 2 contains a number of appendices and forms expressly related to MEIS, including application forms.[95]

2.61. Instrument No. 3, the Handbook of Procedures, bears a chapter encompassing MEIS[96], which sets forth more detailed rules for the application of chapter 3 of the FTP.

2.62. Instrument No. 4 amends some of the "sector-specific requirements for EOUs" in Appendix 6B to the FTP. Appendix 6B relates to the First Programme[97], and it is not clear to the Panel how the reference to Instrument No. 4 is relevant to identify the measure at issue. Similarly, Instrument No. 5 removes the bond requirement from certain provisions under the First Programme, and it is not clear to the Panel how the reference to Instrument No. 5 is relevant to identify the measure at issue.[98]

2.63. Instrument No. 7 bears Appendix 3B, which identifies the relevant goods and markets for purposes of section 3.04 of the FTP, namely, the goods that must be exported, and the markets to which they must be exported, to obtain rewards under MEIS.[99] Instrument No. 8 bears amendments to Appendix 3B.[100] Instrument No. 9 bears the "Harmonised and Consolidated Table 2 of Appendix 3B as per Public Notice No. 61/2015-20".[101] Instrument No. 10 bears corrections to descriptions of products in table 2 of Appendix 3B.[102] Equally, Instruments Nos. 11 to 15 amend, correct or harmonize Appendix 3B.[103]

2.64. Thus, similar to the first measure, the panel request identifies the alleged export subsidies comprising the second measure through a combination of (a) the name of the programme under which the alleged subsidies are provided; and (b) the legal instruments reflecting the alleged subsidies. Again, while some of these legal instruments are broad, the combination of the programme's name and the legal instruments identifies the relevant portions of most of those legal instruments (except for Instruments Nos. 4 and 5, addressed in the next paragraph). Further, the legal instruments set out the manner of operation of the programmes, including the conditions of eligibility, the manner of administration, and the entitlements under the programme.

2.65. Unlike the situation for the First Programme, on the face of the panel request, the relationship between Instruments Nos. 4 and 5 and the Second Programme is not clear. Instruments Nos. 4 and 5 appear to relate to the First Programme. We are therefore puzzled by the reference to these instruments. At the same time, while the reference to these two legal instruments does not add to the understanding of the Second Programme, it does not detract from it either, particularly in light of these two instruments' narrow focus. We also note that India, while raising specific arguments on

[93] Foreign Trade Policy, (Exhibit USA-3), section 3.02.
[94] Foreign Trade Policy, (Exhibit USA-3), section 3.02, together with section 3.18.
[95] Appendices and Aayat Niryat forms, (Exhibit USA-6).
[96] Handbook of Procedures, (Exhibit USA-5), pp. 86-100. The programme related to services is also covered, but separately identified.
[97] Instrument No. 4 http://dgft.gov.in/sites/default/files/pn3116_2.pdf (accessed 13 November 2018). Appendix 6B without this amendment is contained in Appendices and Aayat Niryat forms, (Exhibit USA-6), pp. 167-168.
[98] Instrument No. 5 http://dgft.gov.in/sites/default/files/PN2516_0.pdf (accessed 13 November 2018).
[99] Public Notice 2/2015-2020, (Exhibit USA-11).
[100] Public Notice 27/2015-2020, (Exhibit USA-12).
[101] Public Notice 61/2015-20, (Exhibit USA-13).
[102] Public Notice 1/2015-2020, (Exhibit USA-14).
[103] Public Notice 17/2015-2020, (Exhibit USA-15); Public Notice 22/2015-2020, (Exhibit USA-16); Public Notice 42/2015-2020, (Exhibit USA-17); Public Notice 44/2015-2020, (Exhibit USA-18); and Public Notice 60/2015-2020, (Exhibit USA-19).

Instruments Nos. 1, 2, and 3, has not raised any specific argument relating to the reference to Instruments Nos. 4 and 5 under the Second Programme. Overall, therefore, we consider that the listing of these two legal instruments under the Second Programme is not such as to change our analysis of the sufficiency of the panel request.

2.66. India puts forward the same arguments regarding the Second Programme, and the United States provides the same response, as those we have already considered under the First Programme, in paragraphs 2.46 to 2.53 above. The reasoning set out there applies in the same way to the Second Programme as it did to the First Programme, because the relevant fact pattern regarding the identification of the Second Programme is the same. The panel request does not, and need not, sever the programme names from the legal instruments. Instead, it is the very combination of the different elements in the panel request that permits the identification of the "specific measures at issue" as required by Article 6.2. Similarly, it is this combination that permits the identification of the relevant portions of Instruments No, 1, 2, and 3, which are otherwise indeed broad in scope.

2.67. Therefore, by identifying the second measure through a combination of the name of the programme under which the alleged export subsidies are provided, and the legal instruments reflecting them, the panel request meets the requirement in Article 6.2 of the DSU to "identify the specific measures at issue".

2.3.1.3 The Third Programme: Export Promotion Capital Goods Scheme

2.68. The third programme through which, according to the panel request, India "appears … [to] provide[] export subsidies", is described, in that request, as "Export Promotion Capital Goods Scheme"[104] (the Third Programme). Nine instruments are listed in connection with this scheme, as "legal instruments" in which the measure is "reflected … operating separately or collectively".[105] These nine instruments are listed as Nos. 1-5 and 17-20.[106]

2.69. To recall, Instrument No. 1 sets out the FTP.[107] Chapter 5 of the FTP is entitled "Export Promotion Capital Goods (EPCG) Scheme"[108], a title that matches exactly the programme's name as used in the United States' panel request. This chapter runs for six pages.[109] At section 5.01, it explains that the "EPCG scheme" (a) "allows import of capital goods … at Zero customs duty"; (b) allows for the exemption from certain other taxes; and (c) in some cases allows for advantages also in connection with the procurement of capital goods "from indigenous sources".[110] Section 5.01 continues by providing that "[i]mport under EPCG Scheme shall be subject to an export obligation", whose content is further detailed in chapter 5 of the FTP.[111]

2.70. The FTP then continues by setting out conditions that apply to the EPCG Scheme, the scheme's coverage, and other provisions[112], such as the possibility for exporters who "intend to import capital goods on full payment of applicable duties, taxes and cess in cash" to obtain "Post Export EPCG Duty Credit Scrip(s)".[113]

2.71. Instrument No. 2[114] contains a number of appendices and forms expressly related to the EPCG Scheme, e.g. application forms.

2.72. Instrument No. 3, the Handbook of Procedures, bears a chapter entitled "Export Promotion Capital Goods (EPCG) Scheme".[115] This chapter sets out more detailed provisions for the application of chapter 5 of the FTP, including on (a) authorisation procedures; (b) additional conditions for fulfilment of the export obligation under the scheme; (c) monitoring of the export obligation;

[104] United States' panel request, pp. 1-2.
[105] United States' panel request, p. 1.
[106] United States' panel request, pp. 2-3.
[107] Foreign Trade Policy, (Exhibit USA-3), second page.
[108] Foreign Trade Policy, (Exhibit USA-3), p. 85.
[109] Foreign Trade Policy, (Exhibit USA-3), pp. 85-90.
[110] Foreign Trade Policy, (Exhibit USA-3), p. 85.
[111] Foreign Trade Policy, (Exhibit USA-3), p. 85.
[112] Foreign Trade Policy, (Exhibit USA-3), pp. 86-90.
[113] Foreign Trade Policy, (Exhibit USA-3), p. 89.
[114] Appendices and Aayat Niryat forms, (Exhibit USA-6).
[115] Handbook of Procedures, (Exhibit USA-5), p. 144

(d) reductions in the export obligation in certain circumstances; and (e) criminal liability "[i]n case of failure to fulfil export obligation or any other condition of authorisation".[116]

2.73. Instrument No. 4 amends some of the "sector-specific requirements for EOUs" in Appendix 6B to the FTP. Appendix 6B relates to the First Programme[117], and it is not clear to the Panel how the reference to Instrument No. 4 is relevant to identify the measure at issue. Similarly, Instrument No. 5 removes the bond requirement from certain provisions under the First Programme, and it is not clear to the Panel how the reference to this instrument is relevant to identify the measure at issue.[118]

2.74. Instrument No. 17 lists services that can be counted "towards discharge of Export Obligation under the Export Promotion Capital Goods (EPCG) Scheme"[119], thus setting out details for the implementation of the EPCG Scheme.

2.75. Instrument No. 18 amends some of the forms to be used in the application of the EPCG Scheme, as set out in Instrument No. 2.[120]

2.76. Instrument No. 19 sets out details for the application, in a particular year, of a provision in the Handbook of Procedures, namely, the provision under which the average annual export obligation under the EPCG Scheme can be reduced for sectors or products whose overall exports declined by more than 5%.[121]

2.77. Instrument No. 20 amends the provisions for assessing compliance with the annual average export obligation under the EPCG Scheme, and the list of capital goods that cannot be imported under the EPCG, or that can only be imported subject to conditions.[122]

2.78. Thus, similar to the first and second measures, the panel request identifies the alleged export subsidies comprising the third measure through a combination of (a) the name of the programme under which the alleged subsidies are provided; and (b) the legal instruments reflecting them. Again, while some of these legal instruments are broad, the combination of the programme's name and the legal instruments identifies the relevant portions of most of those legal instruments (except for Instruments Nos. 4 and 5, addressed in the next paragraph). Further, the legal instruments set out the manner of operation of the programmes, including conditions of eligibility, manner of administration, and entitlements under the programme.

2.79. Also similar to the Second Programme, we were puzzled, on the face of the panel request, about the relevance of Instruments Nos. 4 and 5 to the Third Programme. Instruments Nos. 4 and 5 seem to relate to the First Programme. At the same time, considering the panel request as a whole, the reference to these two legal instruments does not ultimately detract from the identification of the measure, particularly in light of these two instruments' narrow focus. We also recall that India, while raising specific arguments on Instruments Nos. 1, 2 and 3, has not raised

[116] Handbook of Procedures, (Exhibit USA-5), pp. 144-158.
[117] Instrument No. 4 http://dgft.gov.in/sites/default/files/pn3116_2.pdf (accessed 13 November 2018). Appendix 6B without this amendment is contained in Appendices and Aayat Niryat forms, (Exhibit USA-6), pp. 167-168.
[118] Instrument No. 5 http://dgft.gov.in/sites/default/files/PN2516_0.pdf (accessed 13 November 2018).
[119] Instrument No. 17 http://dgft.gov.in/sites/default/files/PN0417_0.pdf (accessed 13 November 2018), p. 1.
[120] Instrument No. 18 http://dgft.gov.in/sites/default/files/P.N.%2008%20dated%2006.05.16%20English.pdf (accessed 13 November 2018). Instrument No. 2 is set out in Appendices and Aayat Niryat forms, (Exhibit USA-6).
[121] Instrument No. 19 http://dgft.gov.in/sites/default/files/PolicyCircular03%20dated21.11.2017_0.pdf (accessed 13 November 2018).
[122] Instrument No. 20 http://www.eximguru.com/notifications/new-appendices-5-e-and-82417.aspx (accessed 13 November 2018). There is a slight discrepancy between the title of this Instrument as accessed at this link and the title provided in the panel request: the panel request refers to "Public Notice 47/2015-2010", whereas the title accessed at this link refers to "Public Notice 47/2015-2020". The other identifiers, however, match; moreover, "2015-2020" appears to be a reference to the FTP 2015-2020, further confirming that the ending in "-10" is a typographical error.

any specific argument relating to the reference to Instruments Nos. 4 and 5 under the Second Programme.[123]

2.80. India's arguments and the United States' response regarding the Third Programme are the same as those we have discussed under the First Programme, in paragraphs 2.46 to 2.53 above. The reasoning, set out there, applies in the same way to the Third Programme as it did to the First and Second Programmes, because the relevant fact pattern regarding the identification of the measure in the panel request is the same. The panel request does not, and need not, sever the programme names from the legal instruments. Instead, it is the very combination of the different elements in the panel request that permits the identification of the "specific measures at issue" as required by Article 6.2. Similarly, it is this combination that permits the identification of the relevant portions of Instruments Nos. 1, 2, and 3, which are otherwise indeed broad in scope.

2.81. Therefore, by identifying the alleged export subsidies comprising the third measure through a combination of (a) the name of the programme under which the alleged subsidies are provided; and (b) legal instruments reflecting the alleged subsidies, the panel request meets the requirement in Article 6.2 of the DSU to "identify the specific measures at issue".

2.3.1.4 The Fourth Programme: Special Economic Zones

2.82. The fourth programme through which, according to the panel request, India "appears … [to] provide[] export subsidies", is described, in that request, as "Special Economic Zones"[124] (the Fourth Programme). Six instruments are listed in connection with this scheme, as "legal instruments" in which the measure is "reflected … operating separately or collectively".[125] These six instruments are listed as Nos. 21-26.[126]

2.83. Instrument No. 21 is the Special Economic Zones Act, 2005, No. 28 of 2005 ("Special Economic Zones Act").[127] It makes provision "for the establishment, development and management of the Special Economic Zones for the promotion of exports".[128] In particular, it (a) sets out procedures for establishing special economic zones[129]; (b) establishes bodies charged with approving and administering special economic zones[130]; (c) sets out "special fiscal provisions for special economic zones"[131], as well as separately providing for "Modifications to the Income-tax Act, 1961"[132]; and (d) sets forth other "Miscellaneous" provisions relating to special economic zones.[133]

2.84. Instrument No. 22 consists of the Special Economic Zones Rules, 2006, incorporating amendments up to July 2010 ("Special Economic Zones Rules").[134] These rules were adopted in the "exercise of the powers conferred by section 55" of the Special Economic Zones Act[135], which we have just discussed. The Special Economic Zones Rules set out more detailed provisions for the implementation of the Special Economic Zones Act. These rules relate to (a) the procedure for establishing special economic zones (Chapter II), and for establishing a unit within a special economic zone (Chapter III); (b) the "terms and conditions subject to which entrepreneur and developer shall be entitled to exemptions, drawbacks and concessions" (Chapter IV); (c) the conditions subject to which goods may be removed from a special economic zone to the domestic tariff area (Chapter V); (d) rules relating to the requirement that units achieve net foreign exchange earnings (Chapter VI); (e) rules on appeals (Chapter VII); (f) miscellaneous provisions (Chapter VIII

[123] See para. 2.65 above.
[124] United States' panel request, pp. 1 and 3.
[125] United States' panel request, p. 1.
[126] United States' panel request, p. 3.
[127] Special Economic Zones Act, (Exhibit USA-22).
[128] Special Economic Zones Act, (Exhibit USA-22), p. 1.
[129] Special Economic Zones Act, (Exhibit USA-22), Chapter II.
[130] Special Economic Zones Act, (Exhibit USA-22), Chapters III, IV, V, and VII.
[131] Special Economic Zones Act, (Exhibit USA-22), Chapter VI.
[132] Special Economic Zones Act, (Exhibit USA-22), Second Schedule.
[133] Special Economic Zones Act, (Exhibit USA-22), Chapter VIII. In addition, Chapter I sets out the short title, territorial and temporal scope of application of the act, and definitions for purposes of the act; and the Third Schedule sets out amendments to three further acts.
[134] Special Economic Zones Rules, (Exhibit USA-28), pp. 1-2.
[135] Special Economic Zones Rules, (Exhibit USA-28), p. 3.

and Annexures I and following); and (g) forms needed in the application of the Special Economic Zones Rules.[136]

2.85. Instrument No. 23 bears amendments, dated June 2010, to the Special Economic Rules that we just discussed as Instrument No. 22.[137] These amendments, however, are already reflected in Instrument No. 22, which as its title indicates incorporates amendments up to July 2010.

2.86. Instruments No. 24 bears amendments, dated June 2017, to the Special Economic Rules that we discussed as Instrument No. 22.[138] These June 2017 amendments relate to the conditions under which a unit may subcontract production and still benefit from exemptions, drawbacks, and concessions under the Special Economic Zones Rules.[139]

2.87. Instrument No. 25 "exempts all goods or services or both imported by a unit or a developer in the Special Economic Zone, from the whole of the integrated tax leviable thereon under sub-section (7) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) for authorised operations".[140]

2.88. Instrument No. 26 is the "Income Tax Act, 1961, as amended".[141] The Income Tax Act, 1961, is "[a]n Act to consolidate and amend the law relating to income-tax and super-tax"[142]; it is a very extensive piece of legislation, broad in scope, and spanning more than a thousand pages. In this case, listing the Income Tax Act, 1961, alone, could hardly meet the requirement to identify the "specific measure at issue" under Article 6.2 of the DSU. However, the panel request does not list this act alone. Instead, it lists this act as one of the instruments under the Special Economic Zones programme in which the alleged export subsidies are "reflected", together with a number of other legal instruments, which we have discussed above.[143] We will therefore consider Instrument No. 26 in this context.

2.89. A search in the text of the act for the programme name provided in the panel request, i.e. "Special Economic Zones", identifies provisions relating to special economic zones, typically accompanied by a note explaining that they were inserted by the Special Economic Zones Act. Moreover, Instrument No. 21, the first instrument listed in the panel request in connection with the Special Economic Zones programme (a) provides, in the chapter setting out "Special Fiscal Provisions for Special Economic Zones", that the Income Tax, 1961, shall apply to developers and entrepreneurs for operations in special economic zones or units "subject to the modifications specified in the Second Schedule"[144]; and (b) in the Second Schedule, sets out ten "Modifications to the Income Tax Act, 1961".[145] These modifications relate to ten sections or subsections of the Income Tax Act, 1961, and provide in particular for certain exemptions and deductions relating to business in special economic zones.[146]

[136] Special Economic Zones Rules, (Exhibit USA-28).
[137] Instrument No. 23 http://sezindia.nic.in/upload/uploadfiles/files/20SEZ_Rule_amendment_10.pdf (accessed 13 November 2018).
[138] Instrument No. 24 http://sezindia.nic.in/upload/uploadfiles/files/amendmentrule2006.pdf (accessed 13 November 2018).
[139] The amendments relate to Rule 41, "Sub-contracting", of Chapter IV ("terms and conditions subject to which entrepreneur and developer shall be entitled to exemptions, drawbacks and concessions"). (Instrument No. 24 http://sezindia.nic.in/upload/uploadfiles/files/amendmentrule2006.pdf (accessed 13 November 2018)).
[140] Notification 15/2017, (Exhibit USA-27).
[141] United States' panel request, p. 3.
[142] Instrument No. 26, "as amended by Finance Act 2008" http://www.icnl.org/research/library/files/India/IndiaIncomeTax1961.pdf (accessed 22 November 2018), p. 1. With its first written submission, the United States has submitted excerpts of the Income Tax Act, 1961, as Exhibits USA-29 and USA-30; however, the Panel does not rely on these excerpts (which are more specific than the reference to the Income Tax Act, 1961, as a whole) in its assessment under Article 6.2 of the DSU, since the question before the Panel is whether the panel request, as it existed at the time of filing, was sufficiently specific.
[143] United States' panel request, pp. 1 and 3.
[144] Special Economic Zones Act, (Exhibit USA-22), p. 15, Chapter VI, Section 27.
[145] Special Economic Zones Act, (Exhibit USA-22), pp. 26-32.
[146] Special Economic Zones Act, (Exhibit USA-22), pp. 26-32. The ten sections and subsections are: Sections 10, 10A, 10AA, 54GA, 80-IA, 80-IAB, 80LA, 115JB, 115-0, and 197A.

2.90. Therefore, reading the text of the panel request as a whole, including the name of the Fourth Programme and the Special Economic Zones Act, it is possible to identify the specific portions of the Income Tax Act, 1961, which relate to the Fourth Programme listed in the panel request, namely, the Special Economic Zones programme.

2.91. Therefore, the panel request identifies the alleged export subsidies comprising the fourth measure through a combination of (a) the name of the programme under which the alleged subsidies are provided; and (b) the legal instruments reflecting the alleged export subsidies. Again, while some of these legal instruments are broad, the combination of the programme's name and the legal instruments, as well as the interlinkages between legal instruments, identify the relevant portions of the legal instruments cited in the panel request. Further, these legal instruments set out the manner of operation of the programme, including conditions of eligibility, rules for the administration of the programme, and "special fiscal provisions"[147] under the programme, such as "exemptions, drawbacks and concessions".[148] At the same time, the entitlements available under this fourth programme are many.[149]

2.92. India makes two sets of arguments regarding the fourth measure. First, for all five measures, India argues that the panel request fails to clarify whether the challenge is addressed to the programme or the legal instruments, and that, either way, the request is insufficient. The Panel has considered this set of arguments in paragraphs 2.46 to 2.51 above, with reference to the First Programme. The reasoning set out there applies in the same way to the Fourth Programme, because the relevant fact pattern regarding the identification of the Fourth Programme is the same. The panel request does not, and need not, sever the programme names from the legal instruments. Instead, it is the very combination of the different elements in the panel request that permits the identification of the "specific measures at issue" as required by Article 6.2.

2.93. Second, India argues that the panel request fails to identify the fourth measure with the required precision, because of the scope and breadth of the six legal instruments listed in the panel request in connection with this measure. India explains that "the legal instruments stipulated in these paragraphs regulate a wide variety of India's policy objectives".[150] In particular, India explains that the Special Economic Zones Act "is 53 pages long and addresses a variety of policy objectives"[151], leaving "India [to] wonder and guess as to which measures *within* the cited legal instruments are allegedly in violation of Articles 3.1(a) and 3.2 of the SCM Agreement".[152] India further explains that the Income Tax Act, 1961, "is 1067 pages long and provides the entirety of India's direct taxation regime and administration"[153], so that challenging it in its entirety would be "absurd".[154]

2.94. It is definitely correct that certain of the legal instruments cited in the panel request are very extensive. However, these legal instruments are not cited in isolation. Instead, they are cited in combination with the programme's name, and in combination with each other. In the request before the Panel, it is the combination of these elements that allows the proper identification of the measures at issue. In particular, as regards the Income Tax Act, 1961, it is the combination of these elements that puts the reader on notice that the complainant is not challenging the Income Tax Act in its entirety, but rather the special rules in this Act pertaining to the Special Economic Zones programme.

2.95. As for the Special Economic Zones Act, we agree that the Act is quite comprehensive in scope in that it sets out the legal framework for the establishment of such zones and of units therein, rules for the administration of the Special Economic Zones programme, special fiscal rules for participating entities, conditions of eligibility, and other rules. However, the United States is challenging the alleged export subsidies provided under the Special Economic Zones programme, which means that

[147] See para. 2.83 above.
[148] See para. 2.84 above.
[149] For example, Instrument No. 21 provides for numerous duty, tax, excise tax, or cess exemptions: see, e.g. section 7 and First Schedule (referring to taxes, duties and cess under 21 separate acts), section 26(i)(a)-(g), section 27 and Second Schedule, section 50(a), and section 55 (2)(h). (Special Economic Zones Act, (Exhibit USA-22)).
[150] India's first written submission, para. 51.
[151] India's first written submission, para. 52.
[152] India's first written submission, para. 54. (emphasis original)
[153] India's first written submission, para. 56.
[154] India's first written submission, para. 56.

it is proper for the panel request to refer, among other elements, to the legal instrument that comprehensively sets out the legal framework for this programme.

2.96. We also agree that the Fourth Programme envisages not one, but a number of entitlements available to participating entities. Similar to the First Programme, this raises the question whether the complainant should have singled out each entitlement in its panel request in order to identify the measure at issue. India argues that "the precise incentive within the 'scheme' … must be considered as the measure at issue".[155] India also argues that the panel request before the United States is akin to the portion of the panel request in *Australia − Apples* that was held by that panel to be outside the terms of reference.[156]

2.97. We refer to our discussion of the relevant portion of *Australia − Apples* in paragraphs 2.43 to 2.44 above. The situation in the present case is not the same as that of the umbrella reference to measures in *Australia − Apples*. In the present case, the complainant has explained that it is challenging export subsidies provided under the Special Economic Zones programme, as reflected in the legal instruments listed in the panel request. This is not the same as referring to "measures specified in and required by [a Member] pursuant to the [risk analysis]"[157], because the latter formulation leaves entirely open the type of measures that could be "specified and required", mentioning only that the measures will have some connection ("specified in", or "required … pursuant to") to the risk analysis in question.

2.98. The situation in the present case is reminiscent of *EC − Bananas III*, where the complainants identified the measure by describing it as "a regime for the importation, sale and distribution of bananas", and by referring to the specific regulation establishing the regime, as well as "subsequent EC legislation, regulations and administrative measures … which implement, supplement and amend that regime".[158] In that case, the defendant argued, among other things, that the panel request had failed to identify the specific measure at issue because it was challenging a "regime", without further precision.[159] The panel, upheld by the Appellate Body, found that the measure had been properly identified[160], and it did so in spite of the absence of references to specific aspects of the regime or of the regulation establishing the regime.

2.99. In this case, based on the text of the panel request and of the referenced legislation, we conclude that the panel request properly identifies the challenged measures, through a combination of the name of the programme under which the alleged subsidies are provided, and of the legal instruments reflecting the alleged export subsidies. The text of the panel request and of the referenced legislation identifies a relatively cohesive and comprehensive regime comprising the Fourth Programme, and the fact that the panel request does not single out the relevant provisions of the cited legal instruments, or that the Fourth Programme envisages not one, but many entitlements, does not entail that the measure has not been sufficiently identified.

2.3.1.5 The Fifth Programme: Duty-free imports for exporters program

2.100. The fifth programme through which, according to the panel request, India "appears … [to] provide[] export subsidies", is described, in that request, as "Duty-free imports for exporters program"[161] (the Fifth Programme). The panel request also lists one "legal instrument[]" in which the measure is "reflected", namely, Instrument No. 27.

2.101. The panel request refers to Instrument No. 27 as "Notification No. 50/2017-Customs" ("Notification No. 50/2017"), "including Conditions 10, 21, 28, 32, 33, 36, 60, 61, 101".[162]

[155] India's first written submission, para. 34.
[156] India's first written submission, para. 40.
[157] Preliminary ruling by the Panel, *Australia − Apples*, WT/DS367/7, para. 9.
[158] Request for the establishment of a panel by Ecuador, Guatemala, Honduras, Mexico, and the United States, *EC − Bananas III*, WT/DS27/6, p. 1.
[159] Panel Report, *EC − Bananas III*, para. 7.24.
[160] Panel Report, *EC − Bananas III*, para. 7.27; Appellate Body Report, *EC − Bananas III*, para. 140.
[161] United States' panel request, pp. 1 and 3.
[162] United States' panel request, p. 3.

2.102. The Fifth Programme is the only one whose name as stated in the panel request does not appear word for word in the referenced legal instrument.

2.103. Notification No. 50/2017 sets forth certain caps, for certain products, to the import duties and integrated tax that would otherwise be levied on those goods under the legislation in force, subject, in certain instances, to conditions specified in Notification No. 50/2017.[163] The United States' panel request singles out nine such conditions, which we will now review.

2.104. Under Condition No. 10, the goods must be "imported by an exporter of sea-food products for use in processing sea-food products for export"; "the total value of the goods imported [must] not exceed 1% of the FOB value of exports of sea-food products exported during the preceding financial year"; and certain administrative requirements must be complied with.[164] Condition No. 10 is attached to the duty-free treatment[165] of the items in List 1 of Notification No. 50/2017[166] when used "in the processing of sea-food".[167]

2.105. Under Condition No. 21, the goods must be imported "for use in the manufacture of handicrafts for export" and "the value of the goods imported [must] not exceed 5% of the FOB value of handicrafts exported during the preceding financial year".[168] Condition No. 21 attaches to the duty-free treatment of the goods listed at item 229 of the table in Notification No. 50/2017.[169]

2.106. Similarly, Conditions Nos. 28, 32, 33, and 101 require that the goods be imported for use in the manufacture of certain goods for export[170], and that the imported goods not exceed a certain percentage of the value of exports; and each of these four conditions attaches to the duty-free treatment of the imported goods.[171]

2.107. Condition No. 36 requires that imports of carpet samples not exceed 1% of the value of carpets exported the previous years, and attaches to the duty-free import of carpet samples.[172] Conditions No. 60 and 61 attach to the duty-free import, or the import at a reduced duty rate, of goods used for research and development purposes; and they provide that the value of imports benefiting from such duty-free treatment must not exceed 25%, and 1%, respectively, of the FOB value of exports during the preceding financial year.[173]

2.108. India argues that for all programmes, including the Fifth Programme, the panel request fails to clarify whether the challenge is addressed to the programme or the legal instruments, and that, either way, the request is insufficient.[174] The panel request, however, does clarify that the challenge is to export subsidies provided under certain programmes that, in turn, are reflected in the cited legal instruments. In the case of the Fifth Programme, the panel request explicitly lists nine "Conditions" that readily permit the identification, in the cited legal instrument, of the duty exemptions in question.

2.109. A panel request must be assessed as a whole and, when this is done, the combination of the elements in the request before this Panel permits the identification of the specific measures at issue as required by Article 6.2. Therefore, on the face of the panel request, read as a whole, the request properly identifies as a fifth measure at issue alleged export subsidies provided under Conditions Nos. 10, 21, 28, 32, 33, 36, 60, 61, and 101 of Notification No. 50/2017.

[163] Notification No. 50/2017, (Exhibit USA-36), p. 1.
[164] Notification No. 50/2017, (Exhibit USA-36), p. 53.
[165] Notification No. 50/2017, (Exhibit USA-36), p. 7, item 104, column 4 ("Nil").
[166] Notification No. 50/2017, (Exhibit USA-36), p. 78, List 1.
[167] Notification No. 50/2017, (Exhibit USA-36), p. 7, item 104, column 3.
[168] Notification No. 50/2017, (Exhibit USA-36), p. 56.
[169] Notification No. 50/2017, (Exhibit USA-36), pp. 15-16.
[170] Export of textile garments or leather garments (Condition 28); of leather footwear, synthetic footwear, or other leather products (Condition 32); of handloom made ups or cotton made-ups or man-made made ups (Condition 33); and of sports goods (Condition 101).
[171] Notification No. 50/2017, (Exhibit USA-36), items 288 and 311 (Condition 28), 312 (Condition 32), 313 (Condition 33), and 612 (Condition 101).
[172] Notification No. 50/2017, (Exhibit USA-36), item 327, Condition 36.
[173] Notification No. 50/2017, (Exhibit USA-36), items 430 and 431, and Conditions 60 and 61.
[174] See paras. 2.46-2.51 above, with reference to the First Programme.

2.3.2 Whether the United States' panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly

2.110. We now turn to examine whether the panel request provides a "brief summary of the legal basis sufficient to present the problem clearly" as required by Article 6.2.

2.111. The panel request, after setting out the measures in the manner examined above, reads:

> Consistent with Annex VII of the SCM Agreement, India is subject to the obligations of Article 3.1(a) of the SCM Agreement because India's gross national product per capita has reached $1,000 per annum. Through each program, as reflected in the instruments listed above, India provides subsidies contingent upon export performance. The measures appear to be inconsistent with Article 3.1(a) of the SCM Agreement, and India appears to have acted inconsistently with Article 3.2 of the SCM Agreement.

2.112. In this passage, the United States first addresses the applicability of Article 3.1(a) of the SCM Agreement. The United States asserts that "[c]onsistent with Annex VII of the SCM Agreement", India is now subject to the obligation in Article 3.1(a) "because India's gross national product per capita has reached $1,000 per annum". While India challenges this view on separate grounds, India has not challenged this statement under Article 6.2 of the DSU.

2.113. Next, the United States asserts that "[t]hrough each program, as reflected in the instruments listed above, India provides subsidies contingent upon export performance", which "appear to be inconsistent with Article 3.1(a) … and … Article 3.2 of the SCM Agreement". India's challenge to the sufficiency of the "brief summary of the legal basis" is directed at the connection between the measures identified in the panel request and the claims under Articles 3.1(a) and 3.2.[175]

2.114. India argues that the panel request fails to "plainly connect the challenged measures with the provisions of the covered Agreements claimed to have been infringed".[176] According to India, this is because the request "provides a list of legislations, without indicating the specific measure within that legislation that is being challenged", and "this failure is compounded by a failure to provide a narrative or brief description of how the legal instrument(s) is allegedly in violation of … Article 3.1(a) and 3.2 of the SCM Agreement."[177] The United States responds by noting, in particular, that the panel request must identify claims, not arguments[178], and that Article 6.2 of the DSU "imposes no obligation to set out 'detailed arguments as to which specific aspects of the measure at issue relate to which specific provisions of those Agreements'".[179]

2.115. We note that the request states that "[t]hrough *each* program, as reflected in the instruments listed above, India provides subsidies contingent upon export performance"[180], and that these measures appear to be inconsistent with Articles 3.1(a) and 3.2. Thus, the panel request connects the measures and the claims by explaining that the claims apply to the subsidies provided through "each" program. There is therefore no doubt as to "which allegations of error pertain to which particular measure or set of measures identified in the panel request".[181]

2.116. There appear to be three interrelated facets to India's argument, namely (a) that the United States provided a mere listing of broad legal instruments, and as a result failed to provide any guidance as to the portions of those legal instruments to which its claims relate; (b) that, even within the portions of those legal instruments that relate to the challenged programmes, the

[175] India's first written submission, paras. 62 and 66-67. See also, ibid. para. 57.
[176] India's first written submission, para. 57.
[177] India's first written submission, para. 62 (with reference to "[a]ll Identified Schemes and Legal Instruments 1, 2, 3, 6, and 16"). See also, ibid. paras. 66-67 and 69 (with reference to "[l]egal Instruments in Scheme 4, and Scheme 4").
[178] United States' second written submission, para. 20 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; and *Korea – Dairy*, para. 139).
[179] United States' second written submission, para. 20 (quoting Appellate Body Report, *EC – Bananas III*, para. 141).
[180] United States' panel request, p. 3. (emphasis added)
[181] Appellate Body Report, *China – Raw Materials*, para. 226.

United States failed to indicate the specific elements that it is challenging; and (c) that the narrative of the brief summary of the legal basis is insufficient.

2.117. The first facet of India's argument appears to be premised on an atomization of the panel request into disjointed programme names and legal instruments – the same approach taken by India in its arguments on the identification of measures in the panel request. On that basis, India argues, for example, that "[l]egal Instruments 1, 2 and 3 … address a wide variety of administrative procedures that enact India's numerous policy objectives"[182], and that the panel request fails to connect the claims to specific measures within these legal instruments.

2.118. However, as discussed in section 2.3.1, above, the panel request identifies the challenged export subsidies through a *combination* of (a) the names of the programmes under which the alleged subsidies are provided, and (b) the legal instruments reflecting those subsidies. Thus, the panel request does not merely challenge individual instruments in their isolation ("a list of legislations"[183]) under Articles 3.1(a) and 3.2, with no further guidance as to their connection with these claims. Instead, as already discussed, the programme names allow the identification, within the cited legal instruments, of the portions that are relevant to the United States' challenge. Thus, for example, the United States is not merely challenging the FTP (India's Foreign Trade Policy, Instrument No. 1) under Articles 3.1(a) and 3.2. Instead, it is challenging, under those provisions, alleged export subsidies provided under specific, named programmes that are each provided for in distinct chapters of the FTP.

2.119. The second facet of India's argument suggests that, from among the provisions relating to each programme, the United States should have explicitly identified the specific provisions that give rise to the violation of Articles 3.1(a) and 3.2.

2.120. However, having identified the measures, and having made clear that the claims brought relate to all measures, the complainant was not required, in its panel request, to "set[] out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those Agreements".[184]

2.121. The third facet of India's argument is that "where mere legal instruments are cited, the accompanying narrative provided in the Panel request is critical to determine the specific measures at issue and the manner in which they are connected to the stipulated WTO obligations."[185] While, as discussed, the text of the panel request contradicts the statement that "mere legal instruments are cited", we consider further India's allegation that the "accompanying narrative provided in the Panel request" was insufficient in elucidating the connection between the measures and the claims.

2.122. To recall[186], the summary of the legal basis provided in the panel request must be "sufficient to present the problem clearly", so as to serve the function of delimiting the panel's jurisdiction and the due process objective of notifying the respondent and third parties of the nature of the case.[187] It must allow the respondent to know "what case it has to answer, and what violations have been alleged so that it can begin preparing its defence".[188] This requires, among other things, that the panel request "plainly connect the challenged measure(s) with the provision(s) … claimed to have been infringed"[189], explaining "succinctly how or why the measure at issue is considered … to be violating the WTO obligation in question".[190]

2.123. In this case, the measures at issue, as discussed in section 2.3.1, are identified as the export subsidies provided under certain named programmes, and reflected in the legal instruments listed in the panel request. The brief summary of the legal basis indicates that:

[182] India's first written submission, para. 62.
[183] India's first written submission, para. 62.
[184] Appellate Body Report, *EC – Bananas III*, para. 141.
[185] India's first written submission, para. 69.
[186] See paras. 2.5-2.6, 2.13, and 2.16.
[187] Appellate Body Report, *Argentina – Import Measures*, para. 5.39.
[188] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[189] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.
[190] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

> Through each program, as reflected in the instruments listed above, India provides subsidies contingent upon export performance. The measures appear to be inconsistent with Article 3.1(a) of the SCM Agreement, and India appears to have acted inconsistently with Article 3.2 of the SCM Agreement.[191]

2.124. In this way, the panel request makes it clear that the allegations of violation of Articles 3.1(a) and 3.2 pertain to each of the listed measures. The panel request further states that the reason for the allegation of violation is that, in the complainant's view, these measures are subsidies contingent upon export performance.

2.125. The narrative provided to articulate the violation is not extensive. However, the brief summary of the legal basis in the Panel request before us is sufficient to meet the standard in Article 6.2, first, because the same claims are made for all measures, leaving no doubt as to "which allegations of error pertain to which particular measure or set of measures"[192]; and, second, because of the "specific content of the provisions invoked"[193] and the fact that they establish "one single, distinct obligation," not "multiple obligations".[194]

2.4 Ruling by the Panel

2.126. We therefore rule that the panel request before us identifies the specific measures at issue, and provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required by Article 6.2 of the DSU.

3 THE APPLICABILITY OF ARTICLE 4 OF THE SCM AGREEMENT

3.1. The United States is challenging certain Indian measures under Articles 3.1(a) and 3.2 of the SCM Agreement.[195] In the United States' view, the obligation in Article 3.1(a) applies to India.[196] The United States therefore requested consultations under Articles 4 and 30 of the SCM Agreement and Articles 1 and 4 of the DSU, and the establishment of a panel under Article 4.4 of the SCM Agreement and Article 6 of the DSU. Upon the United States' request, the DSB established the Panel in this dispute pursuant to Article 4.4 of the SCM Agreement and Article 6 of the DSU.[197]

3.2. India has sought a preliminary ruling that the provisions of Article 4 of the SCM Agreement cannot automatically apply to this dispute and that, therefore, they do not apply to this dispute at this stage.[198]

3.3. According to India, the United States has not demonstrated that Article 27 of the SCM Agreement no longer excludes India from the scope of application of Article 3.1(a), and until and unless the United States provides such demonstration, Article 4 does not apply to this dispute.[199] In the alternative, India argues that, even assuming that the United States does not bear the burden of demonstrating that Article 27 no longer excludes India from the scope of application of Article 3.1(a), the Panel must first "evaluat[e] India's substantive claim of the applicability of Article 27 of the SCM Agreement"[200] before Article 4 may apply.[201]

3.4. At the same time, however, India argues that whether its measures are in conformity with Article 27 of the SCM Agreement cannot be adjudicated upon at the preliminary stage and, instead,

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[191] United States' panel request, p. 3.
[192] Appellate Body Report, *China − Raw Materials*, para. 226.
[193] Preliminary ruling by the Panel, *Australia − Apples*, para. 11.
[194] Appellate Body Report, *Korea − Dairy*, para. 124. See also, e.g. Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, paras. 5.14-5.15.
[195] United States' consultations request, p. 3; panel request, p. 3.
[196] United States' consultations request, p. 3; panel request, p. 3.
[197] United States' panel request, pp. 1 and 3; Constitution note of the Panel, WT/DS541/5, para. 1.
[198] India's first written submission, paras. 10, 12-18, and 71-90; Communication dated 5 October 2018 from India to the Chairperson of the Panel, p. 1. See also Communication dated 16 October 2018 from India to the Chairperson of the Panel; and DSB, Minutes of the meeting held on 28 May 2018, WT/DSB/M/413, para. 7.3.
[199] India's first written submission, paras. 74-76 and 78-85.
[200] India's first written submission, para. 87.
[201] India's first written submission, paras. 85-90.

"is a legal issue that goes to the essence of the dispute, and therefore a matter to be adjudicated in subsequent panel meetings".[202]

3.5. The United States responds that under Articles 4.1 and 4.4 of the SCM Agreement, the "threshold for invoking the procedures of Article 4"[203] is whether the complainant "has reason to believe that a prohibited subsidy is being granted or maintained by another Member"[204], and, therefore, "Article 4 does not require that there first be a determination that Article 27 does not apply".[205] According to the United States, India's approach "would require a panel to pre-judge the very issue that is at the core of the dispute".[206] The United States then goes on to reiterate and expand upon its arguments that Article 27 does not exclude India from the scope of application of Article 3.1(a).[207]

3.6. Pursuant to Article 4.1 of the SCM Agreement, a Member may seek consultations with another under that provision when it "has reason to believe" that the other Member is granting or maintaining a prohibited subsidy, thus triggering the application of the provisions of Article 4. If consultations fail to settle the dispute within 30 days, the complaining Member may refer the matter to the DSB "for the immediate establishment of a panel" pursuant to Article 4.4 of the SCM Agreement.

3.7. At the same time, Article 27 of the SCM Agreement affords special and differential treatment to developing countries. One element of that special and differential treatment is that a subset of developing country Members' measures is not subject to the procedures of Article 4 of the SCM Agreement. Pursuant to Article 27.7 of the SCM Agreement:

> The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5.

3.8. One can envisage a range of situations facing a panel. One extreme would be a hypothetical case where it is undisputable that Article 27 excludes the applicability of Article 4. In such an event, it would be particularly appropriate for a panel to issue a preliminary ruling at the earliest stages of the dispute that the case may not proceed under Article 4. The other extreme would be a hypothetical case where a defendant invokes Article 27 frivolously, i.e. with no basis for doing so; there would then be no question that recourse to Article 4 was proper.

3.9. In between these two extremes lie cases where it is disputed whether Article 27 excludes the applicability of Article 4. In such cases, a preliminary ruling on the matter may require adjudicating upon the merits of the parties' arguments under Article 27.

3.10. The case before the Panel lies before the two extremes outlined above. The United States has provided the reasons in law and fact based on which it considers that Article 27 does not exclude the applicability of Article 3.1(a) and therefore of Article 4.[208] India disagrees, arguing that "the ordinary meaning of the text of Article 27.2(b) results in ambiguity and internal contradictions between provisions of Article 27 of the SCM Agreement"[209], and that therefore the Panel must depart from an interpretation based on ordinary meaning. The United States disputes India's interpretive argument, and takes the view that the ordinary meaning of "eight years from the entry into force of the WTO Agreement", in Article 27.2(b), is eight years from 1st January 1995.[210]

3.11. In these circumstances, the Panel considers that ruling on India's preliminary request would require adjudicating upon the parties' interpretive disagreement. However India, the party seeking

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[202] India's first written submission, para. 79. See also Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 5 ("the interpretation of these provisions goes to the essence of the dispute") and 6.

[203] United States' second written submission, para. 26.

[204] Agreement on Subsidies and Countervailing Measures, Article 4.1 (quoted in United States' second written submission, paras. 25-26).

[205] United States' second written submission, para. 26.

[206] United States' second written submission, para. 27.

[207] United States' second written submission, paras. 28-39.

[208] United States' consultations request, p. 3; panel request, p. 3; first written submission, paras. 24-26; and second written submission, paras. 28-39.

[209] India's second written submission, para. 10.

[210] United States' second written submission, para. 32.

a preliminary ruling, has also asked the Panel *not to* rule on the interpretive disagreement between the parties as part of such a preliminary ruling. According to India, whether its measures are in conformity with Article 27 is "a legal issue that goes to the essence of the dispute, and therefore a matter to be adjudicated in subsequent panel meetings".[211]

3.12. The Panel is receptive to India's request that the interpretive disagreement over Article 27 of the SCM Agreement be adjudicated upon as part of the full panel proceedings, and not at a preliminary stage. However, the Panel also considers that without ruling on that disagreement, in the situation before it, the Panel cannot rule that Article 4 of the SCM Agreement does not apply.

3.13. Therefore, the Panel declines to rule at this stage that Article 4 of the SCM Agreement does not apply to this dispute.

4 STATEMENT OF AVAILABLE EVIDENCE

4.1. India has sought a preliminary ruling that the statement of available evidence included in the United States' request for consultations does not meet the requirements of Article 4.2 of the SCM Agreement.[212]

4.2. India argues that this statement falls short of the requirements of Article 4.2 of SCM Agreement.[213] Specifically, India argues that the statement (a) includes no evidence of the character of the measure as a subsidy[214]; (b) "reproduces a verbatim list" of the legal instruments cited in the request for consultations[215]; and (c) provides no "basis for the[] identified programmes/schemes providing a subsidy" because it does "not indicate any specific chapter or paragraph" of the cited legal instruments.[216] In addition, India considers that the lack of "substantive difference" between the request for consultations and the panel request is further evidence of the United States' failure to appreciate the substantive standard in Article 4.2 of the SCM Agreement.[217]

4.3. The United States responds that India confuses evidence with arguments.[218] Article 4.2 requires a statement of the former, not the latter.[219] The United States considers that it has demonstrated in its first written submission that the cited evidence "is indeed evidence regarding the existence and nature of the subsidies in question".[220] Specifically, the statement "identified twenty-five separate legal instruments that gave the United States reason to believe that there are five Indian export subsidy programs that are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement", and "are the primary evidentiary basis for the U.S. claims".[221]

4.4. Article 4.2 of the SCM Agreement provides:

> A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.5. Thus, a complainant in a prohibited subsidies case must "indicate, in its request for consultations, the evidence that it has available to it, at that time, 'with regard to the existence and

[211] India's first written submission, para. 79. See also Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 5 ("the interpretation of these provisions [(i.e. Article 27 and Annex VII of the SCM Agreement)] goes to the essence of the dispute").

[212] India's first written submission, paras. 16-18. To recall, India argues that Article 4 of the SCM Agreement does not apply; India therefore presents its arguments under Article 4.2 of the SCM Agreement as alternative, in the event that the Panel does not accept India's position on the applicability of Article 4 of the SCM Agreement in the first place.

[213] India's first written submission, paras. 16-18.

[214] India's first written submission, paras. 96 and 100.

[215] India's first written submission, paras. 95 and 97.

[216] India's first written submission, para. 101.

[217] India's first written submission, paras. 102-103.

[218] United States' second written submission, paras. 41-43.

[219] United States' second written submission, para. 42 (referring to Panel Report, *Australia – Automotive Leather II*, para. 9.18).

[220] United States' second written submission, para. 41. See also, ibid. para. 44.

[221] United States' second written submission, para. 44.

nature of the subsidy in question'".[222] This must be "available evidence of the character of the measure as a 'subsidy' … and not merely evidence of the existence of the measure".[223]

4.6. Assessing whether a complainant has provided evidence of the "existence and nature" of a subsidy, under Article 4.2, is of course different from assessing whether the complainant has conclusively demonstrated the existence of a subsidy. Under Article 4.2, a panel must assess whether the statement describes or refers to evidence that is sufficient to give the complainant "reason to believe that a prohibited subsidy is being granted or maintained".[224] Moreover, this assessment must be grounded in the text of the statement of available evidence and of the documents it references. Therefore, the consistency of a statement of available evidence with Article 4.2 is capable of lending itself to a ruling at preliminary stage.

4.7. However, having considered the statement of available evidence in light of the legal standard and of the arguments of the parties, the Panel in this case considers it premature to rule on whether the statement of available evidence provides "evidence of the character of the measure as a 'subsidy'".[225] Instead, the Panel wishes to further explore certain questions of fact and law in the context of the substantive meeting with the parties.

4.8. Therefore, the Panel will not rule at this stage on whether the statement of available evidence meets the requirements of Article 4.2.

[222] Appellate Body Report, *US – FSC*, para. 161.
[223] Appellate Body Report, *US – FSC*, para. 161.
[224] Panel Report, *Australia – Automotive Leather II*, para. 9.19 (quoting SCM Agreement, Article 4.1).
[225] Appellate Body Report, *US – FSC*, para. 161.

ANNEX D-3

COMMUNICATION DATED 16 APRIL 2019 FROM THE PANEL TO THE PARTIES CONCERNING THE PANEL'S WORKING PROCEDURES AND TIMETABLE

16 April 2019

1.1. The Panel recalls its earlier communications on the matter of its decision to hold a single substantive meeting with the parties in the current proceedings[1], and recalls that it had reserved the right to schedule additional meetings if necessary. On 13 February 2019, during the substantive meeting with the parties, and on 15 February 2019, as part of the questions posed to the parties after the substantive meeting, the Panel asked each party whether and, if so, why, it considered that adding a second substantive meeting was necessary at that stage.[2] In view of the concerns expressed by India[3], the Panel further asked India whether it considered that the fact of holding a single substantive meeting had concretely, thus far, impaired or otherwise affected its ability to defend itself in this case; and if so, concretely, how this had been the case, and what steps it considered that the Panel should take to remedy that.[4]

1.2. On 4 March 2019, the parties responded to the Panel's questions and on 18 March each party commented on the other party's responses.

1.3. According to the United States, the "hundreds of pages of written submissions … lengthy opening and closing statements … two full days of questions and answers in the substantive meeting", together with the fact that parties were "answering up to 92 questions posed by the Panel with the opportunity to comment on each other's responses"[5], have "provided sufficient opportunity to develop the evidence and arguments to present to the Panel"[6], including "an opportunity to rebut all of the U.S. arguments at every stage of the proceeding".[7] The United States further noted that "the Panel granted India's request for a two-week extension to complete the answers to the Panel's questions to the parties"[8], and also that the 90-day deadline under Article 4 of the SCM Agreement had long passed.[9] Moreover, the United States also noted that "neither the parties nor the Panel raised any new issues, and … this is a *de jure* export subsidies dispute where the evidence … are the measures themselves".[10] Therefore, according to the United States, a second substantive meeting would be unnecessary and inappropriate.[11]

1.4. In response to the Panel's question on the need for a second substantive meeting, India reiterated its previous positions. In India's view, a second substantive meeting is necessary to ensure

[1] Working Procedures (22 August 2018), paras. 3, 5, and 15-16; timetable (22 August 2018); Communication dated 9 October 2018 from the Panel to the parties and third parties; Communication dated 19 October 2018 from the Panel to the parties and third parties; and Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting, paras. 2.1-2.21.

[2] Panel question No. 91. The Panel reminded the parties that, "[i]n the meantime, … the schedule remain[ed] as originally planned, i.e. it [did] not at th[at] moment include a second substantive meeting", and that therefore they should "respond to the … questions as fully as they would in the event that the Panel were not to hold a second substantive meeting". (Communication dated 15 February 2019 from the Panel to the parties)

[3] Communication dated 14 August 2018 from India to the Chairperson of the Panel, paras. 2 and 5-7; Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 8-13; India's first written submission, paras. 16, 18, 105-115 and 406; Communication dated 5 October 2018 from India to the Chairperson of the Panel; Communication dated 16 October 2018 from India to the Chairperson of the Panel; India's second written submission, para. 2; opening statement at the meeting of the Panel, para. 2; and closing statement at the meeting of the Panel, paras. 1 and 8-9.

[4] Panel question No. 92.

[5] United States' response to Panel question No. 91, para. 4. See also ibid. para. 3.

[6] United States' response to Panel question No. 91, para. 3.

[7] United States' comments on India's response to Panel question No. 91, para. 12.

[8] United States' response to Panel question No. 91, para. 5.

[9] United States' response to Panel question No. 91, para. 6.

[10] United States' comments on India's response to Panel question No. 91, para. 16.

[11] United States' response to Panel question No. 91, paras. 1-7.

conformity with the procedure established under the DSU[12], to provide effective deliberation and rebuttal opportunity to the parties[13], and to avoid setting a precedent contrary to the procedures followed in previous disputes.[14]

1.5. In response to the Panel's question of whether India considered that the fact of holding a single substantive meeting had concretely impaired or otherwise affected its ability to defend itself and, if so, how this had been the case, India asserted the following:

a. holding a single meeting had not provided the opportunity for a detailed discussion of "novel issues, such as issues pertaining to Footnote 1 and related Annexes of the SCM Agreement"[15], which "require detailed rebuttal to arguments advanced by the United States"[16];

b. holding a single meeting had not allowed "the discussion of the challenged schemes in a more detailed manner"[17]; and

c. "the responses to the questions posed by the Panel … would also require additional discussion between parties and the Panel"[18] and called for a second substantive meeting "in form of a rebuttal" of those responses.[19]

1.6. The Panel begins with India's broader concerns about the Panel's decision to schedule a single substantive meeting, departing from the working procedures in Appendix 3 of the DSU.[20] The Panel recalls that it set out the applicable legal standard and the balancing of case-specific considerations underpinning its decision in its communication of 22 January 2019.[21] The Panel refers to that discussion and will not repeat it here.[22] Instead, the Panel intends to ascertain whether, at this stage, pertinent considerations, prominently including due process, would warrant holding a further substantive meeting with the parties or taking other steps.

[12] India's response to Panel question No. 91, first para. and section (a).
[13] India's response to Panel question No. 91, first para. and section (b). See also India's comments on the United States' response to Panel question No. 91, para. 6.
[14] India's response to Panel question No. 91, first para. and section (c).
[15] India's responses to Panel question Nos. 92(a) and 92(b). See also responses to Panel question No. 91, section (b), first para.
[16] India's response to Panel question No. 92(b), second para.
[17] India's response to Panel question No. 92(a), first para. See also responses to Panel question No. 92(a), third para., No. 92(c), and No. 91, section (b), first para.
[18] India's response to Panel question No. 92(b), second para. See also responses to Panel question No. 92(a), third para., and No. 92(c).
[19] India's response to Panel question No. 91, section (c), third para. See also comments on the United States' response to Panel question No. 91, para. 2.
[20] India's responses to Panel question No. 91.
[21] Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting, paras. 2.11-2.21. See also Appellate Body Report, *Thailand – Cigarettes*, para. 150 ("ensuring due process requires a balancing of various interests, including systemic interests as well as those of the parties, and both general and case-specific considerations. In our view, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU").
[22] Both parties repeated in their responses to the Panel's questions arguments on the past practice under Article 21.5 of the DSU and Article 4 of the SCM Agreement. Regarding past Article 21.5 proceedings, the United States noted that panels in such cases, faced with a similar 90-day deadline, chose to hold a single substantive meeting, whereas India argued that Article 21.5 proceedings are different from original panel proceedings; regarding panels in past Article 4 proceedings, India reiterated that they held two substantive meetings with the parties. The United States noted that in none of the Article 4 panel proceedings that India relied upon was there any indication that either party requested the panel to hold only one substantive meeting. See India's response to Panel question No. 91, section (c); United States' response to Panel question No. 91, para. 7; India's comments on the United States' response to Panel question No. 91, paras. 4-5; United States' comments on India's response to Panel question No. 91, paras. 4 and 13-14. The Panel noted these arguments in its Communication dated 22 January 2019 but did not ground its decision in them. The Panel's decision was grounded in its interpretation of Articles 11, 12.1, and 12.10, and Appendix 3, of the DSU, and Article 4 of the SCM Agreement, and in the case-specific considerations it set out. See Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting, paras. 2.8-2.9 and 2.11-2.21.

1.7. The Panel takes note of, and agrees with, the United States' description of the extensive opportunity that parties have had to make their case and rebut the other party's case, as well as on the need to bring proceedings to a close. The parties' opportunity to make their case and rebut the adverse case has included extensive filings, two full days of hearings, responses to almost a hundred questions from the Panel and comments on each other's responses, and has further included a doubling of the time for filing responses to the Panel's questions, at India's request.

1.8. Nonetheless, because of the fundamental importance of due process in the Panel's conduct of proceedings, before reaching a final decision on whether to modify its Working Procedures and timetable, the Panel wishes to ascertain whether its decision to hold a single substantive meeting has *concretely* impaired the due process rights of India, who had opposed the Panel's decision to hold a single meeting, so that, if it has, the Panel can decide on the appropriate remedial steps.

1.9. For this purpose, the Panel turns to India's answer to Panel question No. 92. India refers to three ways in which it considers that holding a single substantive meeting has affected its ability to defend itself. First, India considers that there has been insufficient opportunity to discuss footnote 1 and the related Annexes of the SCM Agreement. Second, India considers that there has been insufficient opportunity to discuss the challenged schemes. Third, India considers that there is a need for further discussion of the parties' responses to the Panel's questions. Therefore, "India considers that the Panel should hold a second substantive meeting".[23]

1.10. With regard to footnote 1 and the related Annexes of the SCM Agreement, as well as the challenged schemes, the Panel observes that the parties have filed their first and second written submissions, made statements at the hearing, had the opportunity to ask questions of each other and third parties during and after the hearing, answered questions orally during the hearing, answered questions in writing, and commented on each other's written answers. Further, at India's request, parties obtained four full weeks to answer questions after the hearing. In this context, the Panel does not consider that there has been a lack of an "opportunity to explore in required depth"[24], or respond to, arguments on footnote 1 or on the challenged schemes, and it does not consider that this unspecified call for further discussion warrants a second substantive meeting.

1.11. With regard to the third concern identified by India, namely, the need for discussion and rebuttal of the parties' answers to the Panel's questions, the Panel notes, first, that the possibility for comment by each party on the other party's answers serves precisely that need. At the same time, since India anticipated that the answers to the Panel's questions would require a further substantive meeting, the Panel has reviewed and considered those responses[25], and the comments on those responses[26], before making its decision. Having done so, the Panel has found no point of fact or law in the answers, or in the comments on the answers, that would warrant holding a further substantive meeting with the parties at this stage, and no such point was identified specifically by India.

1.12. In sum, balancing the competing considerations in this case,[27] the Panel chose to depart from Appendix 3 of the DSU by scheduling a single substantive meeting with the parties, while reserving its right to schedule additional substantive meetings if required. After the filing of both sets of written submissions and the holding of the single hearing, the Panel sought the views of the parties on this matter, and in particular it asked India if it considered that the fact of holding a single substantive meeting had concretely affected its ability to defend itself in this case and, if so, concretely, how this had been the case and what steps the Panel could take to remedy that. In response, India identified no instance of its due process rights having been concretely affected. Instead, India generically referred to a need for further discussion of footnote 1 and the related Annexes of the SCM Agreement, of the measures at issue, and of parties' responses to the Panel's questions. In light of this, and in light of the exchanges already had so far on the subjects referred to by India, for which, moreover, the Panel has granted considerable time, the Panel does not consider that there is a need to depart from the structure of proceedings as originally envisaged in this dispute. Nor has

[23] India's response to Panel question No. 92(c).
[24] India's response to Panel question No. 92(a), first para.
[25] Submitted on 18 March 2019.
[26] Submitted on 1 April 2019.
[27] See Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting, paras. 2.20-2.21.

the Panel's review of the two most recent sets of submissions, generically referred to by India as requiring a further substantive meeting, disclosed the need for such a further meeting. Thus, the Panel is satisfied that India's due process rights have been carefully preserved.

1.13. Therefore, the Panel has decided not to modify the Working Procedures and timetable by adding a second substantive meeting. In light of this decision, the Panel has also determined the timing of the further procedural steps in these proceedings, as set out in the attached proposed updated timetable.

1.14. The Panel notes that, if necessary, it has the authority to pose further questions in writing to the parties.

1.15. The Panel invites parties to submit any comments to the attached proposed updated timetable by 25 April 2019.

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WORLD TRADE ORGANIZATION

WT/DS541/R/Add.1

31 October 2019

(19-7315)

INDIA – EXPORT RELATED MEASURES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS541/R.

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ANNEX A

PANEL DOCUMENTS

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 22 August 2018

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the written submission in question is presented to the Panel, unless the Panel establishes a different deadline upon written request of a party showing good cause.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel, in accordance with the timetable adopted by the Panel:

a. a first written submission, in which it presents the facts of the case and its arguments; and

b. a written rebuttal.

(2) Each third party that chooses to make a written submission prior to the substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(3) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) The following procedures shall apply if the responding party considers that the Panel should make a ruling prior to the issuance of the Report that certain measures or claims in the panel request or the complaining party's first written submission are not properly before the Panel. Exceptions to this procedure shall be granted upon a showing of good cause.

a. India shall submit any such request for a preliminary ruling no later than in its first written submission to the Panel. The United States shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by India prior to the meeting, and any subsequent submissions of the parties in relation thereto prior to the meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel prior to the substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) The procedure set out in paragraph (1) is without prejudice to the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel with its first written submission, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or the meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. Exhibits submitted by India should be numbered IND-1, IND-2, etc. If the last exhibit in connection with the first submission was numbered IND-5, the first exhibit in connection with the next submission thus would be numbered IND-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party should consider making its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Prior to the meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of the meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally in the course of the meeting, and in writing following the meeting, as provided for in paragraphs 16 and 21 below.

Substantive meeting

10. The Panel notes the request by the United States for an open or partially open hearing, and will revert to this issue in due course before the date of that meeting.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. There shall be one substantive meeting with the parties.

16. The substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite India to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 5 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

Third party session

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the third party session of the meeting with the Panel.

21. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. In the event that interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit one integrated executive summary, which shall summarize the facts and arguments as presented to the Panel during the proceedings.

24. Each integrated executive summary shall be limited to no more than 15 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If the documents comprising a third-party's submission, oral statement and/or responses to questions do not exceed six pages in total, these may serve as the executive summary of that third party's arguments.

Interim review

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable

adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

29. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties in the course of the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

b. Each party and third party shall submit two paper copies of its submissions and two paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute.

c. Each party and third party shall also send an e-mail to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such e-mails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose e-mail addresses have been provided to the parties in the course of the proceeding. Where it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with three copies of the Exhibits on USB keys, CD-ROMs or DVDs.

d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by e-mail or on a CD-ROM, DVD or USB key only, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion and disposition of the requests for review made at interim review stage. As explained below, where the Panel considered it appropriate, it has modified certain aspects of its Interim Report in light of the parties' comments. The parties have also made some comments on typographical errors: the Panel thanks the parties for those comments, has accepted them in their entirety, and does not discuss them below. In addition, some other corrections of a typographical nature were made to the Report.

1.2. Due to changes resulting from our review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbering in the Interim Report, with the numbering in the Final Report in parentheses for ease of reference, if different.

1.3. Below, we first consider India's requests for review, and then the United States'.

2 INDIA'S REQUESTS CONCERNING THE INTERPRETATION OF ARTICLE 27 OF THE SCM AGREEMENT

2.1 Presentation of India's arguments

2.1.1 Paragraph 7.24 of the Interim Report

2.1. India asks us to supplement the description of India's arguments at paragraph 7.24 of the Interim Report.[1] The United States opposes India's request as unnecessary.[2] We had already reflected the arguments at issue elsewhere in the Interim Report and had considered them in our assessment of the matter before us. Adding the description of the arguments as requested by India does not, however, affect the substance of our Report. Therefore, we have decided to make most of the proposed changes.

2.1.2 Paragraphs 7.40 and 7.59 of the Interim Report

2.2. India argues that it has not asked the Panel to "depart" from giving the terms in Article 27.2(b) their ordinary meaning and that the Panel has thus mischaracterized India's arguments.[3] India therefore requests us to revise the description of India's arguments.[4] Similarly, India argues that we have incorrectly described India's arguments in paragraph 7.59 of the Interim Report as requesting the Panel to "disregard" the text of Article 27.2(b)[5], and therefore asks us to delete the first sentence of that paragraph.

2.3. The United States disagrees with India's requests and argues that India did indeed ask the Panel to ignore the ordinary meaning of Article 27.2(b).[6]

[1] India's request for review, para. 5.
[2] United States' comments on India's request for review, paras. 2-3.
[3] India's request for review, para. 7.
[4] India's request for review, para. 7.
[5] India's request for review, para. 16.
[6] United States' comments on India's request for review, paras. 5 and 8.

2.4. We recall that India argued against giving the terms of Article 27.2(b) their "ordinary meaning"[7] and against a "literal"[8] or "textual"[9] interpretation of that provision. India further argued that it was "the manifest unreasonableness and ambiguity presented in a textual interpretation of Article 27" that called for recourse to supplementary means of interpretation under Article 32 of the Vienna Convention.[10] In this light, we consider it appropriate to describe India's arguments as requesting us to "depart" from giving the terms in Article 27.2(b) their ordinary meaning, or from a literal or textual interpretation of that provision.[11] We therefore reject India's request. We have, however, included references to India's written and oral submissions where the arguments referred to above are found (in footnote 86 of the Interim Report) and a clarification in paragraph 7.40 of the Interim Report that we refer to the SCM Agreement. We have also replaced the term "disregard" with "depart from" paragraphs 7.59 and 7.71 of the Interim Report.

2.2 The Panel's interpretation of Article 27.2(b) in accordance with the general rule of interpretation codified in Article 31 of the Vienna Convention

2.2.1 Paragraph 7.39 of the Interim Report

2.5. India requests us to add language at the end of paragraph 7.39 of the Interim Report[12], for it to read: "[t]he text of Article 27.2(b) does not leave scope for ambiguity in respect of the end date of that transition period, for other developing country Members".[13]

2.6. The United States objects to India's request.[14]

2.7. We agree with the United States that the proposed change would render our finding inaccurate because it could imply that the text of Article 27.2(b) leaves scope for ambiguity for some but not for other Members.[15] We therefore decline India's request.

2.2.2 Paragraphs 7.45-7.53 of the Interim Report

2.8. India asks us to reconsider our findings in paragraphs 7.45-7.53 concerning Annex VII(b).[16] In doing so, India argues that our findings do not accord developing country Members graduating from Annex VII(b) the same treatment as afforded to other developing country Members in Article 27.2(b) and that our findings disregard the mandatory language in Annex VII(b) ("shall be subject to the provisions which are applicable to other developing country Members").[17] India also submits that our interpretation of Annex VII(b) would render that provision ineffective.[18]

2.9. The United States opposes India's request as simply repeating India's previous arguments with which the Panel has disagreed in the Interim Report.[19]

[7] India's first written submission, para. 159; second written submission, paras. 10 and 27.
[8] India's first written submission, para. 164; second written submission, para. 10, response to Panel question No. 18; comments on the United States response to Panel question No. 21, first para.; and request for review, paras. 5 (as regards the proposed change to paragraph 7.24 of the Interim Report), 14, 15, 17, and 20.
[9] India's second written submission, paras. 8, 14, 19, and 31; opening statement at the meeting of the Panel, para. 15.
[10] India's second written submission, para. 31. See also India's first written submission, para. 166; second written submission, para. 27.
[11] We also note that India does not take issue with the same phrase used elsewhere in the Interim Report, see Interim Report, paras. 7.52 and 7.68.
[12] India's request for review, para. 6.
[13] Underlining added. The underlined text is the addition requested by India.
[14] United States' comments on India's request for review, para. 4.
[15] United States' comments on India's request for review, para. 4.
[16] India's request for review, para. 12.
[17] India's request for review, paras. 8, 10, and 11; opening statement at the Panel's interim review meeting, paras. 5-7.
[18] India's request for review, para. 10; opening statement at the Panel's interim review meeting, para. 7.
[19] United States' comments on India's request for review, para. 6.

2.10. We share the United States' view that India repeats at interim review stage arguments that it has already made during the proceedings and that we have considered and rejected in the Interim Report.[20] We therefore decline India's request.

2.2.3 Paragraphs 7.50-7.51 of the Interim Report

2.11. India requests that the Panel reconsider its findings in paragraphs 7.50-7.51 concerning the different types of flexibilities afforded to developing and least-developed country Members under Articles 27.2(a) and (b) and Annexes VII(a) and (b).[21] India submits that the Panel's findings result in less or no flexibility for developing country Members graduating from Annex VII(b) compared to the other developing country Members falling under Article 27.2(b).[22] India also argues that the Panel's interpretation renders Annex VII(b) ineffective and is irreconcilable with the object and purpose of the SCM Agreement.[23]

2.12. The United States opposes India's request as simply repeating India's previous arguments with which the Panel has disagreed in the Interim Report.[24]

2.13. We consider that India, again, repeats at interim review stage arguments that it has already made during the proceedings and that we have carefully considered and rejected in the Interim Report.[25] We therefore decline India's request but have nevertheless slightly modified paragraph 7.50.

2.2.4 Paragraphs 7.62-7.64 of the Interim Report

2.14. With respect to paragraphs 7.62-7.64 of the Interim Report, India submits that the Panel failed to address the "main contradiction" between the second sentence of Article 27.5 and Article 27.2(b) which, according to India, would arise from the Panel's findings in case a developing country Member graduates from Annex VII(b) after having reached export competitiveness with respect to a particular product.[26] According to India, the Panel's interpretation would lead to differing timelines for phasing out export subsidies on products that have reached export competitiveness and for eliminating all other export subsidies.[27] India therefore asks us to reconsider our findings.[28]

2.15. The United States opposes India's request as simply repeating India's previous arguments with which the Panel has disagreed in the Interim Report.[29]

2.16. We have expressly considered and rejected India's arguments concerning the alleged "contradiction" in the Interim Report.[30] India now adds that "the Panel has not elaborated on the basis of such a finding [that the alleged contradiction is based on a misreading of Article 27.5] as Article 27.5 does not qualify the term 'referred to Annex VII'".[31] We refer India to paragraph 7.62 of the Interim Report, where we explained that on graduating, a Member ceases to be one "referred to in Annex VII". We reject the proposition that after graduation, a Member drops out of Annex VII(b) but remains "a developing country Member which is referred to in Annex VII" for purposes of Article 27.5. Such a reading seeks to introduce a contradiction that does not exist in Article 27 and Annex VII.

2.17. India also repeats its argument that the interpretation we have espoused ignores that subsidy programmes often encompass a range of products, with the result that a product could benefit from

[20] United States' comments on India's request for review, para. 6; Interim report, paras. 7.42-7.52.
[21] India's request for review, para. 15.
[22] India's request for review, para. 14.
[23] India's request for review, para. 15.
[24] United States' comments on India's request for review, para. 7.
[25] Interim report, paras. 7.49, 7.51-7.52, and 7.65-7.68.
[26] India's request for review, paras. 17 and 18; opening statement at the Panel's interim review meeting, paras. 8-9.
[27] India's request for review, paras. 17 and 18; opening statement at the Panel's interim review meeting, para. 9.
[28] India's request for review, para. 19; opening statement at the Panel's interim review meeting, para. 9.
[29] United States' comments on India's request for review, para. 9.
[30] Interim Report, paras. 7.60-7.64.
[31] India's request for review, para. 18.

the 8-year period under Article 27.5 while other export subsidies under the same subsidy programme would need to be withdrawn immediately upon graduation from Annex VII(b).[32] In the Interim Report, we have not separately addressed this particular aspect of India's arguments because it is based on the same erroneous premise that the Article 27.5 phase-out period survives graduation from Annex VII(b).

2.18. For the same reason, we now reject India's request.

2.3 Recourse to supplementary means of interpretation

2.19. With respect to paragraph 7.73 of the Interim Report, India repeats its request for the Panel to have recourse to supplementary means of interpretation in accordance with Article 32 of the Vienna Convention.[33]

2.20. The United States objects to India's request. To the United States, recourse to supplementary means of interpretation is unnecessary because the textual interpretation of the terms in Article 27.2(b) does not leave their meaning ambiguous or obscure, or lead to manifestly absurd or unreasonable results.[34]

2.21. We re-affirm our findings in paragraph 7.72 of the Interim Report and thus continue to be of the view that recourse to supplementary means of interpretation is not required on grounds of ambiguity, obscurity, absurdity, and unreasonableness resulting from the interpretation according to Article 31 of the Vienna Convention.

2.22. We also remain convinced that it is not necessary for us to have recourse to supplementary means of interpretation to confirm the meaning resulting from the application of Article 31, as set out in paragraph 7.73 of the Interim Report.

2.23. This notwithstanding, we note India's repeated request "urg[ing] the Panel to resort to … supplementary means of interpretation in order to confirm the meaning resulting from Article 31 of the Vienna Convention".[35] We find that consideration of the negotiating history of Article 27.2(b) and Annex VII(b), as demanded by India, does not lead to a different interpretative outcome.

2.24. India relies on a draft text by the Chairman of the Negotiating Group for the SCM Agreement circulated on 6 November 1990 (the draft Chair text of 6 November 1990).[36] For certain countries, including India, Annex VIII in this draft text, which later became Annex VII of the SCM Agreement, provided for certain reduction commitments in respect of export subsidies to be undertaken when GNP per capita reached USD 1,000 per year.[37] India submits that these countries therefore did not need to eliminate their export subsidies immediately upon graduation. Rather, once graduated, they would become subject to reduction commitments to phase out export subsidies.[38] In India's view, this reflected the intent of the drafters to give certain countries, including India, an additional

[32] India's request for review, para. 18. See also India's second written submission, para. 25.
[33] India's request for review, para 20; opening statement at the Panel's interim review meeting, para. 10.
[34] United States' comments on India's request for review, para. 10.
[35] India's request for review, para 20. See also India's opening statement at the Panel's interim review meeting, para. 10.
[36] Draft Chair text of 6 November 1990, (Exhibit IND-4) (dated 7 November 1990); this document refers to the draft Chair text MTN.GNG/NG10/W/38/Rev.3 of 6 November 1990.
[37] In the draft Chair text of 6 November 1990, the exclusion from the application of the prohibition on export subsidies referred to Annex VIII, which, in turn, set forth ceilings for the level of permissible export subsidies of the listed developing countries. More specifically, Annex VIII provided a country-specific list of progressively decreasing levels of permitted export subsidies. The commitments in respect of export subsidies were divided into three time periods (Periods 1-3). Over up to the three time periods, they provided for decreasing levels of permitted export subsidy rates defined as a percentage of an initial export subsidy rate. For certain countries, including India, Annex VIII did not specify time periods and corresponding levels of permitted export subsidy rates. For these countries, Annex VIII referred to Note 1 according to which the relevant country would undertake a reduction commitment in terms of progressively decreasing levels of permitted export subsidy rates over up to three time periods when that country's GNP per capita reached USD 1,000 per year.
[38] India's first written submission, para. 177.

transition time upon graduation.[39] India posits that this intent must be taken into account when interpreting Article 27.2(b) and Annex VII(b).[40]

2.25. We note that the draft Chair text of 6 November 1990 was one of several revisions of the draft text of the SCM Agreement.[41] It introduced in its Annex VIII the mechanism of reduction commitments on which India now relies.[42] The Draft Final Act circulated on 20 December 1991, however, replaced the previous text of Article 27.2(b) and Annex VIII with the text that corresponds to the ultimately adopted Article 27.2(b) and Annex VII of the SCM Agreement, and which does not provide for an additional transition period for graduating Annex VII(b) Members.[43]

2.26. It may therefore be that the draft Chair text of 6 November 1990 contained a proposal for a mechanism and reflected an intention that was "distinctly different"[44] from the requirement for Members listed in Annex VII(b) to immediately eliminate export subsidies upon graduation. Nevertheless, in contrast to the previous draft text of Article 27.2(b) and the corresponding Annex, the Draft Final Act of 20 December 1991 and the text ultimately adopted differ from the draft of 6 November 1990 specifically with respect to the issue of the graduation mechanism for Annex VII(b) Members.

2.27. There is no apparent reason to give an earlier draft (that of 6 November 1990) greater weight over a subsequent draft (that of 20 December 1991) to interpret the text that was ultimately adopted.[45] Rather, the fact that the draft Chair text of 6 November 1990 is "distinctly different" from the subsequent draft and, more importantly, from the text ultimately adopted, cautions against importing terms and concepts from the 6 November 1990 draft into the SCM Agreement as finally adopted.[46]

2.28. We recall that "the purpose of treaty interpretation under Articles 31 and 32 of the Vienna Convention is to ascertain the "common intention" of the parties"[47], not of one or some parties. The negotiating history discussed above does not establish a common intention of the parties in favour of granting an additional transition period for graduating Annex VII(b) Members, and instead indicates that such an option failed to garner consensus support. Thus, even considering the negotiating history, we find that it does not support India's position. To the contrary, it confirms our interpretation of Article 27.2(b).

[39] India's first written submission, para. 178; response to Panel question No. 23, second para.

[40] India's first written submission, para. 179; second written submission, para. 12.

[41] The text originally circulated in MTN.GNG/NG10/W/38 on 18 July 1990 and first revised in MTN.GNG/NG10/W/38/Rev.1 on 4 September 1990 did not yet contain a special and differential treatment provision equivalent to Article 27 of the SCM Agreement, nor a corresponding Annex. The second revision circulated in MTN.GNG/NG10/W/38/Rev.2 on 2 November 1990 introduced Article 27 in the form reflected in the subsequent draft of 6 November 1990 but contained only a placeholder for Annex VIII.

[42] Following the draft of 6 November 1990, the Draft Final Act circulated on 3 December 1990 kept the text of Article 27 and Annex VIII unchanged. (Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations - Revision, MTN.TNC/W/35/Rev.1 (3 December 1990)).

[43] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (20 December 1991).

[44] India's second written submission, para. 33.

[45] In this context, we note that the Chairman of the Negotiating Group on Subsidies and Countervailing Measures reported that there remained disagreement on Article 27 in the draft of 6 November 1990 and that, in general, "[i]t was clear that the Group was not in a position to reach final Agreement on the text" (Note by the Secretariat on the meeting of 6 November 1990 of the Negotiating Group on Subsidies and Countervailing Measures, MTN.GNG/NG10/24 (29 November 1990), p. 3).

[46] Indeed, in contrast to the Article 27.2(a) approach for least-developing countries, which remained the same, the final version of Article 27.2(b) and Annex VII(b) introduced a different approach to special and differential treatment for developing countries falling under Article 27.2(b). The approach in the draft Chair text of 6 November 1990 was characterized by country-specific, staggered reduction commitments. The subsequent and ultimately adopted version of Article 27.2(b) endorsed a country-neutral, uniform eight-year transition period. Note 1 in the draft Chair text of 6 November 1990 and Annex VII(b) in the final text connected with the respective approaches to special and differential treatment in the relevant versions of Article 27.2(b): upon graduation, Note 1 made applicable the "commitment approach" under Article 27.2(b) and Annex VIII of the draft Chair text of 6 November 1990, while Annex VII(b) renders applicable the transition period of Article 27.2(b) of the SCM Agreement.

[47] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 405.

3 INDIA'S REQUESTS CONCERNING THE DESCRIPTION OF THE MEASURES AT ISSUE

3.1 Export Oriented Units and Sector-Specific Schemes

3.1. Paragraph 7.134 of the Interim Report sets out examples of the sanctions envisaged under the EOU/EHTP/BTP Schemes in the event a Unit fails to ensure positive NFE or fails to abide by other obligations under the schemes. The Interim Report describes one such sanction as "criminal liability". India submits that the appropriate terminology is "penal action".[48] India makes the same request for paragraphs 7.141, 7.487 (7.486), and 7.492 (7.491), and footnotes 716 (718) and 720 (722) of the Interim Report. The United States has not commented on India's request. The Panel has therefore replaced "criminal liability" with "penal action" in the paragraphs and footnotes at issue.

3.2 Special Economic Zones Scheme

3.2. India requests the following addition to paragraph 7.143 of the Interim Report (in the section containing a brief description of the SEZ Scheme)[49]:

> A SEZ is a separate geographical region which provides for more liberal economic measures to be applicable to the Units set up within it, as compared to the rest of India.[236] The rest of India excluding the SEZs is defined as the "Domestic Tariff Area", and the SEZ Scheme recognizes the transfer of inputs and finished goods between the SEZ Units and the Domestic Tariff Area.[237]

[236] India first written submission, para. 321.
[237] India first written submission, para. 326.

3.3. The United States points out that the first part of the language suggested by India is "just India's characterization of the scheme".[50] The United States also observes that the second part of the suggested language is not supported by the factual record.[51]

3.4. Considering India's request, the United States' comments, and the language actually contained in the evidence that India relied on in the passages of its submissions cited in its request, we have added the following new paragraph after paragraph 7.143 of the Interim Report:

> India has submitted that an SEZ is a "distinct"[FN1]"geographical region which provides for more liberal economic measures to be applicable to the Unit set up within it, as compared to the rest of India".[FN2] Further, India has pointed out that the SEZ Act defines the "domestic tariff area" (DTA) as the whole of India excluding SEZs, and that "export" for purposes of the SEZ Act includes not only "the taking of goods … out of India, from a[n SEZ]" and the supply of goods between different Units[FN3] within an SEZ, but also the supply of goods from the DTA to a Unit or developer[FN4] within an SEZ.[FN5]

[FN1] India's first written submission, para. 321; request for review, para. 23.
[FN2] India's first written submission, para. 326; request for review, para. 23. See also Annex A-2, paras. 3.2-3.4.
[FN3] See para. 7.149 [para. 7.148 in the Interim Report] below, defining SEZ "Units".
[FN4] See para. 7.147 [para. 7.146 in the Interim Report] below, defining SEZ "developers".
[FN5] India's first written submission, para. 326; request for review, para. 23. Sections 2(i) and 2(m) of the SEZ Act. See also Annex A-2, paras. 3.2-3.4.

4 INDIA'S REQUESTS CONCERNING THE LEGAL STANDARD UNDER FOOTNOTE 1 OF THE SCM AGREEMENT

4.1 Meaning of "exemption" and "remission"

4.1. Footnote 1 of the SCM Agreement refers to "exemption(s)" and "remission(s)". India disagrees with the Panel's understanding of the respective meaning of these two terms and, as a consequence,

[48] India's request for review, paras. 21-22.
[49] India's request for review, para. 23.
[50] United States' comments on India's request for review, para. 11.
[51] United States' comments on India's request for review, para. 12.

requests changes to paragraphs 7.168 (7.169), 7.172 (7.173) and footnote 281 (286) of the Interim Report.[52]

4.2. First, India observes that footnote 58 of the SCM Agreement defines "remission or drawback" as including "exemption", and that Annexes I(g), (h), and (i) "can involve" both exemptions and remissions.[53] The Panel agrees with these observations, and notes that they are already reflected in footnote 281 (286) of the Interim Report. Indeed, as also already noted in the Interim Report, the relevant clauses of Annex I set out the same disciplines for exemptions and remissions, so that while the mechanism for granting an exemption and remission will differ, the two are subject to the same substantive constraints under footnote 1 read together with Annex I.

4.3. Second, and apparently as a consequence, India disagrees with the following statement of the Panel in paragraph 7.168 (7.169) of the Interim Report[54]:

> We understand the difference between these two groups of measures to be that, in the case of exemptions, the duty or tax liability never arises, whereas, in the case or remissions, the liability first arises, but is later remitted, including by returning the payment if one was already made.[55]

4.4. Instead, according to India:

> [T]he point of difference … is that while the first part [of footnote 1, on exemptions,] applies to taxes or duties <u>on exported products</u>, the second part [of footnote 1, on remissions] applies <u>not</u> to taxes or duties <u>on the exported product itself, but</u> to taxes and duties <u>on inputs</u> that are used … in the production of the exported product or duties <u>or</u> taxes levied <u>on the production/distribution</u> of the exported product.[56]

4.5. In its proposed definition, India draws a distinction between "the exported product itself", on the one hand, and taxes and duties "on inputs" into, or "on the production/distribution" of, that product. India appears to consider that as a matter of definition, exemptions under footnote 1 are only granted with regard to taxes levied on the product "itself" in the final form in which it is exported, whereas remissions under footnote 1 are only granted with regard to taxes and duties imposed on inputs used in the production of an exported product, and with regard to taxes levied on the production or distribution of that product.

4.6. We disagree with India's arguments. Footnote 1 refers to the "exemption *of an exported product* from duties or taxes borne by the like product when destined for domestic consumption", and to the "remission of *such* duties or taxes". The use of the term "such" makes it clear that the difference does not lie in the object of taxation (the product as "itself" exported, versus inputs into its production).[57] To the contrary, in both cases: first, the exemption or remission relates to "an exported product"; and, second, reading footnote 1 together with Annex I makes it clear that there are several ways in which an exemption or omission may relate to an exported product within the meaning of footnote 1, one such way being that there is an exemption from duties or taxes, or a remission of the same, on *inputs* consumed in the production of the exported product.[58] Therefore, we disagree that only exemptions relate to the "exported product itself", and we also disagree that

[52] India's request for review, paras. 24-29 (on para. 7.168 (7.169) and fn 281 (286) of the Interim Report) and 33 (on para. 7.172 (7.173) of the Interim Report).

[53] India's request for review, para. 25. India therefore considers there to be contradictions between the Panel's reasoning and footnote 58, as well as within the Panel's reasoning, and between that reasoning and Annex I and a prior panel report. India's request for review, paras. 24-26. The United States considers India's arguments on such contradictions to be "meritless". (United States' comments on India's request for review, para. 16. See also ibid. para. 15.)

[54] India's request for review, paras. 24, 26, and 28. India also asks the Panel to delete the portion of fn 281 (286) of the Interim Report that mentions this distinction. Ibid. para. 29.

[55] Fns omitted.

[56] India's request for review, para. 27. (underlining added)

[57] In asking the Panel to reject India's request for review, the United States similarly reasons that "[t]he 'such' makes it clear that the remission also refers to remission of 'duties or taxes borne by the like product when destined for domestic consumption'. Both parts of footnote 1 relate to the exemption or remission of duties or taxes borne on the exported product". (United States' comments on India's request for review, para. 18.)

[58] See also Table 2, Step 3, of the Interim Report.

only remissions relate to "inputs" (or to indirect taxes on the production/distribution of the exported product), as proposed by India as a matter of interpretation.

4.7. We therefore reject India's request that we modify paragraph 7.168 (7.169) and footnote 281 (286).

4.8. For the reasons just examined in paragraph 4.5. above, India also asks that we modify paragraph 7.172 (7.173) of the Interim Report, where Annexes I (g), (h) and (i) are described as referring to the exemption and remission of certain taxes and duties "on exported products".[59] However, for the reasons set out in paragraph 4.6. above, we disagree with India's interpretation and we therefore also reject India's request regarding paragraph 7.172 (7.173) of the Interim Report.

4.2 Description of Annex I(h)

4.9. India requests that we modify our description of the first part of Annex I(h), in paragraph 7.175 (7.176) of the Interim Report, by using exactly the language used there.[60] The United States agrees.[61] We have modified the text of paragraph 7.175 (7.176) of the Interim Report accordingly.

5 INDIA'S REQUESTS CONCERNING THE PANEL'S ASSESSMENT OF THE EXPORT ORIENTED UNITS AND SECTOR-SPECIFIC SCHEMES

5.1 The exemption from customs duties: the scope of the Panel's findings

5.1. India asks us to revise the section on "[t]he nature of certain goods covered by the exemptions" from customs duties under the EOU/EHTP/BTP Schemes, spanning paragraphs 7.195-7.215 (7.196-7.216) (Section 7.6.2.1.1) of our Interim Report.[62] India also requests us to revise accordingly our conclusions in paragraphs 7.233 (7.236) and 8.1(a) of the Interim Report.[63]

5.2. According to India, while finding that the exemption is also available to goods other than capital goods, the Panel has then "restricted its evaluation to capital goods".[64] India asks us to review our findings and modify them in essentially two ways, namely (1) by specifying that our findings only relate to "capital goods", and (2) by adding that in all other respects, the EOU/EHTP/BTP Schemes meet the conditions of footnote 1 of the SCM Agreement.[65]

5.3. The United States asks us to reject India's request.[66] Among other things, the United States notes that when aspects of a measure are WTO-inconsistent, the measure as a whole is in breach, and that "[t]o the extent India considers that it need only modify … aspects of a measure in order to come into compliance, that is an issue that would be relevant with respect to compliance and does not affect the Panel's recommendation under Article 19 of the DSU with respect to the measure".[67]

5.4. For the reasons set out in the following paragraphs, we reject India's request.

5.5. As outlined in the Interim Report, the United States articulated a number of ways in which it considered that the customs duty exemption under the EOU/EHTP/BTP Schemes did not meet the third element in our analysis under footnote 1, i.e. the limitation of the exemption to inputs

[59] India's request for review, paras. 30-32. The United States requests the Panel to reject India's request, noting that "[p]aragraph 7.172 summarizes the provisions of Annex I, items (g)-(i), and then the Panel provides a detailed description, with the language directly taken from the provisions themselves, of how each of the relevant Annex I provisions operate". (United States' comments on India's request for review, para. 21.)

[60] India's request for review, para. 33.

[61] United States' comments on India's request for review, para. 24.

[62] India's request for review, paras. 34-39. The text in quotation marks is not reproduced in the request for review and is instead the title of the heading of the section whose review India requests. See also India's opening statement at the Panel's interim review meeting, paras. 12-17.

[63] India's request for review, paras. 46 and 86.

[64] India's request for review, para. 36.

[65] India's request for review, paras. 39, 46, and 86.

[66] United States' comments on India's request for review, paras. 25-29.

[67] United States' comments on India's request for review, para. 28.

consumed in the production of the exported product.[68] Having considered both parties' views, we were persuaded by some of the United States' arguments[69], but not by others.[70]

5.6. The section of the Interim Report that India takes issue with describes one of the two grounds on which we were persuaded that the customs duty exemption under the Schemes is not limited to inputs consumed in the production of the exported product. As its title says, the section in question addresses "[t]he nature of certain goods covered by the exemptions". To summarize, in that section, we find that the exemptions are available, first, for a number of goods that India's measures label as "capital goods"; having examined the definition of "capital goods" in the relevant measures, we have found that these are incapable of constituting "inputs consumed in the production of the exported product".[71] Second, in the same section, we find that certain other goods, in addition to those labelled as "capital goods" in the Indian measures, are also of a nature that makes them incapable of constituting "inputs consumed in the production of the exported product", including for example raw materials for making capital goods for use within a Unit, and prototypes.[72]

5.7. In another section, different from that referred to by India, we have also addressed the fact that the Schemes allow for the exemption from customs duties of "any other item", not expressly listed in the Schemes.[73] We found that the Schemes fail to meet the third element in our analysis under footnote 1 also to the extent that the competent authority approves, under the relevant provision, the duty-free importation of other items that are also incapable of being "inputs consumed in the production of the exported product".[74]

5.8. As noted above, India's first request is that we indicate that our findings are limited to capital goods. We consider, however, that we have been sufficiently precise in indicating the scope of our findings, by reference to the provisions of the Indian legislation and regulations, and to the definitions and lists of goods found therein.[75] "Capital goods", *per se*, is not a notion belonging to the SCM Agreement. As remarked in the Interim Report, the parties appeared to have slightly different understandings of the scope of "capital goods", a divergence that it was not for the Panel to resolve, because the question for the Panel was whether the goods actually covered by the challenged measures were "inputs consumed in the production of the exported product".[76] Moreover, India's measures themselves describe some of the goods that we have found not to qualify as "inputs consumed in the production of the exported product" as belonging to a category "other[]" than capital goods.[77] Therefore, we consider that changing our Report to describe our findings as limited to "capital goods" is neither necessary nor accurate.

5.9. To recall, India's second request is that we add that, in all respects other than capital goods, the challenged customs duty exemption *meets* the conditions of footnote 1.[78] However[79], within the framework set for us by the DSU and by our terms of reference, we consider that our task in assessing a violation complaint is to ascertain, based on the arguments of the parties, whether and to what extent the complainant has *established* the claimed *inconsistencies*. India argues that we have ignored those goods that *are* capable of being inputs consumed in the production of the exported product, and suggests that we have therefore "generaliz[ed] that all duty-free items

[68] Interim Report, para. 7.194 (7.195) and fn 312 (317).
[69] Interim Report, paras. 7.203 (7.204), 7.215 (7.216), and 7.217 (7.218).
[70] Interim Report, para. 7.219 (7.720) and fn 312 (317).
[71] Interim Report, paras. 7.196-7.201 (7.197-7.202).
[72] Interim Report, paras. 7.197 (7.198) and 7.202 (7.203), and fn 322 (327).
[73] Interim Report, para. 7.216 (7.217).
[74] Interim Report, para. 7.217 (7.218) referring to Section 6.04(f) of the HBP.
[75] Interim Report, paras. 7.196 (7.197), 7.197 (7.198), 7.201 (7.202), 7.202 (7.203), 7.215 (7.216), and 7.217 (7.218), and fn 322 (327).
[76] Interim Report, fn 317 (322).
[77] Interim Report, para. 7.197 (7.198).
[78] India asks us to add the following language to para. 7.215 (7.216) of the Interim Report: "[f]or other inputs incorporated in the exported product [footnote reference to HBP Sections 6.04(a) and (f)], the duty exemption meets the conditions of footnote 1 read together with Annex I(i) to the SCM Agreement". (India's request for review, para. 39.) India requests a similar addition to para. 7.233 (7.236) of the Interim Report.
[79] In addition to our objections to India's proposed language on "capital goods", set out in the previous paragraphs.

allowed to be imported under the EOU/EHTP/BTP Schemes are like capital goods".[80] We have not. Our finding of inconsistency is based on, and limited to, the reasoning set out in our Report.

5.2 The exemption from customs duties: India's arguments on a "quantitative analysis" under Annex II of the SCM Agreement

5.10. India asks us to review paragraph 7.213 (7.214) of the Interim Report, where, according to India, we have wrongly taken the view that "India presupposes … the existence of … a scheme that meets the first three requirements of the test under footnote 1 of the SCM Agreement".[81] The United States submits that this is a correct characterization of India's argument and that we should reject India's request for review.[82]

5.11. As reflected in paragraph 7.211 (7.212) of the Interim Report, India repeatedly argued that to establish that the EOU/EHTP/BTP Schemes, EPCG Scheme, MEIS, and DFIS do not meet the conditions in footnote 1 of the SCM Agreement, the United States had to undertake a "data-driven" analysis in accordance with Annex II. In the paragraph India is now asking us to review, we point out that such an analysis[83] presupposes that the first three of the steps in our examination of footnote 1 are met. We remain of this view and we therefore reject India's request.

5.3 The exemption from central excise duty: assessment under footnote 1 of the SCM Agreement

5.12. India requests the Panel to review its analysis of the exemption from central excise duty under footnote 1 of the SCM Agreement, and to find that the exemption meets the conditions in the footnote.[84] The United States disagrees.[85] The parties and the Panel also had an exchange regarding this request for review during the interim review meeting of the Panel with the parties.[86]

5.13. To recall, in the Interim Report we noted that pursuant to Sections 6.08(a)(i) and (v) of the FTP, when an EOU/EHTP/BTP Unit sells finished goods to the DTA, such sales are subject to central excise duty if the finished good itself is subject to central excise duty.[87] Therefore, when the finished good is not subject to central excise duty, these provisions do not provide for the reversal of any central excise duty exemption availed on inputs consumed in the production of the finished good.[88]

5.14. During the interim review, however, India clarified that pursuant to the FTP, sale by an EOU/EHTP/BTP Unit in the DTA also triggers the obligation on the part of such Unit to pay any central excise duty initially foregone on excisable *inputs* consumed to produce the goods in question.[89]

5.15. Specifically, India referred to Section 6.08(a)(vi) of the FTP, which provides for "refund of any benefits under Chapter 7 of the FTP availed by the EOU/supplier as per the FTP, on the goods used for manufacture of the goods cleared into the DTA". India pointed out that Chapter 7 of the FTP, and in particular Section 7.03(c) thereof, provides that domestic suppliers of EOU/EHTP/BTP Units, among others, may obtain a refund of central excise duties on sales to such Units; alternatively, such suppliers may avail themselves of an exemption on sales to Units and therefore not pay the

[80] India's request for review, paras. 36-37. See also opening statement at the Panel's interim review meeting, para. 16.
[81] India's request for review, para. 40.
[82] United States' comments on India's request for review, para. 30.
[83] The subject of "presupposes" in the sentence in question is "the … analysis", not "India", contrary to what is stated in India's review request. Interim Report, para. 7.213 (7.214).
[84] India's request for review, paras. 41-46, and 86. The latter request (in para. 86) relates to paras. 8.1(a) and 8.2 of our Interim Report.
[85] United States' comments on India's request for review, paras. 31-33.
[86] India's opening statement at the Panel's interim review meeting, paras. 21-22; responses to Panel questions Nos. 93-101; and United States' comments on India's responses to Panel questions Nos. 93-101.
[87] Interim Report, para. 7.231 (7.232).
[88] Interim Report, para. 7.231 (7.232).
[89] India's opening statement at the Panel's interim review meeting, para. 21.

central excise duty in the first place, in which case there is no need for the Government to provide them with a refund.[90]

5.16. India further explained that the reference in Section 6.08(a)(vi) to the refund of benefits under Chapter 7 "availed by the EOU/*supplier*" is meant to capture precisely the situation where a benefit was initially availed by a supplier, as is the case for central excise duties on inputs procured by Units: the suppliers are liable for such duties[91], although the benefit is passed on to the Unit, which does not have to pay a price that includes central excise duty.[92] Thus, India explained that pursuant to Section 6.08(a)(vi), any exemption from or refund of central excise duty on inputs consumed in producing a good sold on the DTA is "subject to refund"[93], and that it is the Unit that must provide that refund.[94]

5.17. We find India's explanation to be supported by the evidence on the record (indeed by the FTP, which has featured prominently in the parties' arguments and in our analysis) and in particular by Section 6.08(a)(vi) of the FTP.

5.18. The United States raises a number of objections. First, the United States argues, in several ways, that the exemption it is challenging is provided to EOU/EHTP/BTP Units under Chapter 6 of the FTP, and therefore cannot be undone by the refund of a benefit granted to a supplier under Chapter 7 of the FTP.[95] However, India has explained, as set out above, that in a transaction between a domestic supplier and an EOU/EHTP/BTP Unit purchasing inputs from the domestic supplier, the provision for a central excise duty exemption in favour of the Unit, and for a central excise duty exemption or refund in favour of the supplier, are two sides of the same coin. Moreover, the link between Chapters 6 and 7 of the FTP, and between Units and suppliers, is made in Chapter 6 itself, and specifically in Section 6.08(a)(vi), which provides for a refund of "benefits under Chapter 7 … availed by the EO[Unit]/supplier …".

5.19. Second, the United States argues that Section 7.02 of the FTP does not list, among the transactions covered by Chapter 7 (i.e. "deemed exports"), sales by EOU/EHTP/BTP Units to the DTA[96], and is therefore not applicable to such sales. India, however, is not asserting that. Instead, India is pointing out that the transactions covered by Chapter 7 include the supply of goods by domestic manufacturers *to* EOU/EHTP/BTP Units[97] - i.e. the transactions in which Units purchase inputs *from* the DTA.

5.20. In light of India's explanation of the record evidence on which our analysis has been based, we have therefore reconsidered[98] our findings in paragraph 7.231 (7.232) of the Interim Report, and the findings that presuppose those in paragraph 7.231 (7.232). We have thus revised paragraph 7.231 (7.232-7.235) to conclude that the United States, which bears the burden of proof, has not shown that the EOU/EHTP/BTP Schemes fail to limit the central excise duty exemption to inputs consumed in the production of the exported product. As a consequence, we have also revised paragraphs 7.232 (7.235) and 7.233 (7.236), sections 7.7.2 and 7.10.2, and paragraphs 8.1 and 8.2, of the Interim Report.

[90] India's responses to Panel questions Nos. 95 and 101; Sections 7.02 and 7.03(c) of the FTP (as contained in the second part of Exhibit USA-3).
[91] India's response to Panel question No. 97.
[92] India's response to questioning from the Panel at the interim review meeting (ca. 12.20-12.23 pm).
[93] Section 6.08(a)(vi) of the FTP.
[94] India's response to Panel question No. 99.
[95] United States' comments on India's responses to Panel questions Nos. 95-97 and 99-100.
[96] United States' comments on India's response to Panel question No. 96, paras. 9 and 12-15.
[97] Section 7.02(A)(b) of the FTP.
[98] See Panel Report, *US – Tuna II (Mexico)*, para. 6.3:
[I]n our view, requests to review precise aspects of the Panel's report may legitimately include requests for "reconsideration" of specific factual or legal findings, provided that such requests are not based on the presentation of new evidence.
See also Panel Report, *EC – Large Civil Aircraft*, para. 6.231.

5.4 Export contingency: in general

5.21. India argues that we have failed to take into account its arguments on the (absence of) export contingency of the EOU/EHTP/BTP Schemes.[99] According to India, while the Panel "has correctly identified that EOU/EHTP/...BTP Units are to export the entirety of their production, (except permissible sales to DTA)"[100], it has failed to take into account that the aim of the positive NFE requirement is to "ensure[] business prudence", in particular by ensuring that the value of the imported inputs does not exceed the value of the exported products.[101] India therefore requests us to review section 7.10.2 of the Interim Report.

5.22. The United States takes the view that "the Panel carefully considered India's arguments and rejected them".[102] The United States also addresses those arguments on the merits.[103]

5.23. In our Interim Report, we have identified[104], and addressed[105], India's argument that the NFE requirement is meant to ensure business prudence. We therefore reject India's request for review.

5.5 Export contingency: of the central excise duty exemption

5.24. India asks us to review our findings on the export contingency of the central excise duty exemption under the EOU/EHTP/BTP Schemes.[106] However, as a result of India's request to reconsider our analysis of that same exemption under footnote 1 of the SCM Agreement, we no longer proceed to assess whether that exemption is export contingent.[107]

6 INDIA'S REQUESTS CONCERNING THE PANEL'S ASSESSMENT OF THE DUTY-FREE IMPORTS FOR EXPORTERS SCHEME

6.1 Condition 10

6.1. Under DFIS, Condition 10 (line item 104) exempts food tenderizers for use in the processing of seafood products for export. In the Interim Report, we found that Condition 10 does not meet the conditions of footnote 1 because the evidence submitted by the United States in Exhibit USA-90 indicated that at least one type of tenderizer involves a tool for mechanical tenderization, which would therefore not be physically incorporated into the processed seafood product, and is also not "energy, fuels, and oil".[108]

6.2. India requests us to reconsider our finding in respect of Condition 10 because, in India's view, the evidence submitted by the United States pertains to mechanical meat tenderizers that cannot be used in the production of seafood products.[109]

[99] India's request for review, para. 47; opening statement at the Panel's interim review meeting, para. 27.
[100] India's request for review, para. 47.
[101] India's request for review, paras. 48-49; opening statement at the Panel's interim review meeting, para. 28.
[102] United States' comments on India's request for review, para. 35.
[103] United States' comments on India's request for review, paras. 36-37.
[104] Interim Report, para. 7.489 (7.488) ("[r]egarding the NFE requirement, India argues that it ... ensures that Units act with commercial prudence and without operating at a loss"). India now adds the concern that Units would otherwise be subject to antidumping duties, which does not however add to the substance of its arguments. (India's request for review, para. 48.)
[105] Interim Report, paras. 7.495-7.496 (7.494-7.495).
[106] India's request for review, paras. 50-52; opening statement at the Panel's interim review meeting, paras. 23-26.
[107] See para. 5.20. above.
[108] Interim Report, para. 7.253 (7.256).
[109] India's request for review, paras. 53-54 and 86. The requests relate to paras. 7.253 (7.256), 8.1(d) and 8.2 of our Interim Report. See also India's opening statement at the Panel's interim review meeting, paras. 31-32.

6.3. The United States opposes India's request, observing both that it is unsupported by evidence and that interim review would not be "the proper point at which to make new factual assertions or introduce new evidence".[110]

6.4. We recall that during the proceedings we asked the parties to indicate, among the items eligible under the challenged duty exemptions in Customs Notification No. 50/2017, which were capital goods.[111] In response, the United States asserted that food tenderizers, included in list 1 of Customs Notification No. 50/2017, were capital goods and referred to a website, later submitted as Exhibit USA-90, in support.[112] As we noted in footnote 404 (410) of the Interim Report, India remained silent with regard specifically to food tenderizers. India also neither responded to the United States' assertion that food tenderizers are capital goods, nor objected to the probative value of the United States' evidence in its comments on the United States' response.[113] India's factual assertions at interim review stage are untimely. We therefore reject India's request.

6.2 Condition 36

6.5. Regarding Condition 36, pertaining to the importation of carpet samples, India now invokes, (1) the International Convention to Facilitate the Importation of Commercial Samples and Advertising Materials, 1952 (Convention), which "allows for duty free importation of commercial samples subject to certain conditions"[114], and (2) an Indian measure dated 1994, which was neither submitted nor referred to before and which according to India affords exemptions from customs duties also to importers who do not export.[115] On this basis, India asks us to reconsider our findings on Condition 36.[116]

6.6. The United States submits that we must reject India's request because "India points to no record evidence or any legal argument addressing the Panel's findings" at issue.[117]

6.7. While invoking the Convention, India has made no argument as to how it relates to the Panel's analysis under the WTO Agreement in general and footnote 1 of the SCM Agreement in particular.

6.8. In any event, the Convention being part of international law, we have taken the step of consulting it[118] and we note that it envisages the duty-free importation of samples in two circumstances, namely: when they are of negligible value, and when their admission is temporary (with a view to soliciting orders of goods to be supplied from abroad *to the territory of temporary admission*, and then re-exporting the sample).[119] There is no mention, in DFIS, of these conditions. Instead, DFIS ties the duty-free importation of samples to the value of *exports* of carpets made in the previous year.

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[110] United States' comments on India's request for review, para. 40.

[111] Panel question No. 80.

[112] United States' response to Panel question No. 80, Appendix 2, p. 59, fn 208.

[113] India argues that "[w]hile [it] did not specifically highlight [that mechanical (meat) tenderizers cannot be used in the production of seafood products] in its comments on responses provided by the United States to the Question 80 posed by the Panel, India assumed that the Panel would not base its finding on an incorrect exhibit, that does not relate to the product under consideration". (India's opening statement at the Panel's interim review meeting, para. 32.) We note however that Exhibit USA-90 expressly refers to tenderizers for meat, "[l]et it be red meat consisting of beef, pork, lamb, venison, etc., poultry comprising of chicken, turkey, ducks, etc., *or seafood like fish, shrimp, crabs*, etc." (Exhibit USA-90, p. 1 (emphasis added)) On its face, the evidence submitted by the United States therefore appears pertinent to the issue before us and India did nothing at the appropriate stage of the proceedings to convince us of the opposite.

[114] India's request for review, para. 55. See also India's opening statement at the Panel's interim review meeting, para. 33.

[115] India's request for review, paras. 55-57.

[116] India's request for review, paras. 55-57 and 86. The latter request (in para. 86) relates to paras. 8.1(d) and 8.2 of our Interim Report.

[117] United States' comments on India's request for review, para. 41.

[118] International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, done at Geneva (7 November 1952), available at: https://treaties.un.org/doc/Treaties/1955/11/19551120%2000-56%20AM/Ch_XI_A_05p.pdf (accessed 15 September 2019).

[119] Convention, Articles III and IV.

6.9. Therefore, we see no basis to accept India's request for review based on the Convention.

6.10. Regarding India's 1994 measure, this falls squarely within the category of new evidence, which moreover India could have but has not submitted before, and which it is not appropriate to consider at interim stage.[120]

6.11. We therefore reject India's request relating to Condition 36.

7 INDIA'S REQUESTS CONCERNING THE PANEL'S ASSESSMENT OF THE MERCHANDISE EXPORTS FROM INDIA SCHEME

7.1 Reference period for FOB value of exports

7.1. India points out that paragraph 7.270 (7.273) of the Interim Report indicates that the value of MEIS scrips is a fixed percentage of the FOB value of exports during "the previous year". India explains that scrips are based on the FOB value of the exports but are "not cumulatively provided for an entire year".[121] India therefore requests the Panel to remove the reference to "the previous year" from paragraph 7.270 (7.273). The United States did not comment on this request.

7.2. The Panel has therefore removed the references to "the previous year" from paragraph 7.270 (7.273) of the Interim Report, as requested by India.

7.2 MEIS scrips as a direct transfer of funds

7.3. India asks us to "reconsider [our] findings" in paragraphs 7.433 (7.432) to 7.439 (7.438) of the Interim Report[122], which are part of our assessment of whether MEIS involves a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. While India does not expressly indicate the changes it is seeking, the gist of the request appears to be that we should find that the provision of MEIS scrips belongs, at least in part, to the category of revenue foregone[123] and that, moreover, it is excluded from the definition of a subsidy by virtue of footnote 1 of the SCM Agreement.[124] The United States requests us to reject India's request.[125]

7.4. There are several prongs to India's review request. Factually, India relies on the fact that MEIS scrips may be used to pay for customs duties, excise duties, and certain other government dues, a fact which, India says, the Panel "acknowledges".[126] Indeed, we do not only "acknowledge" this fact: this fact is an important part of the basis on which we have held that scrips are "funds" within the meaning of Article 1.1(a)(1)(i).[127] Thus, pointing to this fact does not warrant a revision of our reasoning, which we will not repeat here.

7.5. India then misquotes us as "not[ing] … that 'MEIS scrips, when used to pay for customs duties, do operate as remitting import charges'".[128] In the relevant passage of our Report however, we say, addressing an argument by India: "*Even assuming* that MEIS scrips, when used …".[129]

7.6. Next, India submits that we have contradicted ourselves by noting that the subparagraphs of Article 1.1(a)(1) are not mutually exclusive, but then only finding that MEIS scrips fall under subparagraph (i), on direct transfer of funds.[130] India also submits that when "government revenue such as taxes, duties collected by the government" are involved, the only applicable clause is

[120] E.g. Appellate Body Report, *EC – Sardines*, para. 301.
[121] India's request for review, para. 58.
[122] India's request for review, para. 63. The request in its entirety is set out ibid. paras. 59-63.
[123] India's request for review, paras. 59-62. The United States describes India's request as "claim[ing] that some unidentified aspect of the MEIS duty scrips fall within subparagraph (ii)", on revenue foregone. (United States' comments on India's request for review, para. 42.)
[124] India's request for review, para. 58.
[125] United States' comments on India's request for review, paras. 42-46.
[126] India's request for review, para. 61.
[127] Interim Report, paras. 7.431 (7.430) and 7.433 (7.432).
[128] India's request for review, para. 60, referring to Interim Report, para. 7.289 (7.292), in the Panel's assessment of MEIS under footnote 1 of the SCM Agreement.
[129] Interim Report, para. 7.289 (7.292) (emphasis added). See also United States' comments on India's request for review, paras. 43-44.
[130] India's request for review, paras. 59 and 61-62.

subparagraph (ii) of Article 1.1(a)(1), not subparagraph (i).[131] These two arguments are in themselves somewhat contradictory, because the first seems to suggest that India considers the subparagraphs not to be mutually exclusive, whereas the second argument seems to suggest India considers them mutually exclusive. Be that as it may, regarding the non-exclusivity of the two subparagraphs, we have already explained that for our finding under Article 1.1(a)(1)(i) to stand, we need not "exclude that aspects of the measure may fall under subparagraph (ii)".[132] Regarding the inapplicability of subparagraph (ii) to measures involving taxes, we recall that while MEIS scrips are instruments that can be used to pay for government dues (and indeed, that is the basis of their monetary value), they are notes provided to recipients as a reward for their exports and are freely transferable.[133] They therefore bear substantial differences from a situation in which a Government merely foregoes taxes owed by the subsidy recipient.

7.7. Finally, India appears to suggest that footnote 1 of the SCM Agreement applies to MEIS scrips.[134] We have extensively addressed India's arguments in this regard in the relevant section of our Interim Report[135], and India has advanced nothing that warrants reviewing that analysis.

7.3 Amendments to MEIS

7.8. India requests changes to paragraphs 7.277 (7.280) and 7.279 (7.282), and footnote 430 (436) of the Interim Report, on the basis of a 2016 amendment to the MEIS list of country groups that was not on the Panel's record and that neither party had previously mentioned in these proceedings.[136] The United States notes that this is "information that is not in the record from … almost two years before the start of this dispute", and that the introduction of new evidence at the interim stage "is not appropriate".[137]

7.9. The paragraphs and footnote that India requests us to review are part of our reasoning regarding India's argument that MEIS scrips are in fact a remission of indirect taxes on products exported in the past.

7.10. There, we noted that the value of the scrips, which the relevant legal instruments describe as a "reward", was determined by multiplying the value of past exports by the "rate(s) of reward"[138] set out in Appendix 3B.[139] We found that nothing in the record evidence indicated that the award of MEIS scrips was based on indirect taxes paid in connection with the exported products[140], and similarly nothing in the record evidence indicated that the rates of reward were in fact determined on the basis of such indirect taxes.[141] We further noted that India changed those rates from time to time: in one such example laid before us, from December 2017, we again found no reference to indirect taxes paid in connection with the exported products playing any role in setting the rates.[142] And we also observed that in the edition of the measure that the parties had laid before us, for some products, MEIS rewarded past exports at different rates depending on the country of export – another fact that was hard to reconcile with the proposition that MEIS scrips merely refunded indirect taxes already paid on past exports.[143]

[131] India's request for review, para. 62. The United States "cannot decipher" the latter argument, and also notes that India's premise, that the "sole purpose [of MEIS scrips] is to offset/refund the indirect taxes already paid by the exporter", was rejected by the Panel. (United States' comments on India's request for review, para. 45.)
[132] Interim Report, para. 7.438 (7.437).
[133] See e.g. Interim Report, paras. 7.160-7.163 (7.161-7.164) and 7.432 (7.431).
[134] India's request for review, para. 60.
[135] Interim Report, section 7.6.5 (paras. 7.265-7.291 (7.268-7.294).
[136] India's request for review, paras. 64-65; opening statement at the Panel's interim review meeting, para. 34.
[137] United States' comments on India's request for review, para. 47.
[138] Section 3.04 of the FTP.
[139] Interim Report, para. 7.276 (7.279).
[140] Interim Report, para. 7.278 (7.281).
[141] Interim Report, para. 7.279 (7.282).
[142] Interim Report, para. 7.280 (7.283).
[143] Interim Report, para. 7.279 (7.282). See also ibid. para. 7.277 (7.280).

7.11. India's request for review relates to this last point, i.e. the provision for different reward rates depending on the country of export. India now argues, relying on new evidence, that in the list of MEIS rates dated April 2016, there is no such variation among reward rates.[144]

7.12. We do not see what difference this would make to our conclusions but, in any event, this Indian legal instrument from 2016 is new evidence, which it is not appropriate for us to consider at interim review stage.[145]

7.4 Use of MEIS scrips in connection with failures to fulfil export obligations

7.13. India requests us to review paragraphs 7.269 (7.272), 7.287 (7.290), 7.431 (7.430) and 7.433 (7.432) of our Interim Report to modify the description of certain uses that MEIS scrips can be put to.[146] The United States does not comment on India's request.

7.14. To recall, the FTP explicitly provides that MEIS scrips can be used to pay for customs duties (basic and additional), excise duties, and to pay for certain other charges *vis-à-vis* the Government in case of "defaults" in export obligations or "shortfall" in export obligations.[147]

7.15. With reference to payment for shortfalls in export obligations, India explained earlier in these proceedings that this occurs when the beneficiaries of certain other government schemes (the exemption or remission scheme, and EPCG, under Chapters 4 and 5 of the FTP) export less than they undertook to: in that case, they have to pay (ex post) customs duties on the "unutilized" goods imported under those schemes.[148]

7.16. On this basis, India asks us to add, wherever we refer to payment for shortfalls in export obligations, that the payment in question consists of "basic customs duty and additional customs duty".[149] We have made certain edits to the language used in our Report in light of India's request, as set out in the subsections below.

7.4.1 Paragraph 7.160 (7.161) of the Interim Report

7.17. India did not refer to this paragraph in its request for review. However, this is where the description at issue first appears. We have made certain changes to this paragraph, to which we will cross-refer in the paragraphs that India requested us to review.

> … "Duty Credit Scrips", … are paper-based notes that can be used to pay for (i) basic and additional customs duties on the importation of goods[264], (ii) central excise duties on domestically procured goods[265], and (iii) certain other charges and fees owed to the Government, such as basic and additional customs duties ~~and fees~~ owed as a consequence of failing to fulfil one's ~~in case of a shortfall~~[266] ~~in~~ export obligations under other schemes.[267] …
>
> ~~[266] The difference between a participating company's actual export performance for a year and its export obligation.~~

[144] India's request for review, para. 64; opening statement at the Panel's interim review meeting, para. 34.

[145] E.g. Appellate Body Reports, *EC – Sardines*, para. 301; *EC – Selected Customs Matters*, para. 259; and Panel Reports, *Russia – Railway Equipment*, paras. 6.45-6.46; *Korea – Radionuclides*, para. 6.8.

[146] India's request for review, paras. 66-69.

[147] Sections 3.02 and 3.18 of the FTP.

[148] India's response to Panel question No. 61. The Panel's question used the term "shortfall". The Panel however understands that India's explanation referred both to defaults and shortfalls in export obligations, which are referred to in Sections 3.18(a) and (b) of the FTP, respectively.

[149] India's request for review, para. 69. However, we note that the language "payment of … shortfall in EO [export obligation]" appears in Section 3.18(b) of the FTP. Further, we note that on the face of Sections 3.02(iv) and 3.18(b) of the FTP, the back payment of customs duties is not the only use to which MEIS scrips can be put under these provisions; this, together with a preference for shorter formulations, accounts for most of the differences between the language proposed by India and our chosen language.

7.4.2 Paragraph 7.269 (7.272) of the Interim Report

7.18. India asks us to reflect the fact that paying for a shortfall in export obligations entails paying for customs duties on past imports. Paragraph 7.269 (7.272) is expressly non-exhaustive ("including"). We have left in a single reference to "customs … duties", without distinguishing the situation of the back payment of customs duties as a result of a default or shortfall in export obligations, and we have added a cross-reference to paragraph 7.160 (7.161) of the Interim Report.

> … The recipient of the scrips can then use them to offset certain liabilities *vis-à-vis* the government, including ~~the payment of~~ customs and excise duties[431] ~~and of shortfalls in export obligations under other schemes~~[432] ….

[431] Sections 3.02 and 3.18 of the FTP. For a fuller description, see para. 7.161 above.

[432] ~~Sections 3.02(iv) and 3.18 of the FTP~~

7.4.3 Paragraph 7.287 (7.290) of the Interim Report

7.19. Since this is a description of India's arguments, we have edited this paragraph using the exact language appearing in one of the cited passages of India's second written submission (paragraph 117).

> India argues that when MEIS scrips are used to pay for customs duties on importation, or ~~for shortfalls~~ to regularize a default in an export obligation, this "results in" a remission of import charges that meets the conditions of footnote 1 read together with Annex I(i).[461]

7.4.4 Paragraph 7.431 (7.430) of the Interim Report

7.20. While leaving this paragraph unchanged, we have edited the footnote.

> First, scrips may be used to pay for (a) basic and additional customs duties applying on importation under the 1975 Customs Tariff Act (with some exclusions), (b) excise duties on goods purchased domestically, and (c) certain other fees and charges owed to the Government, such as charges for failing to fulfil one's export obligations under certain other Government schemes.[624]

[624] Sections 3.02 and 3.18 of the FTP. See para. 7.161 above. As reflected there, such charges for failing to fulfil one's export obligations include the back payment of customs duties.

7.4.5 Paragraph 7.433 (7.432) of the Interim Report

7.21. We do not see the need to modify the relevant portion of this paragraph, given the more detailed descriptions already present earlier in the report, which this paragraph merely sums up.

> … scrips can be used to pay for customs duties and other liabilities *vis-à-vis* the Government …

7.4.6 Footnote 463 (468) of the Interim Report

7.22. We have clarified the language of this footnote, to which India refers in its comments.[150]

> Sections 3.02(i), 3.02(iv) and 3.18(a) of the FTP expressly provide that MEIS scrips can be used to pay for customs duties. In addition, also r~~R~~egarding payments for shortfalls in export obligations pursuant to Section 3.18(b) of the FTP, India appears to argue that paying for such shortfalls ultimately results in paying customs duties on goods imported under the schemes at issue and therefore "results in a remission of these import

[150] India's request for review, para. 68.

charges". (India's second written submission, para. 117). See also India's response to Panel question No. 61. …

7.5 The use of MEIS scrips as a remission or not

7.23. In Section 7.6.5.2, we addressed India's argument to the effect that when MEIS scrips are used to pay for customs duties, they result in a remission that is consistent with Annex I(i) of the SCM Agreement. In footnote 464 of the Interim Report, we noted the contrast between this argument and India's repeated statements that the use of MEIS scrips to pay for customs duties does not result in the remission of those duties. India asks us to delete the footnote, on the basis that the statements at issue were made in the context of the alternative argument that the MEIS scrips are consistent with Annex I(g) and Annex I(h), and that the two arguments are "mutually exclusive".[151] The United States takes the view that footnote 464 "accurately reflects" India's position and asks us to reject India's request for review.[152]

7.24. We disagree with India's reasoning in its request for review. While a litigant may put forward different legal arguments as alternative, the facts presumably remain the same. It is thus at its own peril that a litigant makes contradictory statements of fact in the context of alternative legal arguments.

7.25. At the same time, the observations in footnote 464 of the Interim Report are not required to sustain our findings, and we therefore accede to India's request to delete the footnote.

8 INDIA'S REQUESTS CONCERNING THE PANEL'S ASSESSMENT OF THE SPECIAL ECONOMIC ZONES SCHEME

8.1 The notion of "exports" in the SEZ Scheme

8.1. India recalls its explanations that "the definition of the term 'export' under the SEZ Scheme is wider than the understanding of exports under SCM Agreement", and argues that this argument "has not been considered".[153] India therefore "urges the Panel to provide a detailed consideration of this argument", and to review paragraphs 7.150 (7.151), 7.515 (7.514) and 7.531 (7.530) of the Interim Report.[154] For the same reason, India also asks us to review paragraph 7.529 (7.528) of the Interim Report.[155]

8.2. The United States takes the view that we have addressed this argument in the Interim Report and therefore asks us to reject India's request.[156]

8.3. Contrary to what India contends in its request for review, we have considered India's argument that "export" within the meaning of the SEZ Scheme includes more than taking goods out of India to a third country.

8.4. We have set out the relevant facts, namely (i) the items included in the definition of exports under Section 2(m) of the SEZ Act[157], (ii) the items that can be relied upon to achieve a positive NFE pursuant to the SEZ Rules[158], (iii) the relationship between these two lists of items[159], and (iv) the fact that, in both cases, such items are not limited to taking goods out of India.[160] We have

[151] India's request for review, paras. 70-74.
[152] United States' comments on India's request for review, para. 49.
[153] India's request for review, para. 75; opening statement at the Panel's interim review meeting, para. 36.
[154] India's request for review, paras. 75-76.
[155] India's request for review, para. 83.
[156] United States' comments on India's request for review, paras. 50-52, with reference to India's request for review of paragraphs 7.150 (7.151), 7.515 (7.514), and 7.531 (7.530). Regarding this same request, the United States also comments on the merits of the arguments in line with paragraph 7.525 (7.524) of our Interim Report. Ibid. para. 51. Regarding India's request to review para. 7.529 (7.528), the United States argues it is unsupported. (United States' comments on India's request for review, para. 55.)
[157] Interim Report, fn 766 (768) and para. 7.529 (7.528).
[158] Interim Report, para. 7.524 (7.523) and fns 767-771 (769-780).
[159] Interim Report, fn 766 (768). As set out there, the list of "additional" items in Rule 53 of the SEZ Rules includes, but is more extensive than, the list in Section 2(m) of the SEZ Act.
[160] Interim Report, para. 7.524 (7.523) and fn 766 (768).

referred to India's arguments, based on these facts, that the measure is therefore not export contingent.[161] And we have then addressed and rejected India's arguments on the merits.[162]

8.5. On this basis, we disagree with the contention on which India's request is based, i.e. that we did not consider India's arguments on the scope of the notion of "exports" under the SEZ Scheme.

8.6. In its request for review of paragraphs 7.150 (7.151), 7.515 (7.514) and 7.531 (7.530), India also emphasizes that the definition of exports in the SEZ Act "influences the 'export promotion' objective of the SEZ Scheme".[163] To the extent India considers this argument to be different from the argument on export contingency, which, as just mentioned, we have considered and addressed in our report, we find the argument puzzling. To recall, the items included in the definition of exports provided in the SEZ Act are, in addition to the taking of goods out of India, the export of services, and the supply of goods to SEZs or between SEZs.[164] We do not see how, or to what effect[165], this should influence our understanding of "the 'export promotion' objective of the SEZ Scheme".[166]

8.7. We therefore reject India's request for review in its entirety.

8.2 The Panel's consideration of the objectives of the SEZ Scheme

8.8. India asks us to review our findings regarding the existence of revenue foregone in paragraphs 7.364 (7.363), 7.380 (7.379), and 7.403 (7.402) in light of its description of the SEZ Scheme as creating distinct geographical areas "to increase the production capacity and employment potential of the SEZ Units, and consequently economic development of region".[167] The United States submits that we have already considered these objectives.[168]

8.9. We found the evidence to establish that export promotion was a "central"[169] objective of the SEZ Scheme, and we noted that India argued that, in addition, the objectives of the scheme included the generation of additional economic activity, investment, and employment, and the maintenance of India's sovereignty.[170] We then took these objectives into account in our assessment of the existence of revenue foregone.[171] We have thus already addressed the considerations that India is raising, and we therefore reject India's request.

8.3 Export contingency of the SEZ Scheme

8.10. India asks us to review paragraphs 7.525 (7.524) and 7.531 (7.530) of the Interim Report because, according to India, we have applied the wrong legal standard to assess export contingency.[172]

8.11. We refer to our findings in paragraphs 7.523-7.534 (7.522-7.533) of the Interim Report. What India takes issue with is the fact that we have found there to be export contingency even though it

[161] Interim Report, para. 7.515 (7.514).
[162] Interim Report, para. 7.525 (7.524).
[163] India's request for review, paras. 75-76. This aspect of India's arguments in its interim review request appears to relate to the Panel's finding that the preamble of the SEZ Act refers to "the promotion of exports and ... matters connected therewith and incidental thereto" as objectives of the Scheme. See Interim Report, para. 7.150 (7.151).
[164] Interim Report, fn 766 (768), referring to Section 2(m) of the SEZ Act. Further, as noted in fn 766 (768) and para. 7.524 (7.523) of the Interim Report, yet other supplies are included in the calculation of net foreign exchange under Rule 53 of the SEZ Rules. However, this particular aspect of India's interim review argument (about the measure's "objectives") appears to be related to the definition of exports *per se* rather than to the items comprising net foreign exchange.
[165] To recall, aside from our discussion of *de jure* export contingency (which turns on the conditions triggering the subsidies, rather than on the "objective" of the Scheme as such), the context in which we considered the objectives of the SEZ Scheme in our substantive analysis was our assessment of the existence of revenue foregone under Article 1 of the SCM Agreement.
[166] India's request for review, para. 75.
[167] India's request for review, para. 77.
[168] United States' comments on India's request for review, para. 53.
[169] Interim Report, paras. 7.352-7.353 (7.351-7.352).
[170] Interim Report, paras. 7.150-7.151 (7.151-7.152), and 7.351-7.354 (7.350-7.353).
[171] Interim Report, paras. 7.364 (7.363), 7.380 (7.379), and 7.403 (7.402).
[172] India's request for review, paras. 78-82 and 84-85; opening statement at the Panel's interim review meeting, paras. 37-42.

is possible to achieve a positive NFE through certain listed "supplies" other than taking goods out of India.[173] In particular, India takes issue with our explanation that "when a subsidy is available on condition of export performance, the fact that the same subsidy can also be obtained under a different set of circumstances, not involving export contingency, does not prevent a finding that the subsidy is export contingent".[174]

8.12. According to India, this "runs contrary to the explanation … in footnote 4 of the SCM Agreement"[175], according to which "[t]he mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision".[176] Thus, according to India, our analysis "conflates conditionality with the beneficiaries of a measure".[177]

8.13. The United States responds that "India ignores the fact that SEZ Units are exporters not by happenstance, but by the requirements of the SEZ Scheme".[178]

8.14. We agree with the United States' observation. As set out in our Interim Report, the SEZ Scheme, on its face, conditions the availability of the subsidies on the maintenance of positive NFE[179], which is defined by the formula A − B >> 0. This requires "A" to be greater than 0, and A has several components, the first of which is the FOB value of exports by the Unit. "Therefore, one condition triggering the subsidies to Units is export performance: exports greater than 0".[180] Thus, we are not at all faced with a "mere fact that a subsidy is granted to enterprises which export".[181] Instead, as we have established in the Interim Report, India conditions the subsidy on export performance.

8.15. As it did in the earlier stages of our proceedings, India invokes a passage from the Appellate Body Report in *Canada − Autos*, where the Appellate Body notes that under the measure it is reviewing, "the import duty exemption is simply not available to a manufacturer unless it exports motor vehicles".[182] The Appellate Body therefore finds that the duty exemption in question "is clearly conditional, or dependent upon, exportation".[183] From this, India derives that the legal standard for export contingency is a "but for" standard.[184] India is, however, confusing the Appellate Body's description of the measure before it with the applicable legal standard. That under the measure at issue in *Canada − Autos* exports were the *only* possible trigger of the subsidy does not mean that this is a necessary feature of export contingency.

8.16. India also argues that the reasoning in *US − FSC* is not applicable to the SEZ Scheme because the measures at issue are "structurally different" but, again, India does not identify a difference that would actually affect the application of the legal standard for export contingency.[185]

8.17. Finally, India "emphasize[s]"[186] that in a passage of the panel report in *Canada − Dairy* that was not appealed, that panel observed that "access to milk" at administered prices under certain "milk classes" was "also available (often exclusively) to processors which produce for the domestic

[173] The United States observes that India is repeating arguments already considered by the Panel. (United States' comments on India's request for review, para. 54.)
[174] Interim Report, para. 7.525 (7.524).
[175] India's request for review, para. 78. See also ibid. paras. 84-85.
[176] Fn 4 of the SCM Agreement.
[177] India's request for review, paras. 79; opening statement at the Panel's interim review meeting, para. 40.
[178] United States' comments on India's request for review, para. 56.
[179] And to other requirements involving exportation: see paras. 7.529 (7.528), 7.532 (7.531), and 7.533 (7.532) of the Interim Report.
[180] Interim Report, para. 7.523 (7.522).
[181] Fn 4 of the SCM Agreement.
[182] Appellate Body Report, *Canada − Autos*, para. 104. We had also addressed India's argument in the second part of fn 773 (775) of the Interim Report.
[183] Appellate Body Report, *Canada − Autos*, para. 104.
[184] India's request for review, para. 80; opening statement at the Panel's interim review meeting, para. 41.
[185] India's request for review, para. 81; opening statement at the Panel's interim review meeting, para. 38.
[186] India's request for review, para. 82.

market" and was therefore "not 'contingent on export performance'".[187] We note that the facts underlying this statement were considerably different from those before us.[188] In any event, if India considers that the more recent appellate reports we have relied upon[189] constitute a departure from that earlier report, it has not explained to us why we should nonetheless rely on that earlier report.

8.18. We therefore reject India's request for review.

9 INDIA'S REQUESTS CONCERNING THE PANEL'S RECOMMENDATIONS

9.1 The "extent" of the recommendation

9.1. India asks us to specify that our recommendation to withdraw the prohibited subsidies is only made "to the extent" we have found them to be inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.[190] The United States objects, noting that Article 4.7 of the SCM Agreement expressly refers to a finding that "the *measure* … is … a prohibited subsidy".[191]

9.2. What must be withdrawn pursuant to a recommendation under Article 4.7 is the "prohibited subsidy" − not, for example, aspects of a scheme that do not give rise to a prohibited subsidy. We therefore consider that the requested change is unnecessary, and we decline to make it.

9.2 Time period for withdrawal

9.3. India asks us to review our recommendation on the time period for withdrawal of the prohibited subsidies under four of the five schemes at issue.

9.4. We begin with the prohibited subsidies under the EOU/EHTP/BTP Schemes, EPCG Scheme, and MEIS. For these, in our Interim Report we recommended withdrawal within 90 days, whereas India requests "at least 180 days".[192]

9.5. India does not dispute the Panel's reasoning that withdrawal of the prohibited subsidies in question would require amendment of measures that can be adopted by the Government, i.e. chiefly the FTP and possibly subordinate administrative instruments.[193] India also observes that modifying the FTP requires "consultations with various stakeholders" including at central and state government level, and "an express approval from India's cabinet"[194]; that "the next review of the FTP is scheduled for April 2020"[195]; and that modifications to the FTP "may have to be laid before the Indian Parliament for a period of 30 days".[196]

9.6. The United States considers that the arguments advanced by India are not consistent with the requirement to withdraw prohibited subsidies without delay, and that in the context of its graduation from Annex VII in 2017, as well as following the United States' request for consultations in this dispute in March 2018, India has been on notice of the need to withdraw its prohibited subsidies.[197]

9.7. We consider that stakeholder consultations and approval from India's Cabinet can take place within the three-month framework envisaged in our Interim Report. As for the fact that the next review of the FTP is scheduled to come into effect in April 2020[198], we consider that helpful, as it hopefully facilitates withdrawal of the prohibited subsidies in question. Thus, we do not consider that this warrants an extension to the period for withdrawal. As for the possibility that the FTP may have

[187] India's request for review, para. 82, citing Panel Report, *Canada − Dairy*, para. 7.41. See also India's opening statement at the Panel's interim review meeting, para. 39. We understand the reference to para. "7.14", in India's request for review, to be a typographical error, given that language cited by India is found in para. 7.41 of the cited report.
[188] Panel Report, *Canada − Dairy*, paras. 2.38-2.39.
[189] Interim Report, paras. 7.476 (7.475) and 7.525 (7.524) and fn 773 (775).
[190] India's request for review, para. 87.
[191] United States' comments on India's request for review, para. 58.
[192] India's request for review, para. 91.
[193] India's request for review, paras. 89-91.
[194] India's request for review, para. 90.
[195] India's request for review, para. 91.
[196] India's request for review, para. 91.
[197] United States' comments on India's request for review, paras. 59-63.
[198] Indeed, the current FTP is to "remain in force up to 31st March, 2020". Section 1.01 of the FTP.

to be laid before Parliament for 30 days, we consider that this justifies a 30-day extension to the time period we had envisaged for withdrawal before India made us aware of this requirement. We therefore consider that for the three schemes governed by the FTP, withdrawal "without delay" would be withdrawal within 120 days from adoption of this Report, and we modify our recommendations accordingly.

9.8. We now turn to the prohibited subsidies under the SEZ Scheme. For these, in our Interim Report we envisaged withdrawal within 180 days, in light of the legislative process involved; now India requests us to "allow for the beginning of the next fiscal year after a period of 180 days from the adoption of the report".[199] In other words, India asks for a 180-day period from adoption of the report, plus any period that runs from the end of the 180 days to the beginning of India's fiscal year on 1 April. The resulting time-period could then be anything between 180 days (if the 180-day period ends when the fiscal year starts) and 544 days (if the 180-day period ends the day after).

9.9. India confirms the Panel's understanding that, for the SEZ Scheme, withdrawal of the measures we have found to constitute prohibited subsidies would require legislative action.[200] As reasons for its request for 180 days plus the period up to the start of the following fiscal year, India adds that modifications to tax legislation "are mostly done through a general budget", and "can be implemented at the start of the next financial year".[201]

9.10. The United States argues that we "carefully examined the steps" required for withdrawal of the prohibited subsidies under the SEZ Scheme and that no additional time is required.[202]

9.11. We have considered a number of scenarios under India's proposed approach, and we observe that in the circumstances, *adding up* a 180-day period *and* any other period of time preceding the start of the following financial year introduces elements of uncertainty and potential delay that are incompatible with the requirement to withdraw the prohibited subsidies "without delay". We also note that India's comments concede that 180 days suffice, since under India's proposal, if the fiscal year started immediately after the 180-day period, then India would only have 180 days. We further note that India submits that modifications to tax legislation are "mostly" made through a general budget, which means they are not exclusively made this way; and also that such modifications "can be implemented at the start of the next financial year", which, again, leaves open the possibility of implementing them at a different date.[203] We therefore consider it practicable, also in light of India's interim review arguments, to withdraw the prohibited subsidies in question within 180 days from adoption, as envisaged in our Interim Report.

9.12. We thus reject India's request for a modification of the time period for withdrawal set in our Interim Report for the prohibited subsidies under the SEZ Scheme.

10 THE UNITED STATES' REQUEST CONCERNING SCRIPS PROVIDED UNDER THE EPCG SCHEME

10.1. The United States disagrees with our statement in the last sentence of footnote 219 (220) that duty credit scrips under the EPCG Scheme (EPCG scrips) are not at issue in this dispute, and asks us to delete this sentence.[204] The United States argues that it challenged the provision of EPCG scrips throughout the proceedings[205], and that India failed to rebut the United States' *prima facie* case.[206] The United States therefore also asks us to modify our conclusion in paragraph 8.1(b) of the Interim Report, and conclude that the provision of EPCG scrips is inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

[199] India's request for review, para. 93.
[200] India's request for review, para. 92.
[201] India's request for review, para. 92.
[202] United States' request for review, para. 64.
[203] India's request for review, para. 92.
[204] United States' request for review, paras. 4 and 10.
[205] United States' request for review, paras. 5 and 7, fns 2, 3, and 5 (referring to the United States' first written submission, paras. 64 and 69; second written submission, para. 116; and executive summary, para. 12). With regard to the United States' reference to its executive summary, we note that paragraph 22 of our Working Procedures provides that the parties' "executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case".
[206] United States' request for review, para. 9.

10.2. India opposes the United States' request on the grounds that the United States has not advanced any arguments concerning the EPCG scrips[207], and that these operate in a different manner from the challenged exemption from customs duties under the EPCG Scheme.[208]

10.3. We observe that the United States structured its submissions in two parts with respect to the EPCG Scheme. In a first part, the United States provided a factual description of the Scheme[209] or made introductory remarks.[210] In a second part, the United States articulated its case of inconsistency.[211] The United States referred to EPCG scrips in the first − descriptive or introductory − part[212], but not in the second. Rather, the United States only advanced arguments on the merits in respect of the EPCG's duty exemption. A respondent, however, must be able to understand what case of inconsistency it has to answer. One could not discern from the United States' presentation of its case that the United States was challenging EPCG scrips. We therefore reject the United States' request and do not include EPCG scrips in our analysis and findings.

11 THE UNITED STATES' REQUEST CONCERNING THE PANEL'S ASSESSMENT OF DFIS

11.1. The United States asks us to review our findings, in paragraphs 7.259-7.262 (7.262-7.265) of the Interim Report, that the United States has not established that Conditions 10, 21[213], 28, 32, 33, and 101 do not meet the conditions of footnote 1 of the SCM Agreement.[214] The United States now emphasizes that for each line item the measure "establishes two … conditions"[215], and argues that the backward-looking condition (i.e. the capping of the duty-free entitlement at a value corresponding to a certain percentage of past exports) is not contemplated in footnote 1 of the SCM Agreement and introduces an additional element of export contingency.[216] The United States therefore ask us to conclude that it has demonstrated that the measure does not meet the conditions of footnote 1.

11.2. India responds that the United States is basing its request on a "new theory" and that the request "lacks merit".[217] India observes that the backward-looking element acts as a *limit* on the value of imported inputs consumed in the production of exported products that can benefit from the duty exemption[218], and that while footnote 1 requires exemptions or remissions not to be "*in excess*" of duties or taxes accrued, it does not prevent Members from exempting from, or remitting, *less* than the full exemption or remission allowed by footnote 1.[219]

11.3. We recall that, as described at paragraphs 7.257-7.260 (7.260-7.263) of our Interim Report, there are two requirements (or elements, or "conditions"[220]) attaching to each of the duty exemptions in question. The imported goods must be inputs consumed in the production of an exported product, and the value of the duty-exempt goods must not exceed a defined percentage of the FOB value of the importer's previous year's exports (we referred to the latter as the "backward-looking element"[221]). Until interim review stage, the United States relied on the latter requirement to argue that the duty exemption was "disconnected" from the duties actually levied on

[207] India's comments on the United States' request for review, paras. 3-4 and 6.
[208] India's comments on the United States' request for review, para. 5.
[209] United States' first written submission, paras. 64-69.
[210] United States' second written submission, para. 116.
[211] United States' first written submission, paras. 70-79; second written submission, paras. 117-133.
[212] United States' first written submission, paras. 64 and 69; second written submission, para. 116.
[213] Except for one and six items respectively. Interim Report, paras. 7.252-7.253 (7.255-7.256) and 7.264 (7.267).
[214] United States' request for review, paras. 12-26. We note that the United States mischaracterizes our conclusion as being that "these conditions 'meet the conditions of footnote 1'". Ibid. para. 14. In the passage the United States cites, our conclusion is that "*the United States has not shown* to this Panel that the six duty stipulations at issue do not meet the conditions of footnote 1". Interim Report, para. 7.262 (7.265). (emphasis added)
[215] United States' request for review, para. 15.
[216] United States' request for review, paras. 12-13, and 15-19.
[217] India's comments on the United States' request for review, para. 8.
[218] India's comments on the United States' request for review, para. 9.
[219] India's comments on the United States' request for review, paras. 10 and 14.
[220] Given that the measures are referred to as "Conditions", we prefer to use alternative wording.
[221] Interim Report, para. 7.259 (7.262).

imported inputs. As noted in our Interim Report, that argument all but ignored the first requirement, despite questions in that regard from the Panel.[222]

11.4. As correctly pointed out by India, the United States has now changed approach. Noting that the second element acts as an export-contingent ceiling on an importer's duty-free entitlement under DFIS (when the value of imported inputs exceeds a defined percentage of the FOB value of the previous year's exports), the United States submits that this additional element is not foreseen in footnote 1, and introduces an additional[223] layer of export contingency that does not benefit from the safe harbour of the footnote.

11.5. The fact that an additional condition is not foreseen in footnote 1 is not enough to disqualify a measure from footnote 1. There may well be conditions not foreseen in footnote 1 that make a measure incompatible with the footnote, and there may equally be conditions that are compatible with footnote 1. In the measure before us, the backward-looking element acts as a ceiling on the permissible value of the duty exemption; it does not expand the value of the duty exemption beyond ("in excess of") what is permitted by footnote 1. According to the United States' review request, this ceiling renders the measure incompatible with footnote 1 because it is contingent upon export performance. However, we must first answer the question whether the measure must "not be deemed to be a subsidy" pursuant to footnote 1. While a treaty must be interpreted as a whole, it seems to us that the determination whether there is a subsidy logically precedes, and cannot depend on, a determination of export contingency.

11.6. Therefore, the arguments advanced by the United States in its request for review have not persuaded us to depart from our conclusion that the United States has not established that the duty stipulations at issue do not meet the conditions of footnote 1 of the SCM Agreement.[224] We therefore reject the United States' request for review.

12 THE UNITED STATES' REQUEST CONCERNING THE CHARACTERIZATION OF MUNICIPAL LAW

12.1. At paragraph 7.300 (7.303) of our Interim Report, we have noted that "the rules of taxation of a Member are not part of the applicable law in WTO dispute settlement". The United States submits that this paragraph "could be clarified" by adding "but are instead a question of fact".[225] India does not comment on the United States' request.

12.2. We consider that the statement as currently drafted conveys our reasoning clearly, and we reject the United States' request.

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[222] See Panel question No. 79.
[223] Additional to the export contingency inherent in footnote 1, which foresees the exemption "of an exported product" from duties or taxes, or the remission of the same duties or taxes.
[224] Interim Report, para. 7.262 (7.265).
[225] United States' request for review, para. 27.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

I. INTRODUCTION

1. India provides subsidies to its exporters that are inconsistent with its obligations under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The SCM Agreement prohibits subsidies contingent upon export performance ("export subsidies"). India grants export subsidies through several schemes that are the focus of this dispute.

II. RELEVANT LEGAL STANDARD

2. In summary, under the SCM Agreement, for the complaining Member to establish that a Member provides a prohibited export subsidy, it must show the following three elements: (1) that the government or public body provided a financial contribution through the measure at issue (SCM Agreement Article 1.1(a)); (2) that the financial contribution conferred a benefit (SCM Agreement Article 1.1(b)); and (3) that the resulting subsidy is contingent - in law or in fact - on export performance (SCM Agreement Article 3.1(a)).

3. Although Article 27 of the SCM Agreement provides a limited exception to Article 3.1(a), India no longer qualifies for that limited exception.

III. FACTUAL BACKGROUND AND LEGAL ANALYSIS OF THE PROGRAMS

A. Export Oriented Units and Sector Specific Schemes

4. India designed the Export Oriented Units (EOU) Scheme and Sector Specific Schemes, including the Electronics Hardware Technology Parks (EHTP) Scheme and Bio-Technology Parks (BTP) Scheme, to "promote exports, enhance foreign exchange earnings, and attract investment for export production and employment generation." EOU, EHTP, and BTP units (collectively referred to as "units") agree to export their entire production of goods and services in exchange for exemption from import duties and taxes. Furthermore, throughout these documents, India stresses the requirement that an enterprise maintain a positive net foreign exchange (NFE).

1. Financial Contribution

5. The exemption provided by these schemes from customs and excise duty constitutes "government revenue that is otherwise due [that] is foregone or not collected" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. This provision defines a financial contribution to include a measure through which the government foregoes the collection of revenue that would otherwise be due in the absence of the challenged measure.

6. Exporters participating in the EOU/EHTP/BTP schemes are exempt from the payment of customs and excise duty that would otherwise be due in the absence of the measure. Comparably situated enterprises in India, on the other hand, must pay customs duties according to India's national tariff schedule.

2. Benefit

7. The financial contribution confers a benefit on EOU/EHTP/BTP participants. A benefit analysis under Article 1.1(b) of the SCM Agreement requires considering whether the recipient is in a better position because of the financial contribution. Here, the EOU/EHTP/BTP units receive benefits because they are financially "better off" by receiving an exemption from paying the duties they would otherwise have paid.

3. Export Contingency

8. Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. As evidenced throughout government documents, India conditions the availability of these benefits to the EOU/EHTP/BTP units upon the promise of agreeing to export their entire production and obtaining and maintaining of a positive NFE.

B. Merchandise Exports from India Scheme

9. The Merchandise Exports from India Scheme (MEIS) "provide[s] rewards to exporters to offset infrastructural inefficiencies and associated costs" and thus "promote[s] the manufacture and export of notified goods/products." India, through the MEIS, advances these objectives by providing to exporters transferable import duty credit scrips (scrips) as a reward for export of listed products to specified country markets. These scrips offset the cost of multiple expenses and liabilities, including for: (1) basic customs duty related to import of inputs or goods, including capital goods; (2) central excise duties; (3) basic customs duty related to payment of fees; and (4) a shortfall in export obligation. After an exporter accrues scrips through the MEIS scheme, it may transfer the scrips, and the recipient of the transfer may use the scrips without the same export conditions as the original MEIS participant.

1. Financial Contribution

10. India awards scrips as a "direct transfer" of funds under Article 1.1(a)(1)(i) of the SCM Agreement. India provides the MEIS participants with scrips that serve as a financial claim for that participant. That participant can use the scrips to pay for customs and excise duties, fees, or to cover the difference between an enterprise's deficit in actual export performance for a year versus the export obligation for that year. It is also freely transferable and has cash value.

2. Benefit

11. The MEIS participants receive benefits for participating in this scheme. A benefit analysis under Article 1.1(b) of the SCM Agreement requires considering whether the recipient is in a better position because of the financial contribution. Here, the MEIS participants receive benefits because they are financially "better off" than they would be in the market by receiving scrips that can offset customs duty, central excise duties, and customs fees, and can be used to offset a shortfall in export obligation. These scrips are freely transferable, and can be sold on the open market for cash.

3. Export Contingency

12. Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. An MEIS program participant receives scrips conditioned and tied to the value it exports, where the exports are sold, and of what product. Through an intensive monitoring process, India ensures that the value, place, and product of export, i.e., export performance, determine the MEIS reward.

C. Export Promotion Capital Goods Scheme

13. The Export Promotion Capital Goods Scheme (EPCG) "facilitate[s] import of capital goods for producing quality goods and services and enhance[s] India's manufacturing competitiveness." EPCG applicants promise to fulfil export obligations, i.e., meet export performance benchmarks. In return, participants receive advantages including exemption from paying import duties on capital equipment used to produce exports or duty credit scrips, similar to scrips in the MEIS scheme, which can be used to offset import duty for capital goods imported to produce exports.

1. Financial Contribution

14. Article 1.1(a)(1)(ii) defines a financial contribution to include a measure through which the government foregoes the collection of revenue that would otherwise be due in the absence of the challenged measure. The EPCG scheme exempts a participant from the payment of customs duties otherwise due on the import of capital goods used for export pre-production, production, and post-production. Comparably situated enterprises, not participating in this scheme, in India importing the same or similar capital goods must pay customs duties according to India's national tariff schedule.

2. Benefit

15. EPCG participants receive numerous benefits under the program. A benefit analysis under Article 1.1(b) of the SCM Agreement requires considering whether the recipient is in a better position because of the financial contribution. Here, the participants receive "benefits" because they are financially "better off" by not having to pay the import duties for the capital goods they use for their export operations.

3. Export Contingency

16. Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. Here, a unit receives EPCG benefits conditioned and dependent on its fulfilment of its export obligations. An enterprise agrees to a specific export obligation of six times the duties, taxes, and cess saved on capital goods to be fulfilled in six years from date of issue authorization.

D. Special Economic Zones Scheme

17. Special Economic Zones are geographic areas that contain multiple exporting units (SEZ Units). India established the SEZ scheme for the express purpose of promoting exports by SEZ Units. An SEZ Unit is entitled to a number of tax reductions and customs duty exemptions: (1) Corporate income tax deduction of export earnings (100% for five years, and then 50% each of the subsequent five years); (2) Exemption from customs duty on goods imported into the SEZ; (3) Exemption from export duties; and (4) Exemption from India's Integrated Goods and Services Tax.

18. In the Annual Performance Report, the SEZ Unit reports export value (FOB value of exports for the most recent year) and import value of inputs and capital goods. Using this data, the SEZ Unit calculates the NFE earning for the year: "FOB value of exports for the year" minus total value of imports during the year. If the resulting number is positive, the unit has satisfied the NFE condition.

1. Financial Contribution

19. India makes a financial contribution to SEZ Units in the form of "government revenue that is otherwise due is foregone or not collected" as provided in Article 1.1(a)(1)(ii) of the SCM Agreement. The four tax reductions and duty exemptions identified above [] represent a decision by India to "[give] up an entitlement to raise revenue that it could 'otherwise' have raised." In each instance, as a result of the reduction or exemption provided to SEZ Units, India has foregone revenue that it would otherwise be due.

2. Benefit

20. In the case of each of the reductions or exemptions described above, India confers benefits to SEZ Units. A benefit analysis under Article 1.1(b) of the SCM Agreement requires considering whether the recipient is in a better position because of the financial contribution. Here, the financial contributions confer benefits to SEZ Units within the meaning of Article 1.1(b) to the extent of the tax reduction and customs duty exemptions.

3. Export Contingent in Law

21. Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. The reductions and exemptions India provides through the SEZ scheme are contingent in law. If approved as an SEZ Unit, an enterprise commits to conditions that again relate to export performance. The Letter of Approval issued by India establishes the SEZ Unit's projected annual exports and the NFE earning for the first five years of operation. Finally, the enterprise must commit to achieve a positive NFE, a calculation that relies on the FOB value of exports as the starting point for the determination.

4. Export Contingent in Fact

22. The United States has demonstrated that the challenged subsidies are contingent in law upon export performance, and the Panel's analysis of export contingency may end there. For

completeness, the United States also demonstrates that the facts establish that the subsidies granted or maintained to SEZ Units are also contingent in fact upon export performance by the SEZ Unit.

E. Duty Free Imports for Exporters Scheme

23. The duty-free imports for exporters scheme exempts eligible exporters from customs import duties based on past export performance. The extent of the import duty exemption is contingent upon the FOB value of exports of a given product during the previous year.

1. Financial Contribution

24. India makes a financial contribution to participating enterprises in the form of "government revenue that is otherwise due is foregone or not collected," as defined in Article 1.1(a)(1)(ii). A participating enterprise receives a duty free import entitlement based on export value from the previous year, and is then entitled to import eligible goods duty free until it has exhausted the duty free import entitlement. The enterprise is not required to pay the customs duty that would otherwise be due in the absence of the measures. A comparably situated enterprise in India must pay customs duties according to India's national tariff schedule.

2. Benefit

25. India confers benefits to participating exporters through the exemption of customs duties normally due to the government to the extent of those exemptions. A benefit analysis under Article 1.1(b) of the SCM Agreement requires considering whether the recipient is in a better position because of the financial contribution. Here, the financial contribution confers benefits to a participating enterprise within the meaning of Article 1.1(b) to the extent of the customs duty exemptions.

3. Export Contingency

26. Article 3.1(a) provides that "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited. The availability of the duty exemption under the measure is contingent − or conditional − upon the value of the goods an enterprise exported in the previous year, and the value of the exemption is directly related to the value of exports.

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. ARTICLE 3 OF THE SCM AGREEMENT APPLIES TO INDIA

27. India claims that it is entitled to an eight-year phase out of its export subsidy programs pursuant to Article 27 of the SCM Agreement. India undertakes a convoluted interpretive exercise based largely on policy arguments and negotiating history to argue for a legal interpretation that the SCM Agreement still permits India to grant export subsidies otherwise prohibited by Article 3 of the SCM Agreement.

28. Article 31 of the Vienna Convention on the Law of Treaties, which reflects customary rules of interpretation of public international law, provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The starting point of the interpretive exercise is the text of the applicable treaty.

29. Under Article 27.2(b), the prohibition of Article 3.1(a) shall not apply to certain developing country Members "for a period of eight years from the date of entry into force [January 1, 1995] of the WTO Agreement, subject to compliance with the provisions of paragraph 4" of Article 27. A "developing country" Member under Article 27.2(b) had its right to grant export subsidies end on January 1, 2003, unless it requested and was granted an extension, as provided for in Article 27.4.

30. Therefore, reading Annex VII and Article 27.2(b) of the SCM Agreement together, an Annex VII(b) developing country that graduates shall end its prohibited subsidies by the later of January 1, 2003, or the time it reaches $1,000 GNP per capita.

31. India has no textual support for its position that an additional eight-year phase out applies, and instead requests that the Panel consider such supplemental sources as negotiating history and amorphous language about the general support for giving developing country Members the opportunity to provide export subsidies. Such resort to reviewing supplemental sources is unnecessary when the ordinary meaning of the text, in context and in light of the object and purpose of the SCM Agreement, answers the question, and India's argument should be rejected.

II. ARTICLE 4 OF THE SCM AGREEMENT APPLIES TO THIS DISPUTE

32. India's argument that the special procedures of Article 4 of the SCM Agreement are inapplicable to this dispute fails for a number of reasons.

33. First, India's arguments ignore the plain text of Article 4. Article 4.1 provides that: "[w]henever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member." Article 4.4 then provides that: "[i]f no mutually agreed solution has been reached within 30 days of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel." The threshold for invoking the procedures of Article 4 therefore is whether "a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member." Contrary to India's arguments, Article 4 does not require that there first be a determination that Article 27 does not apply. Here, the United States has properly invoked Article 4 because the United States "has reason to believe that a prohibited subsidy is being granted or maintained by" India.

34. India's claim that the U.S. statement of available evidence does not conform to Article 4.2 of the SCM Agreement is without merit. Article 4.2 of the SCM Agreement contains no obligation to provide a statement of evidence that "establishes that the measures are, in fact, subsidies" - that is, meet the legal definition of a subsidy contained in Article 1 of the SCM Agreement. That would be a legal argument, not a statement of available "evidence." As demonstrated in the U.S. First Written Submission, the evidence cited in the statement of available evidence is indeed evidence regarding the existence and nature of the subsidies in question. India does not identify a legal basis for its claim that the United States was required to present arguments applying evidence to the applicable legal standard. India again appears to confuse what is evidence with what is legal argument.

35. India requests again that the Panel amend and extend the adopted timetable and working procedures for this dispute to include a second substantive meeting because holding one substantive hearing allegedly is not in accordance with Article 12.10 of the DSU and India's "due process rights." However, the parties have had and will have adequate opportunity to present their arguments and to be heard in this proceeding. Importantly, the setting of one substantive meeting rather than two reflects the expedited nature of the proceedings under Articles 4.4 and 4.6 of the SCM Agreement and contributes towards meeting the deadline specified in the SCM Agreement. The Panel's adopted timetable and working procedures for this dispute are consistent with Article 12.10 of the DSU.

III. INDIA'S CHALLENGED EXPORT SUBSIDIES ARE INCONSISTENT WITH ARTICLE 3.1(a) AND 3.2 OF THE SCM AGREEMENT BECAUSE THEY ARE SUBSIDIES CONTINGENT UPON EXPORT PERFORMANCE

36. India argues that the measures at issue fall under the SCM Agreement's exemption for duty drawback systems. India's response fails to address the elements of the schemes that are at issue. As reflected in Annex I of the SCM Agreement, a requisite feature of a duty drawback program is that imported inputs are "consumed" in the production of the exported product (making normal allowance for waste). Accordingly, the challenged schemes differ from drawback, exemption, and remission programs contemplated by Footnote 1 and Annexes I-III of the SCM Agreement.

A. Export Oriented Units and Sector Specific Schemes

37. India argues that it does not provide a financial contribution to these Units because these schemes provide an exemption from customs duties that falls under Footnote 1, and therefore, there is no subsidy under the SCM Agreement Article 1.1.

38. This argument misses the mark because the EOU/EHTP/BTP schemes do not meet the requirements under Footnote 1 since they are not duty drawback schemes. SCM Annex II defines a duty drawback scheme as one where "import charges levied on inputs that are consumed in the production of the exported product ..." are remitted or drawn back. SCM Annex I(i) provides that the "remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product" is an export subsidy.

39. Before reaching the question of whether a remission was in excess of the import charges levied, one must first determine whether, as part of the drawback scheme, imported inputs were consumed in the production of an exported product. Footnote 1 does not apply to EOU/BTP/EHTP units because they fail to meet this requirement. Units face no restriction that imported duty-free goods be consumed in the export production process. The imported duty-free goods need only be imported "for approved activity."

40. India also argues that imported capital goods under the EOU/EHTP/BTP schemes are inputs because they are "consumed" by contributing to the value of the final product. India's argument is contrary to the text of the SCM Agreement. The definition of "inputs" at Footnote 61 of the SCM Agreement does not directly or implicitly contemplate capital goods. The footnote concerns "inputs" that are consumed in the production process. By their very nature, capital goods are not physically incorporated or consumed in the goods being manufactured during the production process.

41. Annex I(i) provides no help to India either. Annex I(i) does not refer to goods contributing to the final cost of exports, but to "imported inputs that are consumed in the production of the exported product (making normal allowance for waste)."

42. India also cites to Annex I(h) to argue that the exemption on excise duties applies to the EOU/BTP/EHTP schemes and falls squarely within the meaning of prior-stage cumulative indirect taxes referred to in Annex I(h) to the SCM Agreement. Similarly here, this provision is inapplicable because Annex I(h) requires that "the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product."

B. Merchandise Exports from India Scheme

43. Next, India claims the MEIS scrips fall under the "ambit" of Footnote 1 of the SCM Agreement, and therefore, the scrips are not a subsidy. To support this theory, India states that the scrips recipient only receives as a refund (in the form of scrips) the money the Unit paid in indirect taxes. As a result, India suggests, the MEIS scrips are a proper remission of duties or taxes not in excess of that accrued.

44. Footnote 1 and Annex I of the SCM Agreement do not apply to the MEIS because the exemption or remission of indirect taxes is irrelevant to the MEIS. There is no requirement for a scrips holder to tie the scrips it receives to imports of certain products, or that the products be inputs to the exported product for which the company received the scrips. The value of the scrips received is tied only to the value, country and product of export, and has no relationship to an exporter's imports.

45. In fact, an MEIS beneficiary may use the scrips to offset an export obligation for other programs such as the EPCG scheme described below. Scrips can be freely bought and sold and are financial instruments. Various online marketplaces facilitate the exchange of scrips, and companies may sell their scrips. Thus, the MEIS program is not an "exemption, remission or deferral" as contemplated by Footnote 1 and Annex I.

C. Export Promotion Capital Goods Scheme

46. India's central argument is that the EPCG scheme falls within the scope of Footnote 1 and Annex I of the SCM Agreement as a duty drawback system that is deemed not to be a subsidy.

47. India first points to Annex I(g) and claims the EPCG scheme is an exemption for various indirect taxes on capital goods. India is mistaken because Annex I(g) is inapplicable to the EPCG scheme. Annex I(g) deals with the "exemption or remission, in respect of the production and distribution of exported products, of indirect taxes." In the EPCG scheme, there is no requirement to use the capital good, for which the exemption or remission of indirect tax was received, in "the production and distribution of exported products," as is required in Annex I(g).

48. India also argues that the EPCG scheme is not a subsidy under Annex I(i). This statement is factually incorrect. Annex I(i) concerns import charges "levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste)." Capital equipment - which is the focus of the EPCG scheme - is distinct from inputs. Footnote 61 of the SCM Agreement limits the applicable inputs to those "inputs physically incorporated" and "consumed," a definition that does not apply to capital goods.

49. The references in Annex I, items (h) and (i), to a "normal allowance for waste" supports an interpretation that Annex I, items (h) and (i), do not contemplate or permit for capital goods to be considered as inputs. Capital goods are not "consumed" in the production process, and do not thereby result in wastage during production for which a normal allowance can be made.

50. In addition, while Indian companies must export to receive advantages under EPCG, there is no requirement that capital goods imported duty-free only be utilized for export production. Rather, the duty-free capital goods imported under EPCG may be used for any amount of production bound for the domestic market so long as the EPCG participant also meets its export obligation.

D. Special Economic Zones Scheme

51. India also claims that a positive NFE can be reached without exporting to other countries. However, despite there being a number of ways listed in the SEZ Rules for a company to increase its NFE, the definition of "export" in the SEZ Act, 2005 is relatively straightforward:

- Item (m) "export" means (i) taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise; or (ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or (iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone.

- Item (ii), regarding supplying goods from the DTA to a Unit or a Developer, would only apply to suppliers of SEZ Units - located in the Domestic Tariff Area and not the SEZ - and not to SEZ Units themselves. Thus, in the case of SEZ Units the SEZ Act defines export to cover two situations: SEZs "taking goods, or providing services, out of India," or providing goods or services to other SEZ units. In the case of the latter, these recipient Units then ultimately must either export those goods out of India (with or without further processing), or provide them to another SEZ Unit.

52. India claims that the U.S. evidence of export contingency in fact is insufficient. India first argues that the intent of the SEZ Act is not relevant to the Panel's analysis, but at no point disagrees with the evidence presented that the SEZ Act was enacted to promote exports from India. This policy rationale is useful evidence in considering whether the subsidy is tied to, or geared to induce, export performance.

53. India also errs in arguing that the SEZ application and approval processes are not in themselves tied to actual or anticipated exports. Consider the requirement to achieve a positive NFE. This requirement incentivizes an SEZ Unit to make export-market sales rather than domestic-market sales. Maintaining positive NFE is the critical requirement for being an SEZ Unit. The determination of whether an SEZ Unit has achieved positive NFE relies principally on the "Free on Board value of exports" by the SEZ Unit. Increased exports and the resulting higher export value will strengthen the likelihood of an SEZ Unit attaining positive NFE, meaning that an enterprise would be inclined to direct sales to the export market and support its effort to reach positive NFE. Thus, the granting of subsidies is tied to actual or anticipated exports, and the premise of this primary requirement of SEZ Units is to encourage exports.

54. India has also not addressed the fact that the SEZ Scheme structured the tax reduction benefit to induce exports by SEZ Units. SEZ Units are permitted to deduct from income tax liability 100% of profits from exports for the first five years, and then 50% of profits from exports during each of the subsequent five years. Any profits from domestic sales do not result in the same benefits to SEZ Units, raising again the question of the economic value to an SEZ Unit in pursuing domestic sales. Indeed, the structure of this tax reduction has a direct impact on the cost of a transaction to an export market, providing SEZ Units with greater flexibility to complete export sales. India tied the tax reduction entirely to export sales, creating a strong incentive for SEZ Units to export.

E. Duty Free Imports for Exporters Scheme

55. India argues that Articles 3.1(a) and 3.2 of the SCM Agreement do not apply to the DFIES because it is a duty drawback system under Footnote 1 of the SCM Agreement and Annex I(i) as "inputs consumed in the production of the export." India also argues that "duty exemptions are only provided on goods that are inputs to be used by manufacturer exporters."

56. As explained above, under DFIES, past export performance entitles the enterprise to an import duty exemption. In addition, while some of the products for which import duty exemptions may be applied can be inputs, it is not true for all of them.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT

57. After filing its Second Written Submission in November 2018, India enacted additional, or expanded, benefits under the MEIS and EPCG schemes. India's actions betray its statement that it is making efforts to "reduce the impact of the duty and tax exemptions on government revenue."

58. India cites to Annex II of the SCM Agreement to advocate that the United States, as the complaining party, bears the burden to undertake an "examination of the inputs consumed," "a quantitative analysis of the amounts and prices of the inputs consumed," and "an examination of whether excess remissions have occurred." Elsewhere, India argues that the United States must offer a "data-driven, technical argument" to show that duty-free imported inputs are not consumed under the challenged schemes.

59. India fails to mention that the section of Annex II it relies upon is one that is only applicable to a countervailing duty investigation. The plain language of the SCM Agreement shows that the guidelines of Annex II apply to countervailing duty investigations.

60. In any event, India has structured the schemes without any regard for whether duty-free products imported by scheme participants are consumed in the production of the exported good (EOU, EPCG, DFIES) or to quantify the existence and amount of any indirect tax liability borne by the exported product (MEIS). Thus, such a "quantitative analysis" of amounts and prices of inputs consumed and whether excess remission occurred would be futile because there is no duty drawback or remission scheme to begin with.

61. With regard to capital goods, India has repeatedly proposed that capital goods be included in the definition of "inputs" for purposes of the SCM Agreement and acknowledged in a WTO filing that "[t]hus capital goods and consumables have been left out even though they can be said to have been used to the extent of their depreciation and actual consumption." India's proposal was opposed and rejected. For instance, a 2001 Chairman's Report recalls that India's proposal "advocates including capital goods in the definition in Footnote 61 of inputs consumed in the production process." In other words, capital goods were not already included. Contrary to India's assertion that "capital goods fall squarely within the definition of 'inputs' in Footnote 61 of the SCM Agreement," the SCM Agreement's negotiating history for Footnote 61 and subsequent discussions show that the question of whether to include capital goods as "inputs" was deliberated and the proposal was rejected.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S QUESTIONS

U.S. RESPONSE TO PANEL QUESTION 35

62. The Appellate Body has applied a three-step approach that (i) identifies the tax treatment that applies to the income of the alleged subsidy recipients; (ii) identifies a benchmark for comparison; and (iii) compares the challenged tax treatment and the reasons for it with the benchmark tax treatment. In the second step, the Appellate Body has noted that determining a benchmark may require examining the "structure" and "organizing principles" of a Member's domestic tax system. Both the United States and India agreed at the substantive meeting that there is no need to examine the structure and organizing principles of India's domestic tax regime.

63. First, while a three-step approach can serve as a useful analytical tool in certain cases, it is unnecessary in this dispute under these facts. Second, while the applied import duty rate may vary by product, exporters participating in the challenged schemes, who receive blanket import duty exemptions, do not pay import duties, and similarly situated exporters in India, absent participation in the challenged scheme, do. Third, the "reasons for the challenged tax treatment" in the case of the challenged schemes are clear: a reward for export performance.

U.S. RESPONSE TO PANEL QUESTION 36

64. The Appellate Body reasoning in its report in *EU - PET (Pakistan)* is not particularly relevant to this dispute. *EU - PET (Pakistan)* began with the unchallenged premise that the scheme at issue was a duty drawback scheme. Here, India has asserted that the challenged schemes are proper duty drawback or remission schemes. The United States has demonstrated that the challenged Indian schemes are not proper duty drawback or remission schemes to begin with because the schemes are not limited to inputs consumed in exported products and/or do not even attempt to connect the alleged drawback or remission to the import charges or indirect taxes accrued.

U.S. RESPONSE TO PANEL QUESTION 41

65. Regardless of whether they operate on what India labels a "post-export" basis, duty drawback schemes must limit their scope to "imported inputs that are consumed in the production of the exported product" and connect the "remission or drawback of import charges" with "those [import charges] levied." The challenged Indian schemes fail to meet these fundamental elements.

66. As explained previously, the SCM Agreement envisions the connection described above to be based on a firm's actual experience, including actual import duty liability incurred and input consumption, and not on an aggregate, estimated or industry or product-wide rate. For instance, paragraph 2 of Annex II specifies that the analysis involves the amount that is "actually levied" on inputs that are consumed in the production of the exported product.

U.S. RESPONSE TO PANEL QUESTION 46

67. The elements that Members agreed are required for a proper remission or exemption scheme differ depending on whether the scheme concerns indirect taxes, cumulative indirect taxes, or import charges.

68. A remission or exemption scheme may fall within the scope of Annex I(g) if it contains the following elements, as reflected in the text of item (g): (1) permits remission or exemption for indirect taxes applied to exported products; (2) permits remission or exemption for only production and distribution-related indirect taxes; and (3) requires determining the indirect taxes actually levied on the production and distribution of like products sold for domestic consumption so as not to provide excessive remission or exemption.

69. A remission or exemption scheme may fall within the scope of Annex I(h) if the exemption, remission or deferral of prior-stage cumulative indirect taxes: (1) is tied to actual prior stage cumulative indirect tax liability; (2) is limited to goods and services used in the production of the exported product; (3) is tied to inputs, as defined in Footnote 61, consumed in the production of exported products; and (4) is determined on actual taxes levied on inputs that are consumed in the production of the exported product.

70. A remission or exemption scheme may fall within the scope of Annex I(i) if: (1) there is an input as defined in Footnote 61; (2) the input is imported (with the exception of certain home market inputs described in Annex I, item (i)) and Annex III; (3) the input is consumed in the production of the exported product; and (4) the remission or drawback of import charges is not in excess of those levied on the imported inputs.

U.S. RESPONSE TO PANEL QUESTION 69

71. Despite this common understanding and the SEZ scheme's primary focus on foreign "export," India focuses on narrow domestic means to improve an enterprise's NFE that purportedly negates the scheme's export contingency. Section 2(m) of the SEZ Act provides for a limited exception under (iii) for domestic sales, and Rule 53 differentiates between exports on the one hand, and a narrowly defined list of exceptions in the form of encouraged domestic sales, subject to special conditions, by which an SEZ unit may improve its NFE.

72. The availability of these limited exceptions as a secondary means for an SEZ unit to fulfill its NFE does not diminish the primary means for an SEZ unit to fulfill its net foreign exchange requirement - foreign export. India has not and cannot explain why the SEZ scheme only incentivizes exports by SEZ units and not sales to other SEZ units. Also, the export contingency of a scheme is not lost even if a small number of "exports" made domestically can count toward positive NFE or a small number of exporters can meet their NFE requirement predominantly through domestic sales.

73. India's own examination of the SEZ scheme supports the U.S. view. The Comptroller and Auditor General of India (CAG), in a report entitled "Performance of Special Economic Zones (SEZs)," analyzed exports from SEZ units based on the common understanding of "exports." While the Department of Commerce noted the NFE impact of certain DTA sales, the CAG concluded that the possibility of an SEZ unit fulfilling its NFE requirement without making physical exports was an unintended loophole incompatible with the SEZ scheme. The CAG emphasized that reliance by SEZ units on domestic sales defeated "the basic objective of the scheme of earning foreign exchange from overseas" through "actual physical exports to foreign countries…"

U.S. RESPONSE TO PANEL QUESTION 79

74. There is a glaring disconnect between the import duty actually levied on the imported inputs, and India's reward of exemption. The SCM Agreement, on its face, necessitates connecting "the remission or drawback of import charges" with "those levied on imported inputs that are consumed in the exported product." Under DFIES, the amount of duty exemption granted for exports is uniform across broad categories of exports based on the FOB value of exports, regardless of what inputs were used, whether the inputs were themselves imported duty-free, or whether the inputs were even imported. As a result, one cannot connect the actual amount of import duty levied on the imported inputs with the amount of the import duty exemption. This fact is unsurprising because the amount of the duty exemption is a reward contingent upon the exporter's export performance.

EXECUTIVE SUMMARY OF U.S. COMMENTS TO INDIA'S RESPONSES TO THE PANEL'S QUESTIONS

U.S. COMMENT ON INDIA'S RESPONSE TO PANEL QUESTION 35

75. India argues that a three-step approach and an inquiry into the "structure" and "organizing principles" of its tax system are unnecessary in this dispute. India argues that, for measures falling under Footnote 1, the Panel need only compare the "amount of remission of such duties or taxes and those which have accrued…." For these reasons, the three-step approach and inquiry into the "structure" and "organizing principles" of India's tax system is unnecessary.

76. This "excess remissions principle," on which India relies, is that "in the context of duty drawback schemes, the financial contribution element of the subsidy (i.e. government revenue forgone that is otherwise due) is limited to the excess remission or drawback of import charges on inputs... ." However, this comparison presumes that a scheme is a proper duty drawback scheme that attempts to relate remission of duties to those duties actually accrued. The challenged schemes do not even attempt to connect the amount of remission and the amount of duties or taxes actually accrued. Thus, the schemes fail to meet a fundamental requirement of a drawback scheme. The

challenged schemes also do not require exempted items to be consumed in production of the exported product, another fundamental requirement.

77. An inquiry into the "structure" and "organizing principles" of India's tax system is unnecessary. India provides: (1) a 100% exemption on duties or taxes under these schemes; (2) similarly-situated enterprises who do not participate in the schemes, all other things being equal, pay the duties or taxes from their income; and (3) the transparent reason for the challenged treatment is a reward for export performance. Under these facts, the "benchmark" treatment for comparison, the treatment of the income of a similarly situated non-scheme participant enterprise under Indian law, is readily identifiable.

78. Finally, to the extent the Panel finds a three-step approach appropriate in this proceeding, in the U.S. written submissions and responses to the Panel's questions, the United States has identified (i) the duty or tax treatment of the income that applies to the scheme participants and (ii) a benchmark for comparison. The United States then compares (iii) the challenged tax treatment and the reasons for it with the benchmark duty or tax treatment. This comparison shows that the challenged schemes result in India foregoing revenue and providing a financial contribution to scheme participants.

U.S. COMMENT ON INDIA'S RESPONSE TO PANEL QUESTION 38

79. India mistakenly applies the mandatory/discretionary distinction, which is a useful analytical tool for determining whether a measure irrespective of its application can be found WTO-inconsistent, to argue that the United States must establish that "the legislation [is] worded in such a manner as to preclude the possibility of imported inputs being consumed in the production of an exported product[], or, alternatively, the legislation [] explicitly prevent[s] the possibility of inputs being imported solely for the consumption of exported products." India misconstrues what will suffice to show the challenged measures are inconsistent with the SCM Agreement.

80. India erroneously contends that the United States must demonstrate how the "legislation [] explicitly prevent[s] or obstruct[s], either in i[t]s language or its operation, the fundamental aspects of a duty drawback program, in order for it to be held as inconsistent" with the SCM Agreement. But there is no basis in the SCM Agreement to require a complaining party to show that a measure could never operate in a WTO-inconsistent manner for it to be in breach.

81. To the contrary, if a complaining party can demonstrate that a measure will, in a defined circumstance, necessarily produce a WTO-inconsistent result, the measure may be found WTO-inconsistent "as such." That in other circumstances the measure may not necessarily produce a WTO-inconsistent result does not cure the inconsistency (for example, a measure that sets out a tariff in excess of a Member's binding, but only on Monday and not Tuesday-Friday). Similarly, the fact that the measures do not mandate, for example, the explicit preclusion of imported inputs being consumed in the production of the exported product does not mean that the challenged schemes do not confer export subsidies when domestic inputs are being consumed in the production of exported products. That is, there is no relevant "discretion" under the measure under the mandatory / discretionary distinction (the discretion not to engage in WTO-inconsistent behavior).

CONCLUSION

82. For the foregoing reasons, the United States respectfully requests that the Panel find that the measures at issue are export subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

I. INTRODUCTION

1. In the present dispute, the United States alleges that five domestic schemes maintained by India ("Challenged Schemes") are prohibited export subsidies under Art. 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The Challenged Schemes are (1) Export Oriented Units Scheme and sector specific schemes including Electronics Hardware Technology Parks Scheme and Bio-Technology Parks Scheme ("EOU Scheme"); (2) Merchandise Exports from India Scheme ("MEIS"); (3) Export Promotion Capital Goods Scheme ("EPCG Scheme"); (4) Special Economic Zones Scheme ("SEZ Scheme"); and (5) Duty Free Imports For Exporters Scheme ("DFIE").

2. India respectfully submits that Art. 3 of SCM Agreement is not applicable to India. Countries listed in Annex VII of the SCM Agreement are to receive the same treatment as accorded to developing countries as stipulated in Art. 27.2(b). Consequently, India has an 8-year phase out period after graduation (from the year 2017) from Annex VII(b) for phasing out any alleged export subsidy.

3. Further, India contends that the Challenged Schemes are not prohibited export subsidies as per Art. 3.1(a) of the SCM Agreement. The United States has mischaracterised and misunderstood the Challenged Schemes. Four of the challenged schemes are duty drawback or remission schemes, and the SEZ Scheme is not export contingent. None of the schemes challenged by the United States violate India's obligations under the SCM Agreement.

II. INDIA'S REQUEST FOR A PRELIMINARY RULING

4. Along with its first written submission, India made a request for a preliminary ruling wherein India contended that (A) the United States has failed to meet the specificity requirements in Art. 6.2 of the DSU and that consequently/as a consequence, the 'problem has not been presented clearly'; (B) the United States has erred in invoking the dispute pursuant to Art. 4 of the SCM Agreement, and the timelines therein are prejudicial to India; (C) the Statement of Available Evidence submitted by the United States does not meet the requirements of Art. 4.2 of the SCM Agreement (D) the failure to provide for a second substantive meeting is a violation of India's due process rights as couched in the DSU, particularly in Art. 12.10 of the DSU.

A. UNITED STATES HAS FAILED TO MEET THE SPECIFICITY REQUIREMENTS IN ART. 6.2 OF DSU

5. India underscores that in the present case, the United States has; (1) obscured the very meaning of the term 'measure' by failing to identify a measure at all, (2) failed to fulfil the specificity requirement in Art. 6.2 of the DSU; and (3) failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

6. Relying on the Panel report in *Australia – Apples (New Zealand),* India expresses its concerns that the panel request by the United States merely lists out legal instruments, particularly the ones that are "too extensive and exhaustive", but does not indicate/identify the specific measure within such instruments. For instance, the United States cites at Instrument 26 "*Income Tax Act, 1961,* as amended." - In citing the entire legal instrument, without indicating the precise measure within the Act that is at issue, nor identifying the relevant provisions within the said legislation, it appears that the United States is challenging the legal instrument in its entirety.

7. In the present case, the Panel Request has not provided sufficient clarity with respect to the legal basis of its complaint vis-à-vis the measures within the identified schemes. Moreover, United States in the Panel Request simply states that the identified schemes provide export subsidies in violation of Art. 3 of the SCM Agreement as the legal basis of the complaint.

B. THE UNITED STATES HAS ERRED IN INVOKING THE DISPUTE PURSUANT TO ART. 4 OF THE SCM AGREEMENT

8. Art. 27 of the SCM Agreement accords that a subset of developing country members are not subject to the procedure laid down in Art. 4 of the SCM Agreement. Art. 4 procedures are only applicable in the case of prohibited export subsidies,[1] and owing to the application of Art. 27.7, alleged export subsidies maintained by developing country members may only be challenged under Art. 7 and not Art. 4 of the SCM Agreement. The United States, without any demonstrable injury, has incorrectly invoked Art. 4 instead of following the Art. 7 procedure. India relies on the Panel Report in *Brazil - Aircraft,* wherein it was held that in order to invoke proceedings under Art. 4, the Complaining member would have to show non-conformity with paragraphs 2-5 of Art. 27.[2] India submits that the United States has failed to satisfy that burden. Therefore, the United States has erred in invoking the dispute pursuant to Art. 4 of the SCM Agreement.

C. IF ART. 4 APPLIES, UNITED STATES HAS FAILED TO MEET ITS OBLIGATIONS UNDER ART. 4.2 OF THE SCM AGREEMENT

9. Alternatively, if Art. 4 of the SCM Agreement applies in the present case, India submits that the requirements of Art. 4, specifically, the requirement to submit a 'Statement of Available Evidence' at the time of consultations under Art. 4.2 of the SCM Agreement − has not been met by the United States. The United States, in its request for consultations, does not provide any basis that establishes the character of the measures in the Challenged Schemes as a subsidy.[3]

10. India asserts that, at the very least, the statement of available evidence must have included specific provisions within the legislation that are relevant to the characterization of the measure as a prohibited subsidy.

11. Additionally, there is no substantive difference between the 'Request for Consultation' dated 14 March 2018, and the Request for Establishment of a Panel dated 18 May 2018. It is submitted that this disregards the substantive difference between a Statement of Available Evidence within the meaning of Art. 4.2 of the SCM Agreement, and the requirement to specify measures in the Request to Establish a Panel, as mandated by Art. 6.2 of the DSU.

D. THE FAILURE TO PROVIDE FOR A SECOND SUBSTANTIVE MEETING IS A VIOLATION OF INDIA'S DUE PROCESS RIGHTS UNDER ART. 12.10 OF THE DSU

12. The Appellate Body in its report in Argentina − Textiles & Apparel stated that 'It is also true, however that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel'[4] while referring to the first and the second substantive meeting with the Panel. The second substantive meeting, as per Paragraph 7 of Appendix 3 of the DSU, shall include but may not be limited to, the Formal Rebuttals.

13. India submits that the failure to grant a second substantive meeting has affected India's right to respond to the claims being made against it, since the proceedings do not present adequate opportunity and sufficient time for India to "prepare and present its argumentation" as mandated by Art. 12.10 of the DSU. A substantive meeting is an opportunity for parties to meet with the Panel, present their arguments, as well as better understand the claims being made.

14. Appendix 3 of the DSU supports the claim that the failure to provide for a second substantive meeting is indeed a denial of the right to be heard and adequate opportunity for a party to present its claims and defences. Appendix 3 of the DSU provides for two substantive meetings in the conduct of a dispute. While India understands that a panel is not compelled to adhere to the timetable and working procedures stipulated in Appendix 3 of the DSU, the Panel can deviate only after consulting the parties to the dispute.[5]

[1] Panel Report, *Indonesia − Autos*, para. 5.381.
[2] Panel Report, *Brazil − Aircraft*, paras. 7.54 and 7.57; Appellate Body, *Brazil − Aircraft*, para. 141.
[3] Appellate Body Report, *US − FSC*, para. 161.
[4] Appellate Body Report, *Argentina-Textiles and Apparel*, para. 79.
[5] Article 12.1 of the DSU. See also: *US − Shrimp (Ecuador),* a dispute pursuant to Article 6 of the DSU and Article 17 of the Anti-Dumping Agreement, where a second substantive meeting was foregone, but only upon a mutual agreement by both parties.

15. India is of the view that the present case does not present any extraordinary circumstances that would require a departure from the procedure provided in Appendix 3 of the DSU. Moreover, as witnessed from all the previous cases, including wherein Art. 4 of the SCM Agreement was invoked, the Panel provided the parties two separate substantive meetings, to adequately provide the Parties to present their submissions before the Panel. Moreover, India respectfully submits that Art. 4 of the SCM Agreement requires the timeline to be expedited, and does not mandate the deletion of procedural steps during the dispute settlement process.

16. Accordingly, India submits that the failure to provide for a second substantive meeting amounts to a denial of an opportunity to be heard and to respond, which is a violation of India's *due process* rights under the DSU and Art. 12.10 of the DSU.

III. AS INDIA BENEFITS FROM THE SPECIAL AND DIFFERENTIAL TREATMENT UNDER ART. 27 OF THE SCM AGREEMENT, THE PROHIBITION UNDER ART. 3 OF THE SCM AGREEMENT DOES NOT APPLY TO INDIA

17. Art. 27 of the SCM Agreement recognises the S&DT afforded to developing country members. India contends that Art. 27.2(b) of the SCM Agreement continues to apply to members who graduate from Annex VII(b).

18. The text of Annex VII(b) of the SCM Agreement instructs that countries included therein become subject to Art. 27.2(b) when their GNP per capita reaches $1000 per annum. Art. 27.2(b) provides a phase-out period of 8 years to the developing country members for prohibited export subsidies under Art. 3. India submits that the eight-year phase-out period in Art. 27.2(b) of the SCM Agreement should be granted to *all* Annex VII developing country members *when* they graduate from Annex VII. As explained below, such an interpretation is required by the general rules of treaty interpretation provided in Art. 31 of the Vienna Convention of the Law of Treaties ("VCLT"), and supported by the supplementary means of interpretation provided in Art. 32 of the VCLT.

19. As per Art. 31(1) of VCLT, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The principle of effectiveness has been read into Art. 31(1) of the VCLT,[6] and has been recognised as a cardinal rule of treaty interpretation by all international adjudicatory bodies, including the WTO Appellate Body.[7] Specifically, in *US − Gasoline*, the Appellate Body explained that '*[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility*'.[8] An effective interpretation of the treaty language guarantees that the text is not rendered useless, redundant, or even irrational.[9] A strictly literal interpretation of Art. 27.2(b), in isolation of the scheme of organization of Art. 27.2, Annex VII(b), and other provisions of Art. 27, deprives the Annex VII countries of the special treatment envisaged under Part VII of the SCM Agreement. More importantly, such an interpretation negates the principle of effectiveness.

20. The Panel in *Indonesia-Autos* stated that Art. 27.1 of the SCM Agreement is an integral part of the object and purpose of the SCM Agreement[10] and must be read in tandem with other provisions of Art. 27 and the Annexes. In addition to these provisions, Annex VII is instrumental in implementing the S&DT framework embedded in the SCM Agreement. Annex VII(b) reads as:

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[6] AB Report, *Japan Alcoholic Beverages II,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para 106.

[7] *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Separate Opinion of Judge Lauterpacht [1955] ICJ Report 90, at 104−105; AB Report, *US − Offset Act (Byrd Amendment)), WT/DS217/AB/R,* at para. 271; see also AB Report, *US- Gasoline*, *WT/DS2/AB/R* at 21; AB Report, *Japan − Alcoholic Beverages II*, *WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R*, at 106, 111; AB Report, *Korea − Dairy, WT/DS98/AB/R,*, at para 80; AB Report, *Canada − Dairy,* WT/DS103,113/AB/R, at para 133; AB Report, *Argentina− Footwear,* WT/DS121/AB/R, at para 81; AB Report, *US − Underwear*, WT/DS24/AB/R, at 24; AB Report, *United States − Section 211 Appropriations Act,* WT/DS176/AB/R, at paras 161, 338; AB Report, *US − Upland Cotton*, WT/DS267/AB/R, at para 549; AB Report, *EC − Chicken Cuts,* WT/DS269/AB/R, WT/DS286/AB/R, at para. 214. *See also* Panel Report, *US − Carbon Steel*, WT/DS213/R, at para. 8.29, see also paras 8.43 and 10.10 ('would yield irrational results').

[8] Panel Report, *US − Gambling,* WT/DS285/R, at para. 6.49, n. 605. The Panel justified its effective interpretation under the good faith principle in Article 31(1).

[9] Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body,* 21 EJIL 3 (2010).

[10] Panel Report, *Indonesia − Autos*, para 5.194.

> *"Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe."*

21. Therefore, a developing country member that graduates from Annex VII "*shall* be subject" to the provisions which are applicable to other developing country members in Art. 27.2(b). The mandatory nature of the provision is evident from the use of the word "*shall*". In other words, the *treatment* that is afforded to a developing country member under Art. 27.2(b) and a developing country member graduating from Annex VII(b) must necessarily be the same.

22. Art. 27.2 of the SCM Agreement serves to exclude, in a qualified or unqualified manner, certain developing countries from the scope of application of substantive obligations found in Art. 3 of the SCM Agreement, for a period of 8 years.[11] Accordingly, through Art. 27.2(b), the applicable *treatment* is an exemption from the prohibition on export subsidies for a period of eight years, i.e. an 8-year phase out period.

23. Annex VII(b) requires that the treatment afforded to a graduating member must be the same as that was afforded to a country originally falling within scope of Art. 27.2(b). The *treatment* is to be understood as an eight-year phase out period. Therefore, the prohibition on export subsidies does not apply to a country graduating from Annex VII, for a period of eight years, from the date when its GNP pe annum crosses $1000 mark, and the data is published by WTO Secretariat, i.e. when the country graduates from Annex VII.

24. India's interpretation of Art. 27.2 and Annex VII seeks to preserve the elements of Annex VII and the objectives of providing special treatment for Annex VII countries. India submits that the phrase "*… from the date of entry into force of the WTO Agreement"* is applicable only to developing country members that were originally within the scope of Art. 27.2(b). Accordingly, those developing country members graduating from Annex VII(b) must receive the same benefit which other developing countries have received, i.e. an "eight year" phase out period. The United States proposes such a narrow "literal interpretation" of Art. 27.2(b) of the SCM Agreement separated from the context of Annex VII(b), and places undue reliance on the phrase "*… from the date of entry into force of the WTO Agreement".* The United States claims that developing country members that graduate from Annex VII(b) are not entitled to the right in Art. 27.2(b) beyond 1 January 2003. However, such an interpretation defeats the very purpose of including two separate provisions, namely for (a) Annex VII countries, and (b) for other developing countries, and consequently renders Art. 27.2(b) inutile for Annex VII(b) members graduating beyond the said date.

25. As explained above, Annex VII(b) and Art. 27.1 are an integral part of the overall object and purpose of the SCM Agreement which recognises that subsidies play an integral role in the economic development of developing country members. The interpretation put forth by India takes into account this object and purpose, and does not render any part of the SCM Agreement inutile. Therefore, as per the general rules of interpretation provided in Art. 31 of the VCLT, an eight-year phase out period in Art. 27.2(b) of the SCM Agreement is available to all developing country members that graduate from Annex VII.

26. Further, the interpretation proposed by the United States results in absurdity when applied in the context of Art. 27.5 of the SCM Agreement. Art. 27.5 provides Annex VII countries with an eight-year phase-out period for export subsidies where a product has reached export competitiveness. However, as per the interpretation proposed by the United States, it does not provide any flexibility or a phase-out period for the wider export subsidies by the same Member. This results in a situation where subsidy program itself is unable to avail of the 8- year phase-out period stipulated in Art. 27.2(b), but one of the products, part of the subsidy program receives an eight-year phase-out period under Art. 27.5.

27. This interpretation is also supported by the text of Art. 27.4 of the SCM Agreement which obligates the developing country members which are subject to Art. 27.2(b) to progressively phase out the subsidies over a period of 8 years. The text of Art. 27.4 does not qualify this period until

[11] Panel Report, *Brazil – Aircraft*, para. 7.53.

1st January 2003, but rather provides a gradual phase-out period of 8 years, accounting for late graduates from Annex VII to benefit from the full term of 8 years. Therefore, to preserve the integrity of Art. 27, the Panel must interpret the provisions in the context in which they operate, i.e. in tandem with all the provisions of Art. 27.

28. Additionally, the supplementary means of interpretation provided in Art. 32 of the VCLT serve as further evidence of this interpretation of Art. 27.2(b) submitted by India. They are not *subsidiary* to the means of interpretation recognised in Art. 31, but supplementary.[12]

29. The list of supplementary means of interpretation identified in Art. 32 is not exhaustive, and that preparatory work of the treaty and the circumstances of its conclusion can be used to ascertain the common intention of the parties.[13] Accordingly, India underscores that the negotiation history of Art. 27 of the SCM Agreement is critical to the interpretation of the provision. As evidenced from the Draft Texts formulated by the Chairman of the Negotiating Group for the SCM Agreement based on the proposal submitted by the members,[14] text which led to the SCM Agreement, developing countries were provided with variable phase-out periods under Art. 27.2(b), in accordance to their development levels. Among the developing countries, a separate group of countries whose GNP per capita was less than $1,000 per annum were given the option to negotiate a phase-out period according to their development needs, upon crossing $1,000 GNP per annum.[15] That is, the drafters of the SCM Agreement intended not a reduction of a timeframe for phase-out period, but rather, to provide wider flexibilities to developing countries, even upon their graduation from Annex VII(b).

30. Therefore, India submits that the eight-year phase out period in Art. 27.2(b) of the SCM Agreement should be available to countries that graduate from Annex VII, and hence, the prohibition under Art. 3 of the SCM Agreement is not applicable to India.

IV. THE CHALLENGED SCHEMES ARE NOT PROHIBITED EXPORT SUBSIDIES AS PER ART. 3 OF THE SCM AGREEMENT

A. Export Oriented Units

31. The United States has argued that the exemption from customs and excise duties provided to companies in the EOU/EHTP/STP/BTP schemes ('EOU Scheme') constitutes "government revenue that is otherwise due [that] is foregone or not collected" within the meaning of Art. 1.1(a)(1)(ii) and is therefore a subsidy for the purposes of the SCM Agreement. The United States has contended that the EOU scheme is an export subsidy based on two defining features − one, that the program requires all participating enterprises ('Units') to export their entire production, and two, that it imposes a Net Foreign Exchange Requirement.[16] However, the United States has failed to view the scheme as a whole, rather, it has selectively culled out provisions of the Indian legislation in order to characterize the scheme as an export subsidy. In doing so, the United States has incorrectly relied on the Appellate Body report in the *Canada − Autos*, to assert that since the import duty exemptions are only available to units that export their entire production, the scheme is export contingent, and therefore a prohibited subsidy in violation of Art. 3.1(a) of the SCM Agreement.

32. India submits that the United States has misunderstood the object and functioning of the EOU Scheme. The EOU scheme presents a system through which India streamlines its domestic administrative and development-oriented policy objectives. The scheme is to be read in the context of the object of the scheme, which is to boost domestic manufacturing. The exclusive designation of units and the requirement to export their entire production under the EOU scheme creates, in a sense, a tax-free zone, which makes certain that the duty exemptions fall within the legal mandate of Footnote 1, Annex I and Annex II of the SCM Agreement, and are not excess in nature. Consequently, the EOU scheme is akin to a pre-authorized duty drawback or remission scheme, rather than an export subsidy.

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[12] MARK E. VILLAGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF THE TREATIES, 446, Internal Footnote "See the statements by Waddock in the ILC, YBILC 1966 ½ 206, para. 41, and at 270, para. 35."

[13] Appellate Body Report, *EC − Chicken Cuts,* para. 283.

[14] Negotiating Group on Subsidies and Countervailing Measures, "Draft Text by the Chairman," MTN.GNG/NG10/23, 7 November 1990, p. 25 (Ex. IN-04)

[15] Negotiating Group on Subsidies and Countervailing Measures, "Draft Text by the Chairman," MTN.GNG/NG10/23, 7 November 1990, p. 25 (Ex. IN-04).

[16] United States Second Written Submission, para. 78.

33. The incentive offered under the EOU scheme is an exemption on the payment of customs duties and additional duty, if any, on the import and/or procurement of all goods, required for manufacturing within the EOU unit. These exemptions are limited to customs and excise duties on those goods imported or procured for use as inputs in the manufacturing activity of the EOU Unit, i.e. "approved activity".[17] The only activity permitted by the Unit is manufacturing activity of products to be exported, and consequently, that the inputs imported or procured by the Unit are necessarily *only* used in the production of exported products. Therefore, the EOU Scheme can only be characterized as a pre-authorized duty drawback or remission scheme.

34. The scope and meaning of Footnote 1 has been clarified by the Appellate Body in *EU − PET (Pakistan)*, where it held that Footnote 1 deals with two situations: a) the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, and b) the remission of such duties or taxes in amounts not in excess of those which have accrued. Accordingly, neither of these two situations fall within the meaning of a 'subsidy' as defined by "government revenue foregone" in Art. 1.1(a)(1)(ii).[18] It follows that only those remissions of duties and taxes that are in excess of those which have accrued are deemed to be a subsidy.

35. India reiterates that these duty exemptions fall within the scope of Footnote 1 of the SCM Agreement, and are therefore not deemed to be a subsidy within the meaning of Art. 1 of the SCM Agreement. Compliance with Footnote 1 is further established through the provision in the scheme that regulates sales of goods by the Unit to the DTA. While the Unit must export its entire production − and this obligation must be met so as to ensure that the inputs being imported are used *only* in the production of exports − certain circumstances of sales to the DTA are permitted.[19] However, such DTA sales are limited in nature,[20] require pre-authorization,[21] and further, are subject to payment of duties on DTA sales as well as reversal of customs duties saved on imported raw materials.[22] The reversal of import duties demonstrates that where Units sell to the DTA, the custom duty exemption becomes inapplicable to them. Further, these duties are aggregated on the basis of Standard Input Output Norm (SION) norms or other norms established by the Norms Committee, to ensure that the amounts to be reversed are the amounts that were actually due.[23] Both of these provisions ensure that the exemption of duties is commensurate to the duties, and their quantities, applicable to the inputs consumed in the production of the exported product.

36. Further, the United States argues that the EOU scheme conditions benefits on export performance.[24] However, in doing so, the United States hinges its argument on export performance as opposed to consumption of inputs. The latter is the fulcrum of the issue, given that the EOU scheme is a duty remission.

37. The United States also argues that the duty exemptions are only available insofar as Units obtain and maintain a positive NFE, which is determined by subtracting the total value of imports from the total value of exports.[25] The United States wrongly alleges that the structure of the NFE requirement is sufficient evidence to establish export contingency.[26] The NFE equation is not indicative of export contingency but rather a function of basic business prudence. It merely requires that enterprises act prudently so as not to operate at a loss, and is a tool to ensure compliance with the Remission Principle.

[17] Foreign Trade Policy, 6.01(d)(i)(ii), (Ex. US-03).
[18] Appellate Body Report, *EU − PET (Pakistan)*, para. 5.97.
[19] Foreign Trade Policy, 6.00(a) (Ex. US-03).
[20] Foreign Trade Policy, 6.08 (Ex. US-03).
[21] Foreign Trade Policy, 6.08 and 6.09 (Ex. US-03); Aayat and Niryat Forms, ANF-6C (Ex. US-06).
[22] Foreign Trade Policy, 6.08(a)(v) (Ex. US-03).

"The DTA sale by EOU/EHTP/STP/BTP units shall be subject to payment of excise duty, if applicable and/or payment of GST and compensation cess along with reversal of duties of Custom leviable under First Schedule to the Customs Tariff Act, 1975 availed as exemption, if any on the inputs utilized for the purpose of manufacturing of such finished goods (including by-products, rejects, waste and scraps arising in the course of production, manufacture, processing or packaging of such goods). This reversal of Customs Duty would be as per prevailing SION norms or norms fixed by Norms Committee (where no SION norms are fixed)."

[23] Foreign Trade Policy, 6.08(a)(v) (Ex. US-03).
[24] United States Second Written Submission, para. 78.
[25] United States Second Written Submission, para. 100.
[26] United States Second Written Submission, para. 78.

38. India also notes the Panel's ruling in *Canada – Aircraft Credits and Guarantees* where it was held that the existence of an export subsidy first requires existence of a subsidy within the meaning of Art. 1 of the SCM Agreement. Since the EOU scheme falls within Footnote 1 of the SCM Agreement, it is deemed not to be a subsidy, and accordingly, the analysis of export contingency is not relevant.[27]

39. The United States has failed to establish that India grants or maintains prohibited export subsidies through the EOU and Sector Specific Schemes. India has demonstrated that the measures under the EOU and Sector Specific Schemes are not subsidies as per Art. 1 of the SCM Agreement, and are not contingent on export performance as per Art. 3.1(a) of the SCM Agreement. Therefore, it is submitted that the EOU and Sector Specific Schemes are not prohibited export subsidies as per Art. 3.1(a) and 3.2 of the SCM Agreement.

B. Merchandise Exports from India Scheme

40. The United States argues that through the MEIS, India grants a subsidy within the meaning of Art. 1.1(a) of the SCM Agreement which is contingent upon export performance, and is in violation of Art. 3.1(a) of the SCM Agreement. The United States mischaracterizes MEIS as a direct transfer of funds under Art. 1.1(a)(1)(i). The United States argues that MEIS scrips are financial claims available to participants, who can use them to pay for customs and excise duties, fees and that these scrips can be traded for cash.

41. India submits that MEIS is consistent with Art. 3.1(a) and 3.2 of the SCM Agreement since it is not a subsidy. India asserts that the correct characterization is that MEIS is a remission of indirect taxes under Footnote 1 of the SCM Agreement. MEIS refunds indirect taxes already paid by exporters on production, distribution of exported products and on inputs consumed in the production of the exported product. Instead of directly granting a monetary refund of such taxes, the Government of India indirectly refunds such taxes paid as MEIS Scrips. When the scrips are used to pay for basic customs duty and additional customs duty on import of inputs, central excise duty on domestically procured inputs and/or custom duties in case of a shortfall in export obligation ("Specified Uses"), the refund of the indirect taxes paid earlier, is actually received by the original recipient/exporter.
MEIS is not a direct transfer of funds:

42. India has advanced the following three-pronged argument, in support of its submission that MEIS is not a direct transfer of funds as per Art. 1.1(a)(1)(i). Firstly, MEIS is not a direct transfer of funds because it is not similar to a loan, grant or equity infusion. Secondly, the scope of direct transfer of funds is limited by Art. 1.1(a)(1)(ii). Thirdly, MEIS scrips are not financial claims available to the recipient. Instead, India submits that MEIS is a remission of indirect taxes already paid.
MEIS is a remission of indirect taxes, falling within Footnote 1:

43. Footnote 1 of the SCM Agreement attaches itself to Art. 1.1(a)(1)(ii) which is financial contribution in the form of government revenue foregone. By way of the deeming fiction created by Footnote 1, the remission of duties or taxes in amounts not in excess of those which have accrued, is deemed to not be a subsidy. Annex I(g), (h) and (i) complement this part of Footnote 1. The remissions under these illustrations are "subsidies" only if they are excess. Annex I(g) identifies the exemption or remission of indirect taxes in respect of the production and distribution of exported products when it is in excess, as an export subsidy. Annex I(h) also identifies indirect tax rebate schemes, which result in exemption, remission or deferral of prior-stage cumulative indirect taxes on inputs that are consumed in the production of the exported product in excess of such tax actually levied, as a form of export subsidy.

44. India submits that MEIS is akin to the transactions referred to in Annex I (g) and (h) and the remission is not in excess of the taxes accrued on the final exported product. MEIS offers a refund of indirect taxes paid by the exporter in respect of the production and distribution of the exported products such as indirect taxes paid on fuel and electricity. Further, MEIS is an indirect tax rebate scheme since it also offers a refund of prior-stage cumulative indirect taxes paid on inputs consumed in the production of exported products, such as indirect tax paid on fuel and other taxes and duties which are outside the ambit of Goods and Services Tax. Notably, remission of taxes includes the refund of taxes as per Footnote 58 appended to Annex I.

[27] India First Written Submission, para. 318 citing Panel Report, *Canada – Aircraft Credits and Guarantees,* para. 7.16.

45. The value of MEIS Scrips is calculated by multiplying the rate with the FOB value of export of the product, which consists of embedded indirect taxes. Since it is extremely cumbersome to calculate the precise amount of embedded taxes in the exported product, given India's complex tax regime, a refund which is approximate but less than the actual levy of duties and taxes, is provided to the exporter.[28]

46. India expressed its view that neither the 'uses' nor the 'value' of MEIS scrips, as contended by the United States, show that MEIS is a direct transfer of funds. The value and nature of the scrip is agnostic to the Specified Uses. For example, if the exporter uses a scrip to pay basic customs duty, he is using his indirect tax refund to pay for the basic customs duty to the extent of the value of the scrip. The 'value' remains the quantum of indirect tax refund offered by the government and the 'nature' remains a form of government revenue foregone as permitted by the Footnote 1 of the SCM Agreement.

47. The United States argues that because MEIS scrips are freely transferable and can be exchanged for cash, they constitute a direct transfer of funds. India clarifies that the policy doesn't provide for sale of scrip for cash and although scrips can be freely transferred to third parties without further permission from the Government, the MEIS scrips can still only be used for the limited Specified Uses enlisted in Paragraph 3.02 of the Foreign Trade Policy. The value of the scrip still corresponds to the remission of embedded indirect taxes already paid, qualifying as a transaction falling under Footnote 1 of the SCM Agreement.[29]

48. India has therefore demonstrated that the transactions of payment of indirect taxes which are embedded in the cost of exported product, subsequent issuance of MEIS Scrips against such exported products and utilization of the MEIS scrips for payment of Specified Uses, as a whole, amount to remission of indirect taxes as covered within Footnote 1 of the SCM Agreement.

49. Alternatively, India argues that scrips act as credit notes, which can be used for payment of duties (basic customs duty, additional customs duty) on imports, which also results only in remission of indirect taxes already paid. Notably, while maintaining that MEIS could be best characterized as a direct transfer of funds, in responding to the Panel's question, the United States has also acceded that MEIS could be characterized as government revenue foregone under Art. 1.1(a)(1)(ii) when the scrip is redeemed.[30]

50. India submits that MEIS is a remission of indirect taxes falling under Footnote 1 of the SCM Agreement and is therefore deemed to not be a subsidy. Since MEIS is not a subsidy, it cannot be a prohibited subsidy as per Art. 3 of the SCM Agreement. This negates the need for a benefit analysis. Hence, MEIS is not a prohibitive subsidy and is consistent India's obligation under Art. 3.1(a) and 3.2 of the SCM Agreement.

C. Export Promotion and Capital Goods Scheme

51. The EPCG scheme grants duty and tax exemptions on the import of capital goods used in the pre-production, production, and post-production of exported goods.[31] These exemptions are on indirect taxes, specifically customs duties, Integrated Goods and Services Tax, and Compensation Cess on capital goods used for pre-production, production, and post-production. India submits that such exemptions qualify under Footnote 1 of the SCM Agreement making the EPCG scheme a duty drawback, read with Annex I(g) and (i).

52. Analogous to other pre-authorized duty drawback schemes, the EPCG Scheme involves a detailed authorization process in order to ensure that the duty and tax exemptions are offered only to exporting entities and within the quantum of consumption of those imported inputs. An enterprise must apply for grant of authorization to the concerned Regional Authority, along with the submission of a nexus certificate from a Chartered Engineer and a Chartered Accountant, both of whom guarantee that the import of capital goods shall be used in the pre-production/production/post-production stage for manufacture of the export products.[32] India asserts that the requirement to use

[28] India's Responses to Written Questions Posed by the Panel, Question 60.
[29] India's Responses to Written Questions Posed by the Panel, Question 56.
[30] United States Responses to Written Questions Posed by the Panel, Questions 54 and 55.
[31] India First Written Submission, para. 296 citing Foreign Trade Policy 5.01(a) (Ex. US-03).
[32] Handbook of Procedures, 5.02 (Ex. US-05); Appendices and Aayat Niryat Forms, "Guidelines for Applicants," ANF 5B (Ex. US-06).

the imported capital goods only in the production of exported products is verified during the application process.

53. The United States argues that the EPCG scheme does not qualify as a duty drawback because capital goods are not inputs within the meaning of Footnote 61 and therefore, do not fall within the meaning of Annex I(g) and (i).[33] However, India disagrees. Capital goods necessarily falls within the ambit of Annex I(g) and (i). These goods are critical to the production of exported products, particularly in the case of developing countries.[34] This view has also been advocated by developing country Members at various occasions.[35]

54. India submits that the list provided in Footnote 61 is indicative, and not exhaustive. It includes inputs that are physically incorporated as well as catalysts, which undergo no permanent change, but remain inputs within the meaning of Footnote 61. Notably, even fuel is not "physically incorporated" but rather used in the process of manufacturing. Further, a duty drawback is meant to offset the cost impact of import duties on inputs incorporated in exported products. Given that capital goods necessarily contribute to the final cost of the exported product, India is of the view that capital goods fall within the meaning of inputs consumed in Footnote 61.

55. Considering that the EPCG scheme falls within the scope of Footnote 1 of the SCM Agreement, India submits since no subsidy is deemed to be found in the case of duty drawbacks, it follows that no benefit can be conferred. In the present case, the United States has failed to establish that the measures under the EPCG Scheme are "subsidies" within the meaning of Art. 1 of the SCM Agreement, or a prohibited export subsidy as per Art. 3.1(a) and 3.2 of the SCM Agreement.

D. The Special Economic Zones Scheme

56. The United States alleges that the SEZ Scheme is a prohibited export subsidy as per Art. 3 of the SCM Agreement. The United States argues that the alleged subsidies under the SEZ Scheme are export contingent "in law", and in the alternative argues that that they are export contingent "in fact". However, United States' arguments are coloured by their misunderstanding of the SEZ Scheme, and the United States fails to establish how the alleged subsidies under the SEZ Scheme meet the threshold laid down for export contingent "in law" or "in fact".

57. India first addresses the mischaracterisation of its domestic policy by the United States.The economic measures in the SEZ Scheme are designed to equip the SEZ Units with increased production capacity, resulting in additional economic activity, promotion of investments, and creation of employment opportunities. By merely reproducing provisions that refer to "export promotion",[36] the United States fails to understand the context in which the phrase is used, and in effect distorts the interpretation of the policy objective of the SEZ Scheme. The promotion of exports is merely one of the many indicators employed by the SEZ Scheme to assess the achievement of its overall objective of increased economic activity. This is materially different from the claim made by the United States that the purpose of the SEZ Scheme is to result in the promotion of exports. This distinction ensures that a condition of export performance is not imposed or mandated on SEZ Units, and the emphasis, instead, is on achieving the overall objective of the Scheme.

58. There are three substantive elements that are required to satisfy the threshold for export contingency under Art. 3.1(a) of the SCM Agreement.[37] The United States also implicitly recognises this standard.[38] First is "*granting* of a subsidy", i.e. whether the authority that is responsible for *granting* the subsidy takes into account the factor of export performance. Second, the *conditionality* of the subsidy, which requires that the subsidy be *dependent* on export performance of the recipient. Third, the subsidy is tied to *export performance* as understood in the SCM Agreement, i.e. the sale

[33] United States Second Written Submission, para. 119.

[34] See Committee on Subsidies and Countervailing Measures, "Chairman's Report on the Implementation-Related Issues referred to the Committee on Subsidies and Countervailing Measures in the 15 December 2000 Decision of the General Council," G/SCM/34, 3 August 2001.

[35] General Council, "Implementation-Related Issues and Concerns- Decision of 15 December 2000", WT/L/384, 19 December 2000, para. 6.3 (Ex.-IN-09).

[36] United States First Written Submission para 80 and 83; United States Second Written Submission para. 134.

[37] Appellate Body Report, *Canada – Aircraft*, paras. 169-172; Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.678.

[38] United States Second Written Submissions, para. 138.

of goods beyond the territorial jurisdiction of the Member state. However, the United States fails to recognise these distinct substantive elements, and consequently fails to establish how the SEZ Scheme falls within the scope of prohibited export subsidies.

The Alleged Subsidies under the SEZ Scheme are not export contingent "in law"

59. In order to establish *de jure* export contingency, the United States erroneously relies on the application process for SEZ Units, the process of review and approval of the applications, and the monitoring process of the SEZ Units.[39] However, in elaborating each of these procedures, the United States has failed to reproduce the entirety of the concerned provisions and, consequently merely creates an illusion of export contingency.

60. In determining whether a particular measure satisfies the threshold for *de jure* export contingency, the Appellate Body in *Canada Autos* has invoked the "but for" test.[40] The burden on the complainant is to establish the *de jure* export contingency, through the words of the measures themselves, that the alleged subsidies under the SEZ Scheme are not available to an SEZ Unit *but for* the exports undertaken by it.

61. The United States primarily relies on the positive NFE requirement provided in the review of applications and approval process, and the monitoring data collected from the SEZ Units.[41] In effect, United States argues that an SEZ Unit would not satisfy the positive NFE requirement unless it engages in export of goods. India respectfully disagrees, and submits that the United States' application of the "but for" test is over-simplistic. A unit in SEZ may achieve positive NFE without exporting to other countries.

62. The positive NFE requirement is one of the tools employed by the SEZ Scheme to ensure that the SEZ Units are effectively utilizing the resources at their disposal and efficiently contributing to production activity. The formula for calculation of the NFE earnings of an SEZ Unit is provided in Rule 53 of the SEZ Rules, and reads "A − B > 0". "A" has been defined as the sum of the FOB value of exports, *and* the value of the products in the situations listed therein, while "B" has been defined as the sum of the CIF value of all inputs listed therein. The emphasis in the present case is on two factors: the use of the term "exports" in "A"; and the additional factors taken into account in calculating the value of "A".

63. India submits that the definition of "exports" under the SEZ Scheme is different from the meaning of exports as envisaged under the SCM Agreement. Exports under the SCM Agreement is physical export of goods outside the territory of the member state. Whereas, in the SEZ Scheme, exports includes the supply of goods/services to another member state as well as the Indian territory, including the supply of goods/services from one SEZ Unit to another SEZ Unit or Developer within the same or different SEZ.[42] Consequently, the condition of "export" under the SEZ Scheme is wider than "export performance" under Art. 3.1(a) of the SCM Agreement.[43] Accordingly, in order to establish that the SEZ Scheme is "export contingent", a higher threshold (than mere reference to the term "exports") would have to be shown to satisfy the "but for" test. This threshold would have to specifically account *only* for exports outside the territory of India by a Unit situated in the SEZ, which is a free trade zone.

64. The second factor concerns the equation for calculating the NFE requirement by the SEZ Units. The United States asserts that "an enterprise *must* export to meet these requirements".[44] However, the United States has abandoned this position altogether and recognized that a positive NFE requirement can be achieved by an SEZ Unit even without engaging in exports as understood by the SCM Agreement.[45] This recognizes that a positive NFE balance can be achieved by enterprises even without engaging in any physical exports outside the territory of India. Therefore, this does not lend support to the claims raised by the United States that the NFE requirement satisfies the "but for" test for export contingency.

[39] United States First Written Submission para. 89 − 102.
[40] Appellate Body Report, *Canada − Autos*, para. 104.
[41] United States Second Written Submission para.147 - 150.
[42] Section 2(m) of the Special Economic Zones Act, 2005.
[43] India First Written Submission para. 345 − 347.
[44] United States First Written Submission para. 124.
[45] United States Second Written Submission, para. 159.

65. Furthermore, India humbly submits that the United States has failed to put forth sufficient evidence to show how the words/legal text of the SEZ Scheme, either explicitly or by necessary implication, results in export contingency. In responding to the questions posed by the Panel, the United States has relied on the Report of the Comptroller and Auditor General of India (CAG) on the Performance of Special Economic Zones, for the year 2012 - 2013.[46] It is pertinent to note that instead of lending support to the United States' claim, the Report affirms that that the SEZ Scheme does not require the SEZ Units to undertake physical exports in order to satisfy the positive NFE requirement.

The Alleged Subsidies under the SEZ Scheme are not export contingent "in fact"

66. The United States alternatively seeks to establish that the alleged subsidies under the SEZ Scheme are export contingent in fact. However, in doing so, the United States has expanded the scope of Art. 3.1(a) and Footnote 4 of the SCM Agreement. The United States argues that "*(a) subsidy granted by a Member with the expectation of exportation meets the standard of contingent "in fact*"".[47] India submits that such a standard renders Footnote 4 of the SCM Agreement ineffective. The appropriate standard is whether there exists a relationship of conditionality or dependence between the granting of the subsidy and the actual or anticipated export. This is distinct from the United States' argument which is satisfied by ascertaining "expectations" of exports on the part of the granting authority. The Appellate Body in *EC- Large Civil Aircrafts* was mindful of this distinction, and limited the understanding of export contingency in fact to the former.[48]

67. It is necessary to reiterate that although the legal standard for *de facto* and *de jure* is the same,[49] the evidence required to establish *de facto* export contingency is necessarily different.

68. The evidence produced by the United States fails to meet its burden to establish contingency of export performance. The United States has erred in relying unofficial statements available on various websites regarding the SEZ Scheme. The United States themselves have relied on the Report of the Appellate Body in *EC- Large Civil Aircrafts*[50] which categorically warns against placing undue reliance on such statements,[51] and lends little support as to the evidentiary value of such statements.

69. Further, the United States attempts to revive their arguments relating to the positive NFE requirement, and claims that the requirement incentivises an SEZ Unit to make export-market sales over domestic market sales.[52] However, there is no distinction made between SEZ Units who achieve the positive NFE requirement by DTA sales and those that achieve them by exports as understood under the SCM Agreement, so as to incentivise one over the other.

70. Therefore, India submits that the United States has not provided adequate evidence to supplement its claim that the alleged subsidies under the SEZ Scheme are export contingent *in law* or *in fact*. Therefore, it is submitted that the SEZ Scheme is not a prohibited export subsidy, either in law or in fact, as per Art. 3.1(a) and 3.2 of the SCM Agreement.

Given that the SEZ Scheme is not export contingent, it is not necessary to make any additional findings

71. The United States has also argued in length on how the economic measures under the SEZ Scheme meet the threshold of "subsidies" under Art. 1 of the SCM Agreement.[53] However, United States has failed to establish that such alleged subsidies are export contingent "in law" or "in fact", India submits that the Panel may not address these arguments at this stage. If the present dispute can be resolved by determining the arguments raised by the United States regarding export

[46] Report of the Comptroller and Auditor General of India "Performance of Special Economic Zones for the Year 2012-13" (Ex. US- 67).

[47] United States First Written Submission, para 130.

[48] Appellate Body Report, *EC - Large Civil Aircraft*, paras. 1049 and 1050; *See also* Appellate Body Report, *Canada – Aircraft*, para. 173. To recall, the second sentence provides that "*{t}he mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of {Article 3.1 of the SCM Agreement}".*

[49] Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.365; Panel Report, *US – FSC (Article 21.5 – EC),* paras. 8.54-8.56.

[50] United States Second Written Submission, para. 155, fn. 198.

[51] Appellate Body Report, *EC- Large Civil Aircraft,* para. 1051.

[52] United States First Written Submission para. 136.

[53] United States First Written Submission para. 106 - 120.

contingency, it is submitted that the determination on whether the measures are subsidies as per Art. 1 of the SCM Agreement need not be undertaken.

E. Duty Free Imports for Exporters Scheme

72. The DFIE is a grouping of individual duty stipulations provided in Customs Notification 50/2017, which is a government regulation that identifies the range of goods that India imports and specifies the commensurate applied duty rate. DFIE authorizes import duty exemptions on specific inputs being imported for use in the manufacture of an exported product. The DFIE operates in the manner of the pre-authorized duty drawback model discussed earlier, in that it only provides this duty exemption to eligible enterprises, subject to strict scrutiny by concerned authorities.

73. In order to import inputs, the eligible exporters must, at the time of import, apply for an Import Certificate, that stipulates the quantum and value of the inputs sought to be imported.[54] In this manner, the DFIE is two-tiered −as a first step it mandates the pre-authorization of eligible enterprises, and subsequently also requires issuance of a certificate each time an eligible exporter seeks to import inputs. The scheme incorporates scrutiny at two different points, ensuring that only enterprises that export their products are seeking exemption under the scheme,[55] and that the duty exemption is offered only on a declared quantum of imported inputs, as required in the manufacture of exports. The Export Promotion Councils ("EPC") are responsible for the administration of the application process to identify and designate the beneficiaries to the scheme. The streamlined method through which the EPC authorizes the exporter as eligible is necessary to ensure that only the duty-free exemption is consistent with Footnote 1 of the SCM Agreement. For example, in the case of leather garment exporters, enterprises are required to submit applications to the Leather EPC.[56] Leather garment exporters that qualify are issued an Export Performance Certificate which they must produce in order to apply for an Import Certificate needed to import inputs on a duty-free basis.[57] Therefore, in its essence, this form of a pre-authorized duty drawback/ substitution drawback falls within Footnote 1 of the SCM Agreement.

74. The United States argues that the DFIE is not a duty drawback within the meaning of Footnote 1 and Annex I(i) of the SCM Agreement because the scheme allegedly grants import duty exemption for past export performance.[58] However, such an approach adopts an export contingency argument and tries to establish it as financial contribution. In any case, the allegation is a misinterpretation of the legislation, as the exemptions provided under the scheme do not hinge on export performance. The scheme merely aggregates the value of the duty exemption on the basis of past export values and volume.

75. Having established that the DFIE falls within the scope of Footnote 1 of the SCM Agreement, India submits that DFIE is not a subsidy, it follows that no benefit can be conferred. The United States has failed to establish that the measures under the DFIE are "subsidies" within the meaning of Art. 1 of the SCM Agreement, and has failed to prove that the DFIE is an export subsidy as per Art. 3.1(a) and 3.2 of the SCM Agreement.

V. CONCLUSION

76. For the reasons stated above, India requests the Panel to conclude India continues to benefit from the 8-year phase out period under Art. 27 of the SCM Agreement, and none of the challenged schemes are in violation of Art. 3.1(a) and Art. 3.2 of the SCM Agreement.

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[54] Council for Leather Exporters Guidelines, p. 6-7 (Ex. IN-11).
[55] Council for Leather Exporters Guidelines p. 7 (Ex. IN-11).
[56] Council for Leather Exporters Guidelines, Annexure-I (Ex. IN-11).
[57] Council for Leather Exporters Guidelines, p. 7 (Ex. IN-11).
[58] United States Second Written Submission, para. 166.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. Introduction

1. Brazil provides the following executive summary of its participation during the panel proceedings in this dispute.

II. The proper interpretation of Article 27 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)

2. Article 27 of the SCM Agreement contains rules on special and differential treatment of developing country Members. In particular, Article 27.2, in conjunction with Annex VII of the SCM Agreement, regulates the applicability of the prohibition of subsidies contingent on export performance contained in Article 3.1(a) of the SCM Agreement to developing countries.

3. In Brazil's view, the ordinary meaning of the terms contained in Article 27.2(b) leaves no margin for doubt when it comes to establishing the time period given to developing country Members: "eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4". Brazil thus finds that the proper interpretation of Annex VII in conjunction with Article 27.2(b) of the SCM Agreement is that once the GDP per capita of a developing country Member listed in Annex VII reaches US$1,000.00 it immediately becomes subject to Article 27.2(b).

4. Brazil notes that consideration of the objective and purpose Article 27.2(b) of the SCM Agreement also confirms the interpretation yielded by the ordinary meaning of the terms used therein. Brazil acknowledges that the object and purpose of Article 27.2 of the SCM Agreement is to provide developing country Members with some flexibility in terms of time to adjust their subsidy policies to the prohibition of export contingent subsidies. Brazil also acknowledges that the objective and purpose of Annex VII is to provide additional flexibility for certain categories of Members.

5. In this context, a harmonious interpretation that gives meaning to all provisions of Article 27 and of Annex VII of the SCM Agreement leads to the following three conclusions. First, developing country Members in general enjoyed a flexibility adjustment period of eight years from the date of entry into force of the WTO Agreement, in accordance with Article 27.2(b). Second, least-developed countries were granted a flexibility that is open-ended, since, in accordance with literal (a) of Annex VII, the provisions of paragraph 1(a) of Article 3 of the SCM Agreement do not apply to WTO Members designated as LDCs by the United Nations. Third, Annex VII also contains another category of Members that lies between the previous two categories in terms of added flexibility – those listed under literal (b).

6. Consideration of the remainder of Article 27 as immediate context confirms the interpretation described above. Article 27.4 serves to limit, not expand the flexibility granted by Article 27.2. It provides that developing country Members shall phase out their export subsidies, preferably in a progressive manner, during the eight-year period established in Article 27.2. It is noteworthy that the lack of a starting point to the eight-year period mentioned in the first sentence of Article 27.4 is, in Brazil's view, simply a consequence of the fact that said provision is referring to the specific time-period stipulated in Article 27.2. This Article, in turn, clearly states the starting point as being the date of entry into force of the WTO Agreement. Article 27.5 also sets limits rather than expands the flexibilities granted by Article 27.2. It operates to reduce the flexibility of Members regarding products in which they have achieved export competitiveness status (as defined in Article 27.6 of the SCM Agreement). It is only applicable while Member countries are still excluded from the application of Article 3.1(a) by virtue of Article 27.2, not after.

III. The applicability of Article 4 of the SCM Agreement in disputes involving developing country members

7. In Brazil's view, the moment and the manner of assessing whether Article 4 of the SCM Agreement is applicable in a dispute involving developing country Members that invoke Article 27.7 of the same Agreement is an issue to be dealt with on a case-by-case basis.

8. Brazil notes that Article 4 of the SCM Agreement establishes both substantive and procedural obligations. The latter are applicable from the consultations request up to the implementation of the recommendations and rulings of the Dispute Settlement Body (DSB). In this sense, some provisions, such as the establishment of a panel at the first DSB meeting (Article 4.4) will apply at the very beginning of proceedings; other provisions, such as the removal of the inconsistent subsidies "without delay" under Article 4.7, will only give rise to obligations if, after the end of panel proceedings (and a possible appeal), a finding of inconsistency is issued.

9. Because obligations have specific requirements and will apply at different moments of the dispute, the relationship between Article 27.7 and Article 4 will likely come into play multiple times at different stages during the proceedings. Brazil also notes, in this regard, that procedural rules contained in Article 4 of the SCM Agreement are likely to come into play earlier than more substantive obligations.

10. At the same time, the specific characteristics of each dispute and the context in which Article 27.7 claims are made can be relevant to determining the appropriate moment at which to assess the relationship between Article 27 and Article 4 of the SCM Agreement. In this context, Brazil's position is that a final determination regarding the applicability of Article 27.7 of the SCM Agreement, which, in some cases, will only be made at a later stage of the dispute (possibly even on appeal) cannot always be a necessary condition for an assessment of whether provisions of Article 4 of the SCM Agreement of a more procedural nature should apply.

IV. The decision by the Panel not to have a Second Substantive Meeting with the Parties

11. As a third party, Brazil did not take part in the organizational meetings, but it would appear from India's First Written Submission that India did not agree with the decision to conduct only one substantive meeting between the Parties and the Panel[1]. In this regard, Brazil's position is that while foregoing a second substantive meeting with the Parties may be admissible in certain circumstances, agreement between the Parties is an important element to consider when pondering deviation from the procedures established in Appendix 3, especially in the case of disputes involving developing country Members.

V. Statement of Available Evidence

12. In response to questions posed by the Panel, Brazil argued that, in its view, Article 4.2 of the SCM Agreement and Article 4.4 of the DSU impose distinct and cumulative obligations on complainants pursuing claims of prohibited subsidies under Article 3 of the SCM Agreement. While Article 4.4 of the DSU requires Members to identify, in their consultation requests, "the measures at issue" and give an "indication of the legal basis for the complaint", Article 4.2 of the SCM Agreement requires Members pursuing claims of prohibited subsidies to include, in their consultations request, a "statement of available evidence". Because there is no conflict between the provisions of Article 4.4 of the DSU and Article 4.2 of the SCM Agreement, it is clear to Brazil that both must be applied simultaneously.

13. However, Brazil believes that the fact that Article 4.2 of the SCM Agreement establishes a distinct and additional requirement for consultations requests involving claims of prohibited subsidies does not mean that the first proposition presented by the Panel must necessarily be incorrect. It is not inconceivable, in Brazil's view, that a legal instrument, and therefore, its mention in a consultations request, may at once achieve the objectives of both Article 4.4 of the DSU and Article 4.2 of the SCM Agreement. It may serve to identify a measure of the responding Member and as evidence that a subsidy is being granted or maintained by the respondent that is contingent either on export performance or on the use of domestic over imported goods. Brazil notes, in this

[1] India, First Written Submission, para. 105-116.

context, that in disputes involving *de jure* claims of prohibited subsidies, it is particularly likely, that mention of legal instruments, norms and regulations may suffice to, simultaneously, identify the measure at issue for the purposes of Article 4.4 of the DSU and serve as evidence of the existence and nature of the subsidy in question within the meaning of Article 4.2 of the SCM Agreement.

14. Another issue is whether the use of the adjective "available" in Article 4.2 of the SCM Agreement means that the complainant must present all evidence available to it. In Brazil's view, what the obligation in Article 4.2 entails is a duty to provide, in good faith, a statement of evidence which a Party has available to it with regard to the existence and nature of the subsidy in question. The purpose of this statement is, to "provide a responding Member with a better understanding of the matter in dispute and serve as the basis for consultations".

VI. Financial contribution

15. In Brazil's view, a measure that contains some components that are inconsistent with the Covered Agreements is inconsistent only to the extent of those components. Therefore, if a measure is found inconsistent because one of its aspects cannot benefit from the shelter of footnote 1 of the SCM Agreement, the respondent may achieve compliance by amending or substituting the challenged measure in a manner that eliminates that inconsistency with the Covered Agreements.

16. When a financial contribution takes the form of government revenue otherwise due that is foregone or not collected, it is Brazil's view that there is a requirement to conduct a "three-step test" which includes an examination of the structure of the domestic tax system and its organizing principles, in order to ascertain whether a financial contribution was granted. Moreover, Brazil does not consider that the existence of a ceiling for the tax exemptions or remissions granted by a hypothetical measure is sufficient to establish that such an scheme no longer falls under footnote 1 of the SCM Agreement by virtue of it not providing exemptions or remissions for the specified inputs "as a whole". Whether a scheme actually results in remissions or exemptions which are in "excess of" and therefore inconsistent with the SCM Agreement is a factual matter to be addressed on a case-by-case basis.

VII. Exceptions, derogations and burden of proof

17. In Brazil's view, when dealing with exceptions, Members, panels and the Appellate Body are facing a potential justification for what would otherwise be a measure that is inconsistent with the Covered Agreements. Exceptions, therefore, result from the acknowledgement by Members that certain circumstances require legitimate deviation from the established norms. Derogations, however, are not justifications. They instead act to limit the scope of application of other provisions and, in so doing, help to clarify the boundaries of Members' rights and obligations under the Covered Agreements. The distinction is significant, among other things, for the determination of the proper order of analysis in specific disputes.

18. Brazil notes that while characterizing a provision as an exception has a clear consequence for the determination of the burden of proof, the implications of the characterization of a provision as a derogation are less clear. In any case, in Brazil's view, the rules normally applicable to the determination of the burden of proof under the WTO dispute settlement system are equally applicable in relation to provisions containing derogation. Moreover, a proper determination of the burden of proof regarding derogations may require an examination on a case-by-case basis.

19. That notwithstanding and regardless of the characterization of a provision as a derogation or as an exception, Brazil notes that, in previous disputes, panels have placed on the respondent the burden of proof regarding provisions which contained language that was very similar to the one adopted in footnote 1 of the SCM Agreement. For instance, in *China − Raw Materials*, the Panel concluded that: "the burden is on the respondent (China in this case) to demonstrate that the conditions of Article XI:2(a) are met in order to demonstrate that no inconsistency arises under Article XI:1".[2]

20. Language contained in the second paragraph of item (k) of Annex I to the SCM Agreement resembles that which is found in footnote 1 of the SCM Agreement. The second paragraph of item (k) contains the following sentence: "an export credit practice which is in conformity with those

[2] Panel Report − *China − Raw Materials* − para 7.213.

provisions shall not be considered an export subsidy prohibited by this Agreement.[3]" This is similar to the formula "shall not be deemed to be" used in footnote 1. Brazil notes that the panel in *Brazil – Aircraft (21.5 – Canada II)*[4] also placed on the respondent the burden of proof regarding the second paragraph of item (k) of the SCM Agreement.

21. Finally, Brazil also notes that none of the parties in this dispute made specific claims regarding the question of burden of proof in footnote 1. Therefore, in Brazil's view, this is not an issue before the Panel.

[3] Emphasis added.
[4] Panel Report – *Brazil – Aircraft (21.5 Canada II)*, paras. 5.61-5.63.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. ARTICLE 27.2 SPECIAL AND DIFFERENTIAL TREATMENT

A. Article 27.2 of the SCM Agreement

1. Article 27.2 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) provides for special and differential treatment (S&DT) applicable to certain developing country Members, which excludes them from the application of the Article 3.1(a) prohibition for export subsidies for a certain period of time. This S&DT applies to three categories of developing countries, under different conditions: (1) the least developed countries referred to in Annex VII(a); (2) the developing countries listed in Annex VII(b); and (3) the other developing countries not referred to in Annex VII.

2. Article 27.2(a) exempts the developing countries listed in Annex VII(b), including India, from the application of Article 3.1(a) until their GNP per capita reaches $1,000. When this condition is met, these developing countries become subject to the provisions applicable to other developing countries according to 27.2(b).

3. Pursuant to Article 27.2(b), the Article 3.1(a) prohibition does not apply to "other developing countries for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4"[1].

4. In Canada's view, the ordinary meaning of Article 27.2(b) is clear that the period of eight years applies from "the date of entry into force of the WTO Agreement". Furthermore, the "date of entry into force of the WTO Agreement" is a fixed date, according to Article XIV of the Marrakesh Agreement Establishing the World Trade Organization (i.e. the WTO Agreement). The WTO Agreement clearly entered into force on 1 January 1995.

5. Canada's position is supported by the Appellate Body's interpretation of Article 27.2(b). In *Brazil – Aircraft*, the Appellate Body found as follows:

> The ordinary meaning of the text of Article 27.2(b) is clear. For a period of eight years after the date of entry into force of the WTO Agreement, the prohibition on export subsidies in paragraph 1(a) of Article 3 of the SCM Agreement does not apply to developing country Members described in Article 27.2(b) – as long as they comply with the provisions of Article 27.4. […] *During the transitional period from 1 January 1995 to 1 January 2003*, certain developing country Members are entitled to the non-application of Article 3.1(a), provided that they comply with the specific obligations set forth in Article 27.4. Put another way, when a developing country Member complies with the conditions in Article 27.4, a claim of violation of Article 3.1(a) cannot be entertained during the transitional period, because the export subsidy prohibition in Article 3 simply does not apply to that developing country Member[2].

6. This jurisprudence confirms that the starting point of the eight year transitional period was the date of entry into force of the WTO Agreement, i.e. 1 January 1995, and not the date a given developing country Member graduates from paragraph (b) of Annex VII. Thus, the transitional period in Article 27.2(b) expired on 1 January 2003, in any event.

[1] Canada notes that in 2001, pursuant to Article 27.4 of the SCM Agreement, the Committee on Subsidies and Countervailing Measures established procedures for granting extensions to the transition period under Article 27.4 for certain developing country members beyond the original 8-year period (G/SCM/39). These procedures provided that Members enumerated in Annex VII(b) who had not yet reached the GNP per capita threshold could reserve their rights to make use of this extension process. It does not appear that India reserved its rights to benefit from the Article 27.4 extension process.

[2] Appellate Body Report, *Brazil – Aircraft,* para. 139 [emphasis added].

7. When the GNP per capita of a developing country Member listed in Annex VII(b) reaches $1,000, it becomes subject to the limited S&DT of Article 27.2(b). Because the period of application of this S&DT clause expired on 1 January 2003, subject to an extension having been granted, any developing country Member who graduates from Annex VII(b) after this date immediately becomes subject to the export subsidies prohibition of Article 3.1(a). In the present case, and in accordance with this mechanism, India is now subject to Article 3.1(a) as there is no debate that it has graduated from Annex VII(b).

8. This view is further strengthened by the language of Annex VII(b), which states, in relevant part that: [India] shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita had reached $1,000 per annum […]. Because the transitional period of paragraph 2(b) of Article 27 expired on 1 January 2003, the "provisions which are applicable to other developing country Members" are the export subsidies disciplines of Article 3.1(a). As such, these disciplines are now applicable to India.

B. Article 27.4 of the SCM Agreement

9. The purpose of Article 27.4 is to set out the conditions according to which developing country Members may be exempted from the application of Article 3.1(a), pursuant to Article 27.2. Therefore, the two occurrences of "the eight-year period" in Article 27.4, in the first and third sentences, refer to the same eight-year period defined in Article 27.2(b).

10. The third sentence of Article 27.4 gives developing country Members the opportunity to request an extension to maintain export subsidies beyond the expiry date of the eight-year period, provided that they enter into consultations with the SCM Committee not later than one year before the expiry of this eight-year period. Thus, developing country Members were required to enter into consultations not later than one year before 1 January 2003; meaning before 1 January 2002.

11. The "Procedures for extensions under Article 27.4 for certain developing country members"[3] ("Procedures") confirm this ordinary meaning, because they provide in Article 1(a) that Members seeking an extension must enter into consultations with the Committee on the basis of documents submitted no later than 31 December 2001. Moreover, Articles 1(c) and 2 of the Procedures provide that the extensions may be granted starting in calendar year 2003, which corresponds to the first year after the end of the eight-year period.

12. Canada considers that the third sentence of Article 27.4 and WTO Members' practice in applying these treaty terms confirm the ordinary meaning of the terms "for a period of eight years from the date of entry into force of the WTO Agreement" as referring to a period delimited by fixed start and end dates, respectively 1 January 1995 and 1 January 2003.

II. STATEMENT OF AVAILABLE EVIDENCE

13. The scope of "the statement of available evidence" required under Article 4.2 is defined by "the existence and nature of the subsidy in question", as indicated by the terms "with regard to". Therefore, the ordinary meaning of Article 4.2 is that a complainant can limit its statement of available evidence to the evidence necessary to demonstrate the existence and nature of the subsidy.

14. To require a complainant to state all evidence available to it at the time of its request for consultations would render inutile the terms "with regard to the existence and nature of the subsidy in question". Thus, this interpretation should be rejected.

III. FINANCIAL CONTRIBUTION

15. The text of footnote 1 of the SCM Agreement read in conjunction with Annex I(i) and (h) makes it clear that this provision is concerned with duties or taxes in the form of "import charges" on inputs that are consumed in the production of goods destined for export[4]. The text refers to an exemption applied to "an exported product" and to a remission or drawback applied to "imported

[3] G/SCM/39, November 20, 2001.
[4] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.98.

inputs" consumed in the production of "the exported product". This rule is clearly linked to the exported product itself and the duties and taxes applied to such a product as well as the duties and taxes applied to the inputs consumed in the exported product's production, meaning the transactions themselves. It does not allow for a general reduction of the tax burden of an exporter, as this would not meet the specific requirements of footnote 1 and the applicable Annexes.

16. With respect to duty exemptions on the importation of inputs, footnote 1 applies when these inputs are consumed in the production of a product which is subsequently exported[5]. The "exported product" in question is the one which was produced using the imported inputs subject to the duty exemption. If a Member decides to impose a limit or ceiling on the amount of duty exemptions that may be provided, this should not prevent exemptions from being applied in accordance with footnote 1 to imported inputs which are consumed in the production of exported goods up to the level of that ceiling, provided that the legal conditions in Annexes I through III are satisfied to the extent that they are applicable.

17. With respect to a scheme that exempts specified goods from customs duties and other indirect taxes while the same goods are subject to duties or taxes outside the challenged scheme, a panel cannot look at a tax measure or scheme in isolation. In the context of a scheme that exempts goods from duties and taxes, it must be determined whether an amount that would otherwise be due has been foregone or not collected by reference to some type of benchmark for comparison. This necessary process of comparing the tax treatment to an appropriate benchmark is essentially what is being referred to as the "three-step test". Considering the breadth and complexity of domestic tax systems, which generally include a multitude of tax rates and exceptions, a careful examination and analysis of the tax program in the context of the broader tax system should be done. If the evidence of a particular case shows that additional programs, taxes, duties, or exceptions may be relevant to or interact with a challenged scheme, it would be necessary for a panel to examine this evidence, taking into account the structure and organizing principles of the domestic tax system.

IV. BENEFIT FROM GOVERNMENT REVENUE FORGONE

18. As a general rule, revenue foregone will confer a benefit to the recipient. The fact that a government does not collect tax from an entity when it would normally have done so confers a benefit to that entity. This does not mean that the concepts of "financial contribution" and "benefit" are conflated. A financial contribution, in the form of revenue foregone, will first have to be identified. Once it has been identified, the question arises as to whether that financial contribution confers a benefit. The fact that the response to this question will, as a general rule, be in the affirmative when revenue foregone is at issue, does not amount to the conflation of "financial contribution" and "benefit".

19. A simple example which illustrates this point is that of a financial contribution in the form of a grant. A grant is considered to be a direct transfer of funds under Article 1.1(a)(1)(i) of the SCM Agreement. By its nature, a grant by a government confers a benefit to the recipient, in the full amount of the grant, as it consists of money being freely given to the recipient that it could not have obtained on the market. Arriving at that conclusion does not mean that the legal elements of financial contribution and benefit are wrongly conflated. It is simply a consequence of the nature of the financial contribution which confers a benefit *per se*.

V. EXCEPTIONS, DEROGATIONS AND BURDEN

20. As recognized by the Appellate Body in *US − Wool Shirts and Blouses*, the burden of proof rests upon the party, whether the complainant or the respondent, who asserts the affirmative of a particular claim or defense. When a party provides sufficient evidence to support its claim or defense, the burden of proof then shifts to the other party[6].

21. The purpose of footnote 1 of the SCM Agreement is to refine the scope of the definition of a particular financial contribution, by preventing certain types of measures to be characterized as revenue foregone.

[5] Ibid., para. 7.37.
[6] Appellate Body Report, *US − Wool Shirts and Blouses*, at para. 335.

22. Therefore, in making an affirmative claim that a measure is a subsidy within the meaning of Article 1.1, a complainant does not necessarily need to address footnote 1. Indeed, if a complainant demonstrates that the measure at issue meets all the definitional criteria of a subsidy set out in Article 1.1, it has met its prima facie burden of proof, which then shifts to the respondent to rebut.

23. Canada recalls that the burden of proof relies on the party making an affirmative claim or defense. This results from the impossibility for a party to prove a claim in the negative.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF EGYPT

Mr. Chairman, Members of the Panel,

1. Egypt thanks you for the opportunity to present its views in this dispute.

2. Egypt has provided a written submission that focuses on some key issues of systemic interest regarding the interpretation and application of Articles 3.1(a), 3.2, 27 and Annex VII of the SCM Agreement.

3. Today, Egypt will focus on the issue raised by the parties relating to the application of Article 27 and Annex VII to the SCM Agreement. As the Panel is aware, these provisions concern the Special and Differential Treatment of Developing Country Members.

4. The United States contends that India no longer qualifies for the exception provided in Article 27.2(a) on the grounds that India's Gross National Product (GNP) has exceeded US$1,000 based on the recent years for which data are available.[1]

5. As an initial matter, Egypt observes that developing countries falling within the scope of Article 27.2(b) of the SCM Agreement were granted a transitional period of eight years from the date of the entry into force of the *WTO Agreement* – i.e. from 1 January 1995 to 1 January 2003.

6. An equivalent transitional period should be available to those developing country Members that have recently graduated from the Annex VII list. It is important to recall that these developing country Members were listed in Annex VII on account of its lower level of economic development. On graduation, these developing countries have reached the threshold of US$1,000 annual GNP per capita; yet, the fact that some developing countries have (barely) exceeded that threshold does not imply that they have reached a comparable level of economic development *vis-à-vis* more advanced developing countries, let alone developed countries.

7. Accordingly, a proper interpretation of Annex VII to the SCM Agreement may not leave recently graduated developing countries in a situation where they are immediately required to eliminate their export subsidies. This would be both unfair and unreasonable. Just as more advanced developing countries had an eight-year phase-out period, so too recently graduated developing countries should avail themselves of an equivalent transitional period to allow for a smooth application of the prohibition set out in Article 3.1(a) of the SCM Agreement.

8. Moreover, recently graduated developing country Members may enjoy the opportunity provided for in Article 27.4 to enter into consultations with the SCM Committee which will determine whether an extension of the eight years period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question.

9. Egypt thus invites the Panel to interpret Article 27.2(a) and Annex VII to the SCM Agreement in the light of the second recital of the preamble of the WTO Agreement that recognizes the "need for positive efforts designed to ensure that developing countries … secure a share in the growth in international trade commensurate with the needs of their economic development". Pursuant to this mandate, Article 27.2(a) and Annex VII to the SCM Agreement may not leave developing countries unprotected upon graduation from Annex VII. Rather, these developing countries must be afforded a transitional period progressively to eliminate their export subsidies.

10. In closing, Egypt's written submission and this oral statement have focused on a few specific issues raised in this dispute. This should not be regarded as an indication that Egypt considers that the issues it has not addressed are not important. Nor does it indicate agreement, or otherwise, with any particular argument of the parties or third parties in this dispute.

[1] United States' first written submission, para. 26.

11. Egypt again thanks the Chairman and Members of the Panel for this opportunity to present its views in this dispute.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. INTRODUCTION

1. The European Union exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

2. OBSERVATIONS OF THE EUROPEAN UNION

2.1. WHETHER THERE IS A "GRADUATION" PERIOD ENVISAGED IN ARTICLE 27.2(B)

2. The wording of Articles 27.2 (b) and 27.4 of the SCM Agreement clearly does not support the interpretation provided by India.

3. To begin with, Articles 27.2(b) and 27.4 refer to exempting certain developing countries from the prohibition in Article 3.1(a), in the form of phasing out the respective subsidies, preferably in a progressive manner, "for a period of eight years from the date of entry into force of the WTO Agreement". Annex VII of the SCM Agreement provides that India "shall be subject to [...] paragraph 2(b) of Article 27 when GNP per capita has reached $1000 per annum".

4. It clearly follows from the above that should India have reached the $1000 per annum GNP per capita in the first 8 years from the date of entry into force of the WTO Agreement (1 January 1995), then it could have benefited from the exemption in Articles 27.2(b) and 27.4 for the remainder of the 8 year period.

5. This means that once a developing country has graduated out of Annex VII, Article 27.2 (b) and 27.4 apply to them. Hence, such countries have to comply with the prohibition of export subsidies after a period of 8 years from the entry into force of the WTO Agreement.

6. India's alleged understanding of Articles 27.2 (b) and 27.4 of the SCM Agreement i.e. that the phasing out period for countries graduating out of Annex VII would start from the year when they graduate cannot be reconciled with the wording of the Agreement. Annex VII (b) states that from the graduation the provision applicable to other developing countries according to Article 27.2 (b) becomes applicable, without adapting the content of those provisions or indicating that they should be applied *mutatis mutandis*.

7. Not granting a full eight year transition period to countries graduating from Annex VII at a much later date after 1 January 1995 is intentional, as those countries should have been aware of their positive economic development so that their graduation and the subsequent application of Article 3.1 (b) should not come as a surprise to them. This is even more so as graduation only occurs once the US $1000 GNP threshold has been exceeded for three consecutive years.

8. The extensions referred to in the third sentence of Article 27.4 refer to periods of time beyond the 8 year period, but such extensions do not have an impact on the interpretation of the starting date of the 8 year period, which is the date of entry into force of the WTO Agreement. In this respect, both the first and third sentences of Article 27.4 use the definite article ("the") when referring to "the eight-year period" and must therefore be referring to something that has already been identified. That something can only be "the" eight-year period referred to in Article 27.2(b), as is expressly stated in the first sentence of Article 27.4. Article 27.2 states unequivocally that the eight-year period starts on the date of entry into force of the WTO Agreement. Therefore, whilst India would benefit from the exemption in Article 27.2(a) and Annex VII as long as it remained below the GNP threshold, when that threshold was reached India's obligations and rights, like other developing country Members, were rather controlled by Article 27.2(b). Thus, India could have benefitted from

the exemption in Article 27.2(b) during the eight-year period, but once that period expired, India, like other developing countries, became subject to the obligation in Article 3.1(a). Interpreting this 8 year phasing out period as starting in the case of developing countries included in Annex VII from the year in which they graduate and not from the date of the entry into force of the WTO Agreement (as India would have it) would go *contra legem* and no means of interpretation would be able to lead to such a result.

9. The European Union considers that recourse to Article 32 of the Vienna Convention is not necessary or appropriate in the present case, as the Panel does not need confirmation of the meaning of the relevant terms in Article 27.4 and the meaning of those terms is not ambiguous or obscure.

10. For the reasons above, the interpretation suggested by India according to which developing countries that graduate out of Annex VII profit from an eight year extendable transition period from the time of graduation is not supported by a faithful reading of the Agreement.

11. Furthermore, the WTO Membership decided in the 2001 Decision on "Implementation-Related Issues and Concerns," that Annex VII includes the Members that are listed therein until their GNP per capita reaches US $1,000 in constant 1990 dollars for three consecutive years. These three consecutive years were also provided in order to address concerns of the kind expressed by India, namely that such developing countries would need a transition period to adjust (India reached the threshold in 2013, 2014, 2015 and 2016).

12. While such language was included in a Ministerial Declaration, language suggested by India and a small group of like-minded countries going against the very text of the SCM Agreement was rejected by the Membership (Negotiating Group on Rules, Amendment to Article 27.2 and 27.4 of ASCM in relation to Developing Countries Covered Under Annex VII- Communication from the Plurinational State of Bolivia, Egypt, Honduras, India and Sri Lanka). *A contrario*, the fact that such language was never adopted by the WTO Membership confirms that what India is asking for in its submissions actually amounts to expect the Panel to add to or diminish the rights and obligations of the Parties, contrary to Article 3.2 of the DSU.

13. Thus, India was obliged at least as of July 2017 to terminate any export subsidy schemes, according to Articles 3.1 (a) and 3.2 of the SCM Agreement.

2.2. WITH RESPECT TO THE BURDEN OF PROOF

14. The European Union at this stage of the proceedings, after the parties have already exchanged two sets of written submissions, there is already a good deal of evidence before the Panel. This places both the Panel and the third parties in a good evidentiary position.

15. The European Union would be cautious against a mechanistic delimitation between the effects on the burden of proof of provisions which are in the nature of a derogation and the effects of those that are in the nature of an exception.

16. There is a well-known legal principle in pretty much every legal system under the sun which says that the one who makes a positive affirmation before a court of justice bears the burden of proving it (*onus probandi incumbit actori*). The Appellate Body did not re-invent the wheel in *US - Wool Shirts and Blouses*. This principle is valid in the interpretation of the covered agreements, including the SCM Agreement.

17. The European Union also agrees with the longstanding practice that the party invoking an affirmative defence bears the burden of making its case and that it is not up to the complainant to second-guess the kind of arguments the respondent may put forward.

18. However, there are cases, and in particular certain SCM cases, when by its very nature not all the information which may be relevant is in the hands of the complainant. Rather, such information is in the custody of the Member whose measures are challenged. This distribution of available evidence needs to be taken into account when determining the respective duties of the parties to a dispute with regard to the gathering of evidence and its presentation to a panel.

19. Keeping the above considerations in mind, the European Union turns now to footnote 1 of the SCM Agreement. We already know that "footnote 1 indicates when certain measures will not constitute a subsidy". The language which is used ("not deemed"), juxtaposed to the language of Article 1.1 ("deemed") suggests that this footnote is a mere continuation of the definition of what constitutes and what does not constitute a subsidy for the purpose of the SCM Agreement. It can be compared to Article III:8(a) of GATT 1994, which is a derogation limiting the scope of the national treatment obligation.

20. Thus, footnote 1 of the SCM Agreement is rather in the nature of a derogation and not in the nature of an affirmative defence, as it is the case, for instance, with the general and security exceptions in Articles XX and XXI of GATT 1994.

21. This being said, in the circumstances of the SCM Agreement and of this particular case, the European Union considers that the existing exchange between the parties enables the Panel to make an objective assessment of the matter before it, including with regard to footnote 1 and the relevant portions of Annexes I to III of the SCM Agreement.

22. Furthermore, we point out that footnote 1 is part of the definition of a subsidy. Definitional provisions do not have to be expressly cited in consultations requests or panel requests. Rather, when a claim is made under, for example, Article 3.1(a), it is implicit that the complainant is asserting that the measure is a subsidy. The situation would be different if the "derogation" in question would limit and frame the obligation. In such a case, the "derogation" would have to be cited in the consultations request and panel request in order to be within the panel's terms of reference. If not cited, the panel would be unable to determine the claim, since the scope of the obligation would simply not have been corrected stated by the complainant.

2.3. WITH RESPECT TO THE STATEMENT OF AVAILABLE EVIDENCE

23. *First*, the adequacy of the statement of available evidence must be determined on a case by case basis.

24. *Second*, in the case of prohibited subsidies it may, indeed, often occur that the legal instruments that serve to identify the measures at issue also provide evidence of the existence of the subsidies and of their nature as subsidies.

25. *Third*, the European Union would emphasize the word "available". The evidence should be in the public domain and thus available to the complainant at that very early stage of the proceedings, when drafting a consultations request. It should not be made impossible to write consultations requests compliant with Article 4.2 of the SCM Agreement because some information is in the custody of the Member adopting the contested measures. Furthermore, during consultations Members usually ask for and receive clarifications with regard to the measures at issue, in order to improve their understanding and to attempt to obtain satisfactory adjustment of the matter.

26. In conclusion, it cannot be excluded that in certain cases the listing of the legal instruments containing the measures at issue will satisfy at the same time both the conditions in Article 4.2 of the SCM Agreement and in Article 4.4 of the DSU.

27. The text of Article 4.2 does not use the words "statement of all available evidence", but instead refers to "statement of available evidence".

28. Thus, the complainant is under an obligation to state only the evidence "available", and only to the extent that such evidence is able to serve the purpose of clarifying "the existence and nature" of the subsidy in question.

29. A complainant is required to provide evidence of facts that it asserts. In a de jure case the facts are the terms actually used in the measure at issue and the evidence is the text of that measure. Thus, no controversy should normally arise. However, in a de facto case complainant and defendant may have different views about the relevance and weight to be given to certain facts. In the opinion of the European Union, a complainant is not required to include in its "statement of available evidence" facts that it considers irrelevant. Even if they are subsequently found to be relevant, that would not invalidate the statement of available evidence or the claim.

30. Furthermore, the European Union considers that it is for the defendant to bring forward evidence of facts that it seeks to rely on for the purposes of rebutting a de facto claim. There is no obligation on the complainant to include such evidence in its "statement of available evidence". Thus, for example, if there would be a press release in which the granting authority would assert that the measure is not contingent upon export, that would be something for the defendant to rely on and adduce if it would so wish. The absence of such evidence from the statement of available evidence would not invalidate the statement or the claim. A complainant cannot be expected to anticipate what a defendant might wish to seek to rely on. Article 4.2 only requires "a" statement of available evidence. Use of the indefinite article supports the view that the statement may be tailored to the purposes of the complainant, that is, that it need only contain the evidence of the facts that the complainant seeks to rely on.

31. Finally, the European Union considers that it is also possible that, during the course of the exchange of arguments, the complainant wishes to refer to additional facts in order to rebut representations being made by the defendant, and to adduce supporting evidence for those additional facts. That such additional evidence would not be referred to in the statement of available evidence would not invalidate the statement or the claim. This would also be consistent with Article 7.2 of the SCM Agreement, which contains similar wording.

32. Only if there would be a complete absence of a statement of available evidence, or a statement that would be manifestly devoid of substance and incapable of supporting the claim, would the European Union see a procedural defect capable of vitiating the claim.

2.4. WHETHER ELEMENTS OF THE FIVE PROGRAMMES CONSTITUTE PROHIBITED SUBSIDIES

33. The European Union starts by recalling that for a subsidy to qualify as a prohibited export subsidy under the SCM Agreement three conditions should be met: (i) there must be a financial contribution by a government, (ii) conferring a benefit and (iii) being contingent upon export performance.

34. The European Union disagrees with India. The same facts and evidence may be relevant both for the determination of financial contribution and the determination of benefit. However, the two concepts remain legally distinct and are not conflated.

35. The European Union notes that in the present case companies under the Export Oriented Units and Sector Specific Schemes (EOU & SSS) and the special economic zones (SEZ) programme are required to achieve a positive Net Foreign Exchange (NFE). Furthermore, all goods produced pursuant to the EOU requirements may be destined for export. Monitoring is in place so as to ensure the fulfilment of the export condition. Failure to comply with the terms of the agreement between companies and the state may result in penal action in the case of EOU & SSS and SEZ.

36. In exchange, participating Indian companies are exempted from customs and excise duties under the EOU & SSS, while SEZ Units are entitled to a corporate income tax deduction of export earnings, exemptions from customs duty on goods imported into the SEZ, exemptions from export duties and exemptions from India's Integrated Goods and Services Tax.

37. The scenario when a Member has a scheme exempting from import duties both (1) inputs that are consumed in the production of exported products, and (2) goods that cannot qualify as "inputs that are consumed in the production of the exported product" under Annex I(i) may be of particular interest in the context of Part V of the SCM Agreement, where it is necessary to calculate the amount of the subsidy in order to calculate the rate of the countervailing duty, and hence where it is necessary to understand whether the amount of the subsidy is to be calculated by reference to the entire scheme, or only the component that falls outside footnote 1. Is it of less immediate interest in the context of Part II of the SCM Agreement because, in any event, an unsuccessful defendant will have to bring the measure into conformity with its obligations under the SCM Agreement, and this is so irrespective of whether or not the "measure" is considered to be the scheme as a whole, or only the component that falls outside the scope of footnote 1. This Panel may therefore not have to engage with this issue or do so in any detail.

38. The Appellate Body in PET found that in the context of duty drawback schemes, the financial contribution element of the subsidy (i.e. the government revenue foregone that is otherwise due) is

limited to the excess remission or drawback of import charges and does not encompass the entire amount of the remission or drawback of import charges.

39. The above interpretation would be pertinent only to the extent that the respective Indian schemes can be qualified as duty drawback schemes at all.

40. Thus, in an abstract scenario like the one invoked above, the part of the scheme which does not conform to footnote 1/Annexes II and III of the SCM Agreement would not fall under the carve out of footnote 1 (e.g. capital goods that are not 'consumed' within the meaning of the SCM Agreement). In other words, the components outside footnote 1 could amount to prohibited export subsidies. In the European Union's view, a Member cannot rely on footnote 1 to include elements exogenous to the true nature of the measures envisaged under footnote 1. Such elements or components which do not belong to footnote 1 could be assessed with regard to their conformity with the SCM Agreement.

41. In this respect, a panel could examine whether the design, structure and expected operation of such a scheme could lead to a legal characterisation as a duty drawback scheme under the SCM Agreement.

42. In that respect, the European Union recalls that the Appellate Body has previously held that the characterisation of a measure under a Member's municipal law is not dispositive (*US - Large Civil Aircraft (2nd complaint), Canada - Renewable Energy / Canada - Feed-in Tariff Program, Indonesia - Iron or Steel Products).*

43. A duty drawback system aims at refunding import duties paid (or to be paid in case of import substitution drawbacks) on imports of raw materials when those raw materials are incorporated into exported finished products. It also presupposes a verification system assessing whether expenses on raw materials that are consumed are indeed linked to exported products (e.g. excluding import duties paid on raw materials incorporated in domestically sold processed products) etc. Furthermore, there may be such circumstances that the scheme does not only suffer from an improper verification system, but it is rather a question of the very design of that scheme.

44. In a case where the design, structure and expected operation of a scheme leads to the conclusion that it cannot be characterized as a duty drawback scheme under the SCM Agreement, the entire scheme falls outside the scope of footnote 1. If the assessment indicates that the scheme is designed and operates in a manner that its footnote 1 compliant components could be severed from the non-compliant components, then only the non-compliant components would fall outside the scope of footnote 1.

45. Neither footnote 1, which refers to Annexes I to III, nor Annex I, nor Annex II, paragraphs 1 and 2, nor the introductory paragraph of Annex III are limited to countervailing duty investigations. The fact that provisions are "technical in nature" or "data driven" does not release a panel from its obligation to make an objective assessment of the matter before it, including an objective assessment of the facts, pursuant to Article 11 of the DSU.

46. The Panel should apply the normal burden of proof rules. To the extent that India is making affirmative factual assertions, India should have already brought forward evidence in support of those assertions. This is particularly so when the relevant facts and evidence are under the sole control of India. To the extent that India has failed to provide the necessary factual clarifications or evidence, the Panel should consider making use of Article 13 of the DSU in order to require India to provide the necessary information. In the absence of a response or complete response from India the Panel should draw reasonable inferences based on the information available to it.

47. In the case of footnote 1 a proper duty drawback scheme will not constitute a prohibited subsidy. According to the destination principle, formulated in the context of border tax adjustments, a product destined for export could be exempted from domestic taxes or given a rebate (or remission) by the country of export, and then taxed by the country of import.

48. Footnote 1 can be considered an expression of the destination principle in the context of the SCM Agreement. However, specific rules to the SCM Agreement clarify that there has to be a certain correlation between the exemptions/remissions and the consumption of e.g. imported inputs as per

Annexes I to III. Any system which by design or in its implementation fails to respect this correlation will amount to an export subsidy.

3. CONCLUSIONS

49. The European Union hopes that its contribution in the present case will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the SCM Agreement.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. *De facto* export contingency under Article 3.1(a) of the SCM Agreement

1. While Japan does not wish to take a specific position on the facts of the present case, Japan would like to emphasize that, first, subsidies contingent in fact upon export performance should be determined by examining how a subsidy's design and structure contribute to the existence of an incentive for a recipient to favor exports over domestic sales. In this regard, it is Japan's position, supported by WTO jurisprudence, that the export orientation of a recipient cannot be the sole supporting fact of a finding of export contingency. For example, in the present case, the fact that an enterprise's application to be an SEZ unit must include the anticipated FOB value of exports for the first five years of operation is not in and of itself an indication of the export contingency of the subsidies. Second, Japan considers that subjective statements made by government officials with regard to the reason why the subsidies were granted, alone cannot prove the export contingency of the subsidies. Accordingly, the Panel should focus on the subsidy itself and on the objective evidence surrounding the granting of the subsidy, as is required by the Appellate Body.

II. Special and differential treatment under Article 27 of the SCM Agreement

a) Articles 27.2(b), 27.4 and Annex VII(b) of the SCM Agreement

2. Japan disagrees with India's argument that Article 27.2 of the SCM Agreement is "meant to provide for an 8 year phase out period for any late Annex VII graduating country".[1] Article 27.2(b) of the SCM Agreement expressly stipulates that developing country Members that are not part of Annex VII are under an obligation to phase out their subsidies within an eight-year period "from the date of entry into force of the WTO Agreement". Articles 27.2(b) and 27.4 apply to Members that are not part of Annex VII for a maximum period of eight years after the entry into force of the WTO Agreement, i.e. until 2003. This means that Annex VII Members who graduate after 2003 can no longer benefit from Article 27.2(b) and by implication from Article 27.4.

3. Japan is mindful of the fact that a country graduating from Annex VII does not have the necessary means to remove its subsidies overnight. Nonetheless, Japan submits that these concerns have been accommodated through the extension mechanism provided for in Article 27.4 which allowed Annex VII countries that were not able to phase out their subsidies in due time, that is before 2003, to request extension periods prior to the expiration of the eight-year phase-out period, and through the 2001 Decision on "Implementation-Related Issues and Concerns", according to which a Member will not graduate from Annex VII unless their GNP per capita reaches US $1000 for three consecutive years.[2]

b) Article 27.5 of the SCM Agreement

4. The second sentence of Article 27.5 obliges Members that are allowed to maintain their subsidies by virtue of being part of Annex VII to phase out these subsidies for products in which they reach export competitiveness. If a Member graduates from Annex VII, it shall be "subject to the provisions of paragraph 1(a) of Article 3", "according to paragraph 2(b) of Article 27", as set out in Annex VII itself. Thus, by logical implication, there is no room to apply the second sentence of Article 27.5 to a country who has already graduated from Annex VII. The wording of the second sentence of Article 27.5 supports this view, as it applies only to developing country Members that are "referred to in Annex VII and which has reached export competitiveness".

[1] India's First Written Submission, para. 188.

[2] Decision adopted at the Doha WTO Ministerial Conference, Fourth Session, "Implementation-Related Issues and Concerns, paras 10.1 and 10.4 - Decision of 14 November 2001" WT/MIN(01)/17 (20 November 2001) and various addenda thereto.

III. Burden of proof

5. Japan submits that while the burden of proof for a *prima facie* case is on the complaining party, the respondent party with exclusive access to the details of the challenged measures should have an obligation to cooperate in the context of litigation. Japan considers that a complaining party should not be disadvantaged by the non-cooperation of the respondent. This position is supported by the Appellate Body in *US − Large Civil Aircraft (2nd complaint)* which has recognized that when one party has relevant evidence in its sole possession, the burden of adducing evidence must fall on that party.[3] Furthermore, the panel in *Argentina − Textiles and Apparel* stressed "the requirement for *collaboration* of the parties in the presentation of the *facts and evidence* to the panel and especially the role of the respondent in that process", adding that "the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession".[4]

6. With regard to the question of whether the burden of proof depends on the characterization of a provision as a derogation or an exception, the Appellate Body noted that "the characterization of the provision as a derogation does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision".[5] In Japan's view, who has a burden of proof for a *prima facie* case on a particular provision or part of a provision should not be determined *categorically* depending on whether it is a derogation or an exception.

IV. Government revenue foregone under Article 1.1(a)(1)(ii) of the SCM Agreement

a) Examination of whether government revenue that is otherwise due has been foregone

7. When examining a claim under Article 1.1(a)(1)(ii) of the SCM Agreement, a "three-step test" articulated by the Appellate Body[6] should be applied in order to fully comprehend the structure and principles of a Member's tax system. A complainant should not be placed at a disadvantage vis-à-vis a respondent in cases where the latter chooses not to disclose, or avoid the provision of, necessary information for the complainant's case.

8. The Appellate Body further explained that in light of the variety and complexity of domestic tax systems, an examination under Article 1.1(a)(1)(ii) "must be sufficiently flexible to adjust to the complexities of a Member's domestic rules of taxation".[7] Japan is therefore of the view that such an examination should involve a comprehensive assessment of a Member's tax system when applying the "three-step test" established by and consistently reaffirmed in WTO jurisprudence.

b) Benefit analysis in cases of foregone government revenue otherwise due

9. Japan is of the view that a benefit is conferred whenever government revenue otherwise due is foregone for the purposes of Article 1.1(a)(1)(ii) of the SCM Agreement. In accordance with standing case-law, Japan considers that in cases of foregone government revenue otherwise due, unless it falls within the scope of Footnote 1 of the SCM Agreement, the conferral of a benefit for the purposes of the SCM Agreement requires little, if any, further examination. The very word "foregone" suggests that the government has given up an entitlement to raise the revenue that it could otherwise have raised, which the market could not have possibly had. In other words, a comparison with the terms that would have been "available to the recipient on the market"[8] would thus make no sense.

[3] Appellate Body Report, *US − Large Civil Aircraft (2nd complaint),* para. 1139 (emphasis added).
[4] Panel Report, *Argentina − Textiles and Apparel*, para. 6.40 (emphasis added).
[5] Appellate Body Reports, *Canada − Renewable Energy / Canada − Feed-in Tariff Program*, para. 5.56.
[6] See, e.g. Appellate Body Reports, *Brazil - Taxation*, paras. 5.162 and 5.196; *US − Large Civil Aircraft (2nd complaint)*, paras. 812-814.
[7] Appellate Body Report, *Brazil − Taxation* para. 5.162, quoting Appellate Body Report, *US − FSC (Article 21.5 − EC)*, fn. 66 to para. 91.
[8] Panel Report, *Canada − Aircraft,* para. 9.112; see also Appellate Body Report, *Canada − Aircraft*, paras. 154 and 157; Panel Report, *Brazil − Aircraft*, para. 7.24; Panel Report, *Korea − Commercial Vessels*, para. 7.427 ("[T]here will be a 'benefit' if a financial contribution is made available on terms more favourable than those that the recipient could obtain on the market").

V. Statement of available evidence under Article 4.2 of the SCM Agreement

10. While the Appellate Body has explained that the additional requirement of Article 4.2 of the SCM Agreement is distinct from and not satisfied by the compliance with Article 4.4 of the DSU,[9] it would be illogical to expect that this was meant to refer to more than the available evidence that goes towards identifying the existence and the character or nature of the measure as a subsidy.[10] A Member should only have to identify a measure in light of the limited available evidence that will allow it to characterize the existence and nature of the measure as a subsidy.

11. Furthermore, given that "[t]he purpose of consultation shall be to clarify the facts" according to the second sentence of Article 4.3 of the SCM Agreement, and "the requirement to submit a statement of available evidence applies in the earliest stages of WTO dispute settlement, and that the requirement is to provide a 'statement' of the evidence and not the evidence itself",[11] Japan is of the view that the complainant should only supply the evidence that is necessary and sufficient with regard to the existence and nature of the alleged subsidy. Indeed, in order to comply with the requirements of Article 4.2 of the SCM Agreement in particular, the statement of evidence need not comprise "all evidence" but rather only that which is needed to assess the existence and nature of a measure as a subsidy.

[9] Appellate Body Report, *US – FSC*, para. 161.
[10] Panel Report, *US – Upland Cotton*, para. 7.88.
[11] Appellate Body Report, *US – Upland Cotton*, para. 308.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SRI LANKA

Mr. Chairman,

Thank you for the opportunity to present Sri Lanka's position as a third party to this dispute. We believe that this dispute, and the panel's decision, will have a direct impact on the interests and on key elements of the economic and development policies of Annex VII graduating countries. The stakes are equally high for all other Annex VII countries as well as the least-developed countries (LDCs) that, one hopefully not so distant day, will graduate from their LDC status to Annex VII status. In other words, what this panel will rule in this dispute has significant implications for approximately one entire third of the WTO Membership − and it is the poorest third of the WTO Membership.

The question is simple, but fundamental. Is it equitable that low-income developing countries should be deprived of the very same transition period that higher-income developing countries enjoyed for their export promotion policies for twenty years of the WTO's history? Should they be deprived of a transition period to adjust their economies and government policies to a new categorical and consequential prohibition on export promotion, which is an extremely important tool of industrial policy? Should low-income developing countries be, in this regard, placed in a worse position than higher-income developing countries?

It is evident that the answer to these questions should be "no"; it is obviously not equitable to treat poorer countries less favourably than wealthier countries. This is also a fundamental principle which has long been embodied in the WTO system − the principle of special and differential (S&D) treatment for developing countries.

Mr. Chairman, members of the panel,

It hardly needs recalling that trade plays a fundamental role in the development needs of developing countries. The United Nations Sustainable Development Goals of 2015 recognize the key role of trade as a mean of sustainable development in developing countries, in order to eradicate poverty and to address social imbalances. But the contribution of trade to GDP is still relatively low in many developing countries. For instance, the average export to GDP ratio of Annex VII countries is still below the world average of 37% and, according to World Bank statistics, has declined by 17.2% since 1995. Developing countries desperately need to diversify their products and geographical markets for their trade-led development. Attracting foreign or domestic investments to export-oriented industries is therefore a crucial development strategy for these countries, and government incentives to that effect are vital, and consistency and predictability are essential.

Mr. Chairman, members of the panel,

Your interpretation of the SCM Agreement should reflect these realities. And indeed, it is perfectly possible − indeed, compelling − to interpret the language of the relevant provisions of the SCM Agreement before you in exactly that way, using the standard interpretative tools of the *Vienna Convention*.

In legal terms, you have been requested to determine whether countries that have graduated from Annex VII should be granted the same period of 8 years to eliminate the existing export subsidies that was granted in 1995 to all non-Annex VII developing countries, pursuant to Article 27.2(b).

The 8-year period referred to in Article 27.2(b) was and remains applicable to all developing countries <u>when the prohibition of export subsidies becomes applicable to them</u>. Article 27.2(b) includes the phrase "from the date of entry into force of the WTO Agreement". However, that phrase must be understood in a broader sense, in exactly the sense it must have been understood by the drafters − <u>as referring to the point in time when the Article 3.1(a) prohibition would "kick in" for any given developing country</u>.

For countries other than those listed in Annex VII, that "kicking in" point in time was in 1995 when the WTO Agreement entered into force. That is why Article 27.2(b) explicitly refers to the entry into force of the WTO Agreement.

But for the Annex VII countries that now "emerge" from Annex VII, that point in time is precisely when they lose the Annex VII protective shield. In other words, that point in time is the moment of their graduation. The reason why Article 27.2(b) does not state that explicitly is simple: Annex VII countries were not subject to the Article 3.1(a) prohibition at the time of entry into force of the WTO Agreement, and so there was no need to provide for a carve-out for them. The countries that needed a carve-out were those in principle subject to the Article 3.1(a) prohibition, and they needed that carve-out to apply immediately, in 1995.

Had the drafters wished to deny graduating Annex VII economies the Article 27.2(b) phase-out period, they would have presumably stated so explicitly. But they did not do so. Hence, the applicability of the transition period referred to in Article 27.2(b) to now-graduating Annex VII countries from the time of their graduation, is implicit in the wording of the provision. There are other instances in the SCM Agreement of such implicit regulations compelled by simple logic. For instance, there is no explicit provision which states that an LDC graduates from its LDC status would fall under the group of countries in Annex VII with a per capita income of below 1,000 USD. But would anybody doubt that this would be the case?

The legal view put forward by Sri Lanka is also fully consistent with the logic of other S&D provisions of the SCM Agreement such as Article 27.5, which stipulates an 8-year phase-out period for individual products of Annex VII countries for which export competitiveness has been achieved. Clearly, this 8-year period did not begin in 1995; rather, it begins anytime – after 1995, today or in the future – when export competitiveness for that product has been achieved. The drafters went to great length to "cushion" the blow of the export subsidy prohibition when it comes to *one individual product*, by granting an 8-year phase out period. Does it then make sense that the same drafters would have denied the same "cushion" *to the entire economy, and the full panoply of all products*, of an Annex VII country when its economy as a whole graduates from Annex VII?

Sri Lanka accepts that the string of extensions granted by the SCM Committee under Article 27.4 beyond the original 8-year period – until 2013, with an effective ending date of 2015 – should not apply to newly-graduated countries. Thus, Sri Lanka is not asking that graduating Annex VII countries be granted a phase-out period of 20 years. These extensions were granted for the countries, and specific subsidy programmes, to which Article 27.2(b) and 27.4 were applicable at the point in time when these extensions were granted. However, that cannot mean that the basic, original 8-year transition period does not apply to newly-graduated countries today.

Mr. Chairman, members of the Panel,

Thank you for your attention to my statement. We have confidence that your interpretation of the SCM Agreement in this dispute will reflect both the clear wording as well as the sound and compelling policy arguments we have put before you today.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THAILAND

I. INTRODUCTION

1. Thailand appreciates the opportunity to present its views as a third party in this dispute.

2. In this oral statement, Thailand will focus its comments on the interpretation of Article 27 of the Agreement on Subsidies and Countervailing Measure ("SCM Agreement") and its application to developing countries Members graduating from Annex VII(b) of the SCM Agreement.

II. THE INTERPRETATION AND APPLICATION OF EXPORT SUBSIDIES DISCIPLINES TO GRADUATED ANNEX VII(B) MEMBERS

3. The United States asserts that India no longer qualifies for the exception to the prohibition of export subsidies since India's GNP per capita has reached $1,000 for three consecutive years.[1] India, on the other hand, argues that the harmonious reading of Article 27.2(b) and Annex VII(b) of the SCM Agreement demonstrates that India is entitled to eight additional years to phase out the alleged export subsidies from the point of its graduation.[2]

4. At the outset, Thailand reiterates the importance of special and differential treatment in assisting less developed country Members to integrate fully into the international trading system. To this end, special and differential treatment provisions are an integral part of WTO Agreements, providing, *inter alia*, exemptions or delays from implementing multilateral trade rules so as to allow greater policy space for less developed country Members in a manner commensurate with their development needs.

5. Having said that, Thailand notes that the interpretation of special and differential treatment provisions is subject to the same "general rule of interpretation" applicable to all legal provisions under the WTO covered agreements.[3] In particular, the WTO provisions must be read in good faith in accordance with their ordinary meaning in the context and in the light of the treaty's object and purpose.[4]

6. Thailand considers that the general rule of interpretation does not support India's reading of Article 27.2(b) and Annex VII(b) of the SCM Agreement. In Thailand's view, these provisions do not grant Members graduating from Annex VII(b) an extra eight-year phase-out period from the point of their graduation, for the following reasons.

7. Annex VII(b) of the SCM Agreement states that developing countries listed therein "shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 *when* GNP per capita has reached $1,000 per annum".[5] Article 27.2(b) stipulates "a period of eight years *from the date of entry into force of the WTO Agreement*" during which other developing country Members are exempted from the prohibition of export subsidies.[6]

8. Thailand is of the view that the ordinary meaning of the terms contained in these provisions is clear and leaves no ambiguity. As soon as the GNP per capita of a Member listed in Annex VII(b) reaches $1,000, that Member becomes subject to the disciplines in Article 27.2(b). Since the eight-year period from the date of entry into force of the WTO Agreement in that Article lapsed on 1 January 2003, graduated Annex VII(b) countries are currently prohibited from using export subsidies like other developing countries. Article 27.2(b) makes no reference to other particular

[1] The United States' first written submission, para 26.
[2] India's first written submission, paras 155-188.
[3] Article 31 of the Vienna Convention of the Law of Treaties. *See* Appellate Body Report, *US – Gasoline*, p.17.
[4] Article 31 of the Vienna Convention of the Law of Treaties.
[5] Annex VII(b) of the SCM Agreement (emphasis added).
[6] Article 27.2(b) of the SCM Agreement (emphasis added).

points of time for the exemption period, nor does it distinguish between graduated Annex VII(b) countries and other developing countries.

9. From Thailand's perspective, the fact that Article 27.4 "does not restrict the application of the 8 year period from the date of entry into force of the WTO Agreement" does not imply a special phase-out period for graduated Annex VII(b) Members.[7] The reference to "*the* eight-year period" in Article 27.4 indicates the drafters' intention that it refers to the same eight-year period starting from the date of entry into force of the WTO Agreement as appears in Article 27.2(b). Indeed, a formulation akin to "*a* period of eight years" contained in Article 27.5 could have been used if another specific point of time had been intended. Accordingly, Thailand considers that neither Article 27.2(b) nor Article 27.4 leaves a room to read into these provisions an eight-year phase-out period from the point of graduation.

10. It is worth highlighting that, compared to other developing countries, Members listed in Annex VII(b) are granted more preferential treatment in respect of subsidies disciplines. Annex VII(b) Members are exempted from the elimination of export subsidies for an indefinite period and without a phase-out obligation, as long as their GNP per capita are below $1000. Thus, this group of developing country Members enjoys greater flexibility as to whether they wish to voluntarily remove export subsidies gradually in a manner corresponding to their development, or to eliminate prohibited subsidies right upon the graduation. Even in the latter scenario, it seems unlikely that graduated Annex VII(b) Members are expected to withdraw export subsidies "overnight"[8], since the graduation would only occur when their GNP per capita reach $1,000 "for three consecutive years".[9] The preferential treatment described here reflects the "concession offered in Annex VII(b)"[10]. This is not invalidated in any way by the clear and unambiguous ordinary meaning of the terms of Article 27.2(b) described earlier.

11. Lastly, Thailand notes that the assertion that graduated Annex VII(b) Members are entitled to an eight-year period to maintain export subsidies starting from the point of graduation is difficult to reconcile with subsequent agreements or practices of WTO Membership.

12. The WTO Ministerial Conference agreed on 20 November 2001 to extend the transition period under Article 27.2(b) of the SCM Agreement to the year 2007 for certain subsidy programmes pursuant to the agreed Procedures for Extensions under Article 27.4 for Certain Developing Country Members.[11] The Procedures provides that, for an Annex VII(b) Member that has reserved rights and subsequently reaches the development threshold during the period of 2003-2007, that Member is entitled to an extension "for the remainder of the period [2003-2007]"[12]. On 27 July 2007, the General Council adopted similar procedures which allows Annex VII(b) Members graduating during the period 2008-2015 to have an extension "for the remainder of that period" after the graduation.[13]

13. These further underscore the fact that graduated Annex VII(b) Members do not have eight additional years from the point of their graduation to phase out export subsidies. Otherwise, it would have been pointless for WTO Membership to specifically grant graduated Annex VII(b) Members the transition periods referred to in these procedures, if Annex VII(b) Members had already have a right to maintain export subsidies for another eight years after their graduation. Based on the procedures mentioned-above, WTO Membership appears to share the views that the eight-year period in Article 27.4 ends on 1 January 2003, and that export subsidies maintained thereafter by developing country Members, including graduated Annex VII(b) Members, are subject to conditions which permit only certain eligible subsidies and within the prescribed timeframe.

[7] India's first written submission, para 162.
[8] India's first written submission, paras 177, 186, 187.
[9] Doha Ministerial Conference, Decision of 14 November 2001 on Implementation-Related Issues and Concerns, WT/MIN(01)/17, 20 November 2001, para. 10.1.
[10] India's first written submission, para 159.
[11] Doha Ministerial Conference, Decision of 14 November 2001 on Implementation-Related Issues and Concerns, WT/MIN(01)/17, 20 November 2001, para. 10.6; Committee on Subsidies and Countervailing Measures, Procedures for Extensions under Article 27.4 for Certain Developing Country Members, G/SCM/39, 20 November 2001.
[12] Committee on Subsidies and Countervailing Measures, Procedures for Extensions under Article 27.4 for Certain Developing Country Members, G/SCM/39, 20 November 2001, paras 6(b)-(c).
[13] General Council, Decision of 27 July 2007 on Article 27.4 of the Agreement on Subsidies and Countervailing Measures, WT/L/691, para 5(b).

III. CONCLUSION

14. For the reasons set out above, while Thailand recognizes the role of special and differential treatment in response to development needs, we do not consider that the general rule of interpretation is able to accommodate the reading that graduated Annex VII(b) Members have an additional eight years after the point of graduation to phase out prohibited export subsidies.

15. This concludes Thailand's oral statement. Thailand thanks the Panel for the consideration of its views.

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ANNEX D

PRELIMINARY RULINGS AND OTHER COMMUNICATIONS FROM THE PANEL TO THE PARTIES

ANNEX D-1

COMMUNICATION DATED 22 JANUARY 2019 FROM THE PANEL TO THE PARTIES CONCERNING THE ISSUES OF A SINGLE SUBSTANTIVE MEETING AND A PARTIALLY OPEN MEETING

22 January 2019

COMMUNICATION FROM THE PANEL ON THE WORKING PROCEDURES AND TIMETABLE

1 INTRODUCTION

1.1. This communication addresses two requests by the parties relating to the Panel's Working Procedures and timetable.

1.2. First, the Panel's Working Procedures and timetable provide for a single substantive meeting with the parties, while reserving the possibility to hold additional meetings as required. In a number of submissions, India asked the Panel to hold two substantive meetings with the parties as contemplated by Appendix 3 to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In response, the Panel confirmed its earlier decision and indicated that it would communicate its reasons in due course. In this communication, the Panel sets out the reasons for its earlier decision (section 2).

1.3. Second, the United States requested that the Panel hold a partially open meeting, making its oral statement and answers in the course of the panel meeting available for public viewing, although the oral statement and answers of the other party would not be available for public viewing. The Panel has decided to decline the United States' request for a partially open meeting (section 3).

2 SINGLE MEETING

2.1 Introduction

2.1. As set out in the Working Procedures and timetable adopted in this case, the Panel decided to hold one substantive meeting with the parties, after both parties filed their respective first and second written submissions.[1] The Panel reserved the right to reassess the situation and hold additional meetings with the parties as required.[2] In response to submissions by India, the Panel confirmed that it would proceed with the Working Procedures and timetable as adopted[3], and indicated that it would communicate the reasons for its decision in due course.[4]

2.2. Below, the Panel sets out the reasons for its earlier decision (section 2.4), after recalling the procedural background and arguments of the parties and third parties (section 2.2), and the applicable legal standard (section 2.3).

2.2 Procedural background and main arguments of the parties and third parties

2.3. On 3 August 2018, the Chairperson of the Panel, on behalf of the Panel, held a meeting with the parties to obtain their views in preparation of the Panel's draft Working Procedures and timetable, particularly considering the need to reconcile competing considerations, namely, the provision for accelerated procedures in Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the obligation to provide special and differential treatment to developing country Members, and resource constraints in the Secretariat. At that meeting, the

[1] Working Procedures (22 August 2018), paras. 3, 5, and 15-16; and timetable (22 August 2018).
[2] Timetable (22 August 2018), fn 1; Communication dated 9 October 2018 from the Panel to the parties and third parties; and Communication dated 19 October 2018 from the Panel to the parties and third parties.
[3] Communication dated 9 October 2018 from the Panel to the parties and third parties; and Communication dated 19 October 2018 from the Panel to the parties and third parties.
[4] Communication dated 19 October 2018 from the Panel to the parties and third parties.

United States proposed that the Panel hold a single meeting with the parties in this case, a proposal which India opposed.

2.4. As a means to balance the competing obligations and constraints in the particular circumstances of this case, in its draft Working Procedures and timetable sent to the parties on 8 August 2018, the Panel proposed holding a single meeting with the parties, after the filing of both parties' first and second written submissions[5], and reserved the right to schedule further meetings with the parties as required.[6] On 22 August 2018, the Panel adopted these draft Working Procedures and timetable. In response to submissions by India, on 9 and 19 October 2018 the Panel confirmed that it would proceed with the adopted Working Procedures and timetable, while reserving the right to schedule additional meetings as necessary.[7] On 19 October 2018, the Panel indicated that it would communicate the reasons supporting its decisions in due course.[8]

2.5. India objected to the Panel's approach in its comments on the draft Working Procedures and timetable[9], comments on the United States' comments[10], first written submission[11], and in communications dated 5 October and 16 October 2018[12], and sought a preliminary ruling from the Panel that an additional substantive meeting with the parties should be held before the filing of the second written submissions.[13]

2.6. In its own communications, the United States took the view that the Panel could hold a single substantive meeting with the parties, or even decide the case entirely on the basis of the parties' written submissions, without holding any substantive meeting with the parties.[14] The United States set out its arguments on the matter in its comments on the draft Working Procedures and timetable[15], comments on India's comments[16], and second written submission.[17]

2.7. Brazil commented on this matter in its third-party submission.

2.8. India argued that the Panel was required to hold two substantive meetings with the parties, in order to comply with its obligation to ensure due process, and in order to comply with Article 12.10 of the DSU. It argued that holding a single meeting with the parties would deprive India of a fair opportunity to present its arguments adequately and defend itself[18]; that the case was complex and required adequate time for oral argumentation[19]; that the DSU envisages two distinguishable stages in panel proceedings, each with a substantive panel meeting with the parties[20]; that the right to be heard in the context of proceedings conducted in a balanced and orderly manner, according to

[5] Draft Working Procedures (8 August 2018), paras. 3, 5, and 15-16; Draft timetable (8 August 2018).
[6] Draft timetable (8 August 2018), fn 1.
[7] Communication dated 9 October 2018 from the Panel to the parties and third parties; Communication dated 19 October 2018 from the Panel to the parties and third parties.
[8] Communication dated 19 October 2018 from the Panel to the parties and third parties.
[9] Communication dated 14 August 2018 from India to the Chairperson of the Panel, paras. 1-2 and 5-7.
[10] Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 1-15.
[11] India's first written submission, paras. 16-18 and 105-116.
[12] Communication dated 5 October 2018 from India to the Chairperson of the Panel; Communication dated 16 October 2018 from India to the Chairperson of the Panel.
[13] India's first written submission, paras. 18 and 105-115; Communication dated 5 October 2018 from India to the Chairperson of the Panel, pp. 1-4. See also Communication dated 16 October 2018 from India to the Chairperson of the Panel, p. 2.
[14] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 4-7; Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, para. 1.
[15] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 1-7.
[16] Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, paras. 1-8.
[17] United States' second written submission, paras. 45-52.
[18] Communication dated 14 August 2018 from India to the Chairperson of the Panel, para. 2; India's first written submission, paras. 106, 111, and 114; and Communication dated 5 October 2018 from India to the Chairperson of the Panel, pp. 2-3.
[19] Communication dated 14 August 2018 from India to the Chairperson of the Panel, paras. 2 and 5; Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 5-6.
[20] Communication dated 14 August 2018 from India to the Chairperson of the Panel, paras. 6-7; Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 11. See also, Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 12-13; and India's first written submission, para. 109.

established rules, is part of due process[21]; that Article 12.10 of the DSU requires panels to afford developing country respondents sufficient time to prepare and present their argumentation[22]; that, in the past, panels in proceedings governed by Article 4 of the SCM Agreement had held two substantive meetings with the parties[23]; that Article 21.5 proceedings, in which panels hold a single substantive meeting with the parties, are of a different nature from original panel proceedings[24]; that in the other cases where panels had held a single meeting with the parties, they had done so with the Agreement of the parties[25]; and that resource constraints in the Secretariat could not trump parties' due process rights.[26]

2.9. The United States argued that Article 4 of the SCM Agreement requires expedited proceedings, unless parties agree otherwise[27]; that its claims were "focused" and required neither two panel meetings with the parties nor one[28]; that Article 12.1 of the DSU allows panels to depart from Appendix 3 of the DSU, and that in proceedings under Article 21.5 of the DSU, where the overall timeframe is the same as that provided for in Article 4.6 of the SCM Agreement, panels routinely hold a single meeting with the parties[29]; that Article 12.10 of the DSU did not justify a departure from Article 4.6 of the DSU[30]; and that in any event the timetable provided enough opportunity for India to be heard.[31]

2.10. In its third-party submission, Brazil observed that Appendix 3 of the DSU provides for two substantive panel meetings with the parties, with the second meeting devoted to rebuttals[32]; that the Agreement of the parties is an important element to consider when deciding to deviate from Appendix 3, as there is otherwise a risk that due process will be affected[33]; that the opportunity to participate in a second substantive panel meeting is an important aspect of giving a developing country respondent sufficient time to prepare and present its argumentation as required by Article 12.10 of the DSU[34]; and that Article 4.12 of the SCM Agreement envisages halving time periods, not skipping procedural steps.[35]

2.3 The applicable legal standard

2.11. The Working Procedures in Appendix 3 of the DSU envisage a process consisting of a first exchange of written submissions, followed by a first substantive panel meeting with the parties, and a second exchange of written submissions, followed by a second substantive panel meeting with the parties.[36]

2.12. Thus, the Working Procedures in Appendix 3 contemplate two "main stages in a proceeding before a panel".[37] The first stage is devoted to each party setting out its case in chief, and the second

[21] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 11; India's first written submission, para. 105.

[22] Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 2-4; India's first written submission, paras. 18-19; and Communication dated 5 October 2018 from India to the Chairperson of the Panel, p. 2.

[23] Communication dated 14 August 2018 from India to the Chairperson of the Panel, para. 7; India's first written submission, para. 110; and Communication dated 5 October 2018 from India to the Chairperson of the Panel, p. 3.

[24] Communication dated 16 October 2018 from India to the Chairperson of the Panel, p. 1.

[25] Communication dated 14 August 2018 from India to the Chairperson of the Panel, para. 7; Communication dated 16 October 2018 from India to the Chairperson of the Panel, p. 1.

[26] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 12.

[27] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 2 and 4-6; Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, paras. 1-3 and 7; and United States' second written submission, paras. 45-46 and 50.

[28] Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, paras. 1-2.

[29] Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, para. 6; United States' second written submission, para. 47.

[30] United States' second written submission, para. 49.

[31] United States' second written submission, paras. 50-51.

[32] Brazil's third-party submission, para. 29.

[33] Brazil's third-party submission, paras. 28 and 30.

[34] Brazil's third-party submission, para. 31.

[35] Brazil's third-party submission, para. 32.

[36] Dispute Settlement Understanding, Appendix 3, paras. 5-10 and 12.

[37] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 149. See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 79.

stage is "designed to permit the rebuttal by each party of the arguments and evidence submitted by the other parties".[38] Appendix 3 envisages that each of these two stages include written submissions and a substantive meeting.

2.13. Article 12.1 of the DSU provides that "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute". Thus, panels enjoy relatively broad discretion to depart from the procedures in Appendix 3, after consulting the parties, as part of their "ample and extensive authority to undertake and to control the [panel] process … [which] is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU".[39] This discretion, while broad, is not unlimited. Its exercise cannot entail the violation of other provisions of the DSU[40], including the due process requirement embedded in Article 11 of the DSU, and other provisions such as Article 12.10 of the DSU.

2.14. Departing from the procedures in Appendix 3 would violate due process, for example, if it deprived parties of "an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules".[41]

2.15. Further, departing from the procedures in Appendix 3 would violate Article 12.10 of the DSU if by doing so a panel failed to "accord sufficient time to the [responding] developing country Member to prepare and present its argumentation".[42]

2.16. Articles 4.2 to 4.12 of the SCM Agreement are special or additional rules listed in Appendix 2 of the DSU. Pursuant to Article 1.2 of the DSU, such special or additional rules apply together with the DSU, except to the extent there is a conflict.[43]

2.17. Article 4.6 of the SCM Agreement provides that the panel report shall be issued within 90 days of the date of the establishment of the panel's terms of reference.[44] This is half the time envisaged in Article 12.8 of the DSU for ordinary panel proceedings.

2.18. To reconcile this reduced timeframe with the procedural steps envisaged by the DSU, Article 4.12 of the SCM Agreement provides that for disputes under Article 4 of the SCM Agreement, "time-periods applicable under the DSU … shall be half the time prescribed therein". That is, Article 4.12 provides for halving the time-periods applicable to each step in the proceedings.

2.4 The reasons for the Panel's decision in this case

2.19. The Panel chose to depart from Appendix 3 of the DSU, by scheduling only one substantive meeting with the parties, to be held after both parties filed their respective first and second written submissions.[45] The Panel reserved its right to schedule additional meetings with the parties if required.[46]

2.20. The Panel's choice was motivated by the need to reconcile competing considerations. First, the Panel is bound by the provision for abbreviated proceedings in Article 4 of the SCM Agreement. Second, the Panel is bound by the requirement in Article 12.10 of the DSU that it accord sufficient time for a developing country respondent to prepare and present its argumentation. The Panel abided by this requirement, in particular, by allowing four weeks for India to prepare its first written submission following the United States' first written submission, and four weeks for India to prepare its second written submission following the United States' second written submission. The Panel's timetable also provided for more than two months between the filing of submissions and the

[38] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 149.
[39] Appellate Body Report, *US – Shrimp*, para. 106. As regards fixing the timetable, Article 12.3 of the DSU provides that it is for panellists to do so, after consulting the parties to the dispute.
[40] See, e.g. Appellate Body Report, *India – Patents (US)*, para. 92.
[41] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.
[42] Dispute Settlement Understanding, Article 12.10.
[43] Appellate Body Report, *Guatemala – Cement*, para. 65.
[44] Footnote 6 to the SCM Agreement provides that the time periods set out in Article 4 "may be extended by mutual Agreement".
[45] See fn 1 above.
[46] See fn 2 above.

substantive meeting with the parties. Third, in seeking to comply with Article 4 of the SCM Agreement and Article 12.10 of the DSU, the Panel had to take into account resource constraints in the Secretariat.

2.21. After consulting the parties during the organizational meeting, as a means of balancing the considerations described above in the particular circumstances of this case, the Panel proposed Working Procedures and a timetable that envisaged a single panel meeting with the parties. The parties, as set out above, had opposite views on the matter. The United States proposed a single panel meeting and suggested that the Panel could even decide the dispute without any substantive meeting with the parties; India opposed the proposal and asked the Panel to hold two substantive meetings as contemplated in Appendix 3 to the DSU. In the circumstances of this case, the Panel decided to proceed with only one substantive meeting, while reserving the right to hold further substantive meetings with the parties if required.

3 PARTIALLY OPEN MEETING

3.1 Introduction

3.1. The United States requests that the Panel make its meeting with the parties either entirely open to public viewing or, in the event that India objects to this request, partially open, by making the oral statement and answers of the United States in the course of the meeting available for public viewing. India objects both to an open meeting and to a partially open meeting, and asks that the Panel meet with the parties in closed session.

3.2. Given that India did object to the United States' request, the remaining question before the Panel is whether to meet with the parties in closed session, or in a partially open session. Holding a partially open Panel meeting would involve making the oral statement and answers of only one of the parties (the United States) in the course of the Panel meeting available for public viewing, despite the fact that the other party to the dispute (India) opposes the request for an open meeting and does not consent to making its own oral statement and answers available for public viewing.

3.3. Below, the panel recalls the procedural background and arguments of the parties and third parties (section 3.2), and sets out the applicable legal standard (section 3.3) and its decision in this case (section 3.4).

3.2 Procedural background and main arguments of the parties and third parties

3.4. On 8 August 2018, the Panel transmitted the draft Working Procedures to the parties, pursuant to which the Panel would "meet in closed session".[47] On 14 August 2018, the United States requested the Panel to provide for the meeting(s) with the parties to be "open … to the public, either in whole or in part".[48] On 17 August 2018, India "completely oppose[d]" the United States' request.[49]

3.5. In the Working Procedures adopted on 22 August 2018, the Panel indicated that it would "revert to this issue in due course before the date of [its] meeting" with the parties.[50]

3.6. On 3 January 2019, the Panel invited third parties to express their views on the matter of holding a partially open meeting. Third parties submitted their views on 11 January 2019.

3.7. The United States argued that opening panel meetings to the public serves to heighten public confidence in the system[51]; that it is done in other international adjudicatory systems[52]; that the

[47] Draft Working Procedures (8 August 2018), para. 10.

[48] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, para. 18. See also, ibid. paras. 11-17, and Annex, Additional Working Procedures for the Panel: Open Meetings.

[49] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 21. See also, ibid. paras. 22-26.

[50] Working Procedures (22 August 2018), para. 10.

[51] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 12-13.

[52] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, para. 14.

United States has a right, under Article 18.2 of the DSU, to disclose its statements to the public, and that the United States was in essence seeking the Panel's assistance to be able to disclose its statements "contemporaneously with their utterance"[53]; and that the reasoning that led the Appellate Body in *US − Continued Suspension* to open its hearing to the public should lead this Panel to hold a partially open meeting in this case.[54]

3.8. India responded that, under Article 18.2, the United States has a right to disclose its own position only to the extent that it does not affect India's right to confidentiality[55]; that a party's right to disclose its own statements under Article 18.2 does not extend to opening panel proceedings to the public[56]; that Appendix 3 to the DSU envisages that panels meet with the parties in closed session[57]; that partially open hearings could affect the efficiency of panel proceedings[58]; and that the only applicable procedures are those established in the WTO Agreements and jurisprudence.[59]

3.9. Among the third parties, five answered the Panel's question whether the DSU "does not allow, gives discretion to, or requires a panel to accept" a request for a partially open meeting.[60] Canada, China, the European Union and Japan indicated that, under the DSU, it is within panels' discretion to decide on such a request[61], and Thailand noted that panels have "some discretion" to depart from the procedures in Appendix 3 to the DSU.[62] As to how to exercise that discretion, China and Thailand expressed deep concerns about granting a request for a partially open meeting in the absence of the consent of both parties to the dispute[63], whereas Canada and the European Union took the view that a party that does not want to make its own statements available for public viewing cannot prevent another party from doing so, provided its own right to confidentiality is respected.[64]

3.3 The applicable legal standard

3.10. Appendix 3 of the DSU provides, at paragraph 2, that "[t]he panel shall meet in closed session", and that parties and interested parties "shall be present at the meetings only when invited by the panel to appear before it". Article 12.1 of the DSU provides that "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute."

3.11. Thus, the default rule set out in the DSU is for panels to meet in closed sessions.[65] At the same time, under Article 12.1, panels may depart from Appendix 3 after consulting the parties,

[53] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, para. 15.

[54] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 16-17.

[55] Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 21 and 23.

[56] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 24.

[57] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 22.

[58] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 24.

[59] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 25.

[60] Communication dated 3 January 2019 from the Panel to the third parties, question 2. In addition to seeking third parties' view on this matter, the Panel asked the third parties whether they would wish to make their own statements and answers available to the public in the event a partially open meeting were held. (Ibid. question 1). Four third parties indicated that they would, four indicated that they would not, one answered that the question was premature, and one did not submit an answer.

[61] Communication dated 11 January 2019 from Canada to the Chairperson of the Panel; Communication dated 11 January 2019 from China to the Chairperson of the Panel; Communication dated 11 January 2019 from the European Union to the Chairperson of the Panel; and Communication dated 11 January 2019 from Japan to the Chairperson of the Panel.

[62] Communication dated 11 January 2019 from Thailand to the Chairperson of the Panel.

[63] Communication dated 11 January 2019 from China to the Chairperson of the Panel; Communication dated 11 January 2019 from Thailand to the Chairperson of the Panel.

[64] Communication dated 11 January 2019 from Canada to the Chairperson of the Panel, pp. 1-2; Communication dated 11 January 2019 from the European Union to the Chairperson of the Panel, p. 2. Japan noted that Article 18.2 of the DSU recognizes that the DSU does not prevent a party from disclosing statements of its own position to the public. (Communication dated 11 January 2019 from Japan to the Chairperson of the Panel).

[65] See, e.g. Panel Report, *US − Continued Suspension*, para. 7.50:

> The Panel understands [paragraph 2 of Appendix 3] to mean that it shall always meet *in camera*, whether or not the parties and/or interested parties have been invited to appear before it. No reference is made in that provision to other Members or to the general public.
> (emphasis original)

which is part of panels' "ample and extensive authority to undertake and to control the [panel] process … [which] is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU".[66]

3.12. A panel's discretion to depart from the Working Procedures in Appendix 3 has limits. In particular, it "does not extend to modifying the substantive provisions of the DSU"[67], including the provisions regarding confidentiality set out in Article 18.2 of the DSU, and the due process requirement embedded in Article 11 of the DSU.[68]

3.13. The second sentence of Article 18.2 of the DSU recognizes that the DSU does not preclude a Member "from disclosing statements of its own position to the public". At the same time, the third sentence of Article 18.2 requires Members to "treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential". Therefore, Members' right to make their "statements of their own position" public, under the second sentence, finds its limit in their duty to maintain the confidentiality of information designated by other Members as confidential, under the third sentence. Panels and the Appellate Body have read these two provisions as referring not only to written submissions, but also to the statements of Members during hearings.[69]

3.14. Turning to due process, this is "a fundamental principle of WTO dispute settlement" which "finds reflection in the provisions of the DSU", and is "intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard … in the context of proceedings conducted in a balanced and orderly manner".[70]

3.15. Thus, panels have discretion, pursuant to Article 12.1 of the DSU, to depart from Appendix 3 and open their substantive meetings with the parties to the public, provided they consult the parties to the dispute, and provided they do not infringe other provisions of the DSU, including the requirement to afford due process, and the provisions of Article 18.2 of the DSU.

3.4 Whether to grant a partially open hearing in this case

3.16. As set out above, Article 12.1 gives discretion to panels to depart from Appendix 3, which otherwise provides for meetings "in closed session". To date, with the exception of three proceedings, all in the same dispute[71], WTO adjudicators have only opened substantive meetings for public viewing when all parties to the dispute in question agreed.[72] In the present case, one of

[66] Appellate Body Report, *US − Shrimp*, para. 106.

[67] Appellate Body Report, *India − Patents (US)*, para. 92.

[68] A WTO adjudicator must also ensure the prompt settlement of disputes pursuant to Article 3.3 of the DSU, and "the careful and efficient discharge, or the integrity, of the adjudicative function". (Panel Reports, *US − Tuna II (Mexico) (Article 21.5 − US) / US − Tuna II (Mexico) (Article 21.5 − Mexico II)*, para. 7.31). See also, ibid. paras. 7.28-7.30.

[69] See, e.g. Panel Report, *US − Continued Suspension*, para. 7.50; and Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 4 (discussing the opening of appellate hearings to the public).

[70] Appellate Body Report, *Thailand − Cigarettes (Philippines)*, para. 147.

[71] Panel Reports, *US − Tuna II (Mexico) (Article 21.5 − US) / US − Tuna II (Mexico) (Article 21.5 − Mexico II)*, paras. 7.16-7.31; and Decision by the Arbitrator, *US − Tuna II (Mexico) (Article 22.6 − US)*, paras. 2.17-2.31. On appeal, the Appellate Body found it unnecessary to rule on the issue, while indicating that this did not constitute an endorsement of the panel's decision to hold a partially open meeting. (Appellate Body Reports, *US − Tuna II (Mexico) (Article 21.5 − US) / US − Tuna II (Mexico) (Article 21.5 − Mexico II)*, para. 6.320 and fn 901). These three proceedings, like the present case, involved a request for a partially open meeting. In *US − Upland Cotton (Article 21.5 − Brazil)* and *US − OCTG (Korea)*, the same type of request was rejected. (Panel Reports, *US − Upland Cotton (Article 21.5 − Brazil)*, para. 8.20; and *US − OCTG (Korea)*, Annex E-1, paras. 1.2 and 3.1-3.4).

[72] See, e.g. Panel Report, *US − Continued Suspension*, para. 7.50. With reference to the partly different legal framework applying to appellate proceedings, see also, e.g. Appellate Body Reports, *US − Continued Suspension*, Annex IV; and *US − COOL (Article 21.5 − Canada and Mexico)*, paras. 1.22-1.23. The question of the consent of all parties to the dispute has been treated differently from that of the consent of third parties: panels and the Appellate Body have consistently held that objections from third parties did not preclude the opening to public viewing of those parts of a hearing that did not involve the objecting third parties. (See e.g. Panel Report, *US − Continued Suspension*, para. 7.40; and Appellate Body Reports, *Canada − Continued Suspension*, Annex IV, paras. 6, 7, and 9; *US − Continued Suspension*, Annex IV, paras. 6, 7, and 9; and *US − Continued Zeroing*, Annex III, para. 6). In *Canada − Continued Suspension* and *US − Continued Suspension*, the Appellate Body distinguished the "relationship between the participants and the Appellate Body" from the "relationship between the third participants and the Appellate Body", and reasoned

the two parties has vigorously objected to opening the hearing to public viewing, in whole or in part. In view of these considerations, the Panel has decided to decline the United States' request that it depart from the rule in Appendix 3, paragraph 2, of the DSU.

that third participants cannot invoke confidentiality "as it applies to their relationship with the Appellate Body" to "bar the lifting of confidentiality … in the relationship between the participants and the Appellate Body". (Appellate Body Reports, *Canada – Continued Suspension*, Annex IV, paras. 6-7; *US – Continued Suspension*, Annex IV, paras. 6-7).

ANNEX D-2

COMMUNICATION DATED 22 JANUARY 2019 FROM THE PANEL TO THE PARTIES CONCERNING THE PANEL'S TERMS OF REFERENCE, THE APPLICABILITY OF ARTICLE 4 OF THE SCM AGREEMENT AND THE STATEMENT OF AVAILABLE EVIDENCE

22 January 2019

PRELIMINARY RULING BY THE PANEL

1 INTRODUCTION

1.1. In this communication, the Panel addresses three preliminary ruling requests by India. India requested the Panel to rule (a) that the United States' request for the establishment of the Panel does not meet the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU); (b) that the provisions of Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) cannot, at this stage, apply to the dispute before the Panel; and (c) that the statement of available evidence in the United States' request for consultations does not meet the requirements of Article 4.2 of the SCM Agreement.

1.2. For the reasons set out below, the Panel rules that the United States' request for the establishment of the Panel meets the requirements of Article 6.2 of the DSU (section 2).

1.3. The Panel declines to rule at this stage that Article 4 of the SCM Agreement does not apply to this dispute and instead defers its decision on this matter (section 3). The Panel also declines to rule at this stage on whether the statement of available evidence meets the requirements of Article 4.2 of the SCM Agreement and instead defers its decision on this matter (section 4).

2 TERMS OF REFERENCE

2.1 Introduction

2.1. In its first written submission, India has sought a preliminary ruling from the Panel that the United States' panel request does not meet the requirements of Article 6.2 of the DSU. India has challenged the sufficiency of the panel request in its entirety. According to India, for all measures and claims, the panel request (a) fails to identify the specific measures at issue; and (b) fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[1]

2.2. We will begin our consideration of India's request by recalling the applicable legal standard under Article 6.2 of the DSU (section 2.2). We will then apply that legal standard to the panel request in this case (section 2.3), beginning from whether the panel request properly identifies the specific measures at issue (section 2.3.1), and turning then to whether it sets out a sufficient summary of the legal basis of the complaint (section 2.3.2).

2.2 The applicable legal standard under Article 6.2 of the DSU

2.3. Article 6.2 of the DSU sets out the requirements applying to requests for the establishment of a panel. The sufficiency of a panel request, judged according to the standard set out in Article 6.2, is one of those issues of such a "fundamental nature" that panels must deal with them and satisfy themselves that they have the authority to proceed, even, "if necessary, on their own motion".[2]

[1] India's first written submission, para. 19; see also ibid. paras. 16 and 20-70.

[2] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36. See also, e.g. Appellate Body Reports, *US – Carbon Steel*, para. 123; and *EC – Large Civil Aircraft*, para. 791.

2.4. Article 6.2 of the DSU provides, in relevant part, that panel requests:

> [S]hall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2.5. Accordingly, Article 6.2 "sets out two principal requirements: (i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[3] Together, the measures and the claims identified in the panel request form "the matter referred to the DSB" under Article 7.1 of the DSU.[4]

2.6. Article 6.2 serves the fundamental functions of "establishing and delimiting the panel's jurisdiction and serving the due process objective of notifying the respondent and third parties of the nature of the case".[5] The need for these two functions to be fulfilled is the very reason why it is "important that a panel request be sufficiently precise".[6]

2.7. The specific measure at issue is "the object of the challenge, namely, the measure that is alleged to be causing the violation of an obligation contained in a covered Agreement".[7] The requirement to identify the specific measures at issue "means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request"[8]; further, "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity as to indicate the nature of the measure and the gist of what is at issue."[9]

2.8. Assessing whether a request identifies the specific measures at issue "may depend on the particular context in which those measures exist and operate", and "involves, by necessity, a case-by-case analysis since it may require examining the extent to which those measures are capable of being precisely identified".[10] For example, whether a measure is identified with sufficient specificity may "depend on the extent to which that measure is specified in the public domain".[11]

2.9. Whether a panel request identifies a measure with sufficient specificity is not necessarily dependent on how multi-faceted the measure at issue is, or on how lengthy the relevant legal instruments are.

2.10. In *EC − Bananas III*, the Appellate Body agreed with the panel that the European Communities' regime for the importation of bananas, a complex measure, had been identified with sufficient specificity by the language in the panel request that referred to "a regime for the importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures,

[3] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.12. See also, e.g. Appellate Body Reports, *Argentina − Import Measures*, para. 5.39; *EC and certain member States − Large Civil Aircraft*, para. 639; *US − Continued Zeroing*, para. 160; *EC − Selected Customs Matters*, para. 129; and *US − Carbon Steel*, para. 125.

[4] Appellate Body Report, *Argentina − Import Measures*, para. 5.39. See also, e.g. Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 639.

[5] Appellate Body Report, *Argentina − Import Measures*, para. 5.39 (referring to Appellate Body Report, *US − Countervailing and Anti-Dumping Measures (China)*, paras. 4.6-4.7). See also, e.g. Appellate Body Reports, *EC and certain member States − Large Civil Aircraft*, paras. 639-640; *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 108; *EC − Selected Customs Matters*, para. 130; *EC − Computer Equipment*, para. 68 (observing that whether the terms it was examining were sufficiently specific under Article 6.2 depended "upon whether they satisfy the purposes of the requirements of that provision"); and *US − Continued Zeroing*, para. 161; and Panel Report, *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EC)*, para. 7.374.

[6] Appellate Body Report, *EC − Bananas III*, para. 142.

[7] Appellate Body Report, *EC − Selected Customs Matters*, para. 130. See also, e.g. Appellate Body Report, *Argentina − Import Measures*, para. 5.40.

[8] Appellate Body Report, *US − Continued Zeroing*, para. 168.

[9] Appellate Body Report, *US − Continued Zeroing*, para. 169.

[10] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 641. See also Appellate Body Report, *Argentina − Import Measures*, para. 5.41.

[11] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 648. See also, ibid. paras. 646-647.

including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime".[12]

2.11. In *EC – Selected Customs Matters*, the United States had challenged four European Communities' regulations that "cumulatively contain[ed], literally, thousands of different provisions … relate[d] to a vast array of different customs areas, and [could] entail administration in a multitude of diverse ways"[13], as well as their implementing measures and other related measures. The panel request "ma[de] it clear that the United States [did] not challenge … the substantive content of [those] legal instruments … but their administration collectively".[14] The Appellate Body found that, with regard to the four identified regulations, "the specificity requirement in Article 6.2 of the DSU … [was] met", because "[f]or each of these instruments, a specific citation is provided", and "the panel request indicate[d] clearly that the United States was challenging the manner in which these legal instruments are administered collectively".[15]

2.12. As to what may constitute a "measure" identified in the panel request, "[a]s long as the specificity requirements of Article 6.2 are met, [there is] no reason why a Member should be precluded from setting out in a panel request 'any act or omission' attributable to another Member as the measure at issue."[16] Article 6.2 "does not impose any additional requirement … that a complainant must, in its request for establishment of a panel, demonstrate that the identified measure at issue … *can violate* … the relevant obligation".[17]

2.13. Turning now to the legal basis of the complaint, i.e. the claims[18], this "pertains to the specific provision of the covered Agreement that contains the obligation alleged to be violated".[19] The brief summary of the legal basis must "aim[] to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[20] This summary must be "sufficient to present the problem clearly", in particular so that the respondent knows "what case it has to answer, and what violations have been alleged so that it can begin preparing its defense", and so that third parties are "informed of the legal basis of the complaint".[21] For the summary of the legal basis to present the problem clearly the panel request must, in particular, "'plainly connect' the challenged measure(s) with the provision(s) claimed to have been infringed such that a respondent can 'know what case it has to answer, and … begin preparing its defence'".[22]

2.14. As a "minimum prerequisite", to provide a brief summary of the legal basis the complainant must identify "the treaty provisions claimed to have been violated by the respondent".[23] There may be situations where such identification of the treaty provisions is enough[24], but this will "not always be enough".[25] For example, it may not be enough "where the Articles listed establish not one single, distinct obligation, but rather multiple obligations".[26] The question "whether the mere listing of the Articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis … tak[ing] into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request

[12] Appellate Body Report, *EC – Bananas III*, para. 140.
[13] Panel Report, *EC – Selected Customs Matters*, para. 7.30.
[14] Appellate Body Report, *EC – Selected Customs Matters*, para. 151.
[15] Appellate Body Report, *EC – Selected Customs Matters*, para. 152. The Appellate Body conversely found that "the phrase 'implementing measures and other related measures' [did] not 'identify the specific measures at issue' as required in Article 6.2 of the DSU". (Ibid. fn 369).
[16] Appellate Body Report, *EC – Selected Customs Matters*, para. 133.
[17] Appellate Body Report, *Australia – Apples*, para. 423. (emphasis original)
[18] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.
[19] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.
[20] Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (emphasis original)
[21] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[22] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162); see also, e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.39; and *China – Raw Materials*, para. 226.
[23] Appellate Body Reports, *Korea – Dairy*, para. 124; *EC – Bananas III*, para. 142. See also, e.g. Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14.
[24] See, e.g. Appellate Body Report, *EC – Bananas III*, para. 141.
[25] Appellate Body Report, *Korea – Dairy*, para. 124.
[26] Appellate Body Report, *Korea – Dairy*, para. 124. See also, e.g. Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.14-5.15.

simply listed the provisions claimed to have been violated."[27] A respondent alleging that a "mere listing of articles" in the panel request "prejudiced its ability to defend itself" may have to corroborate that allegation with "supporting particulars" as to how that was the case.[28]

2.15. The legal basis of the complaint, i.e. the claims, must be distinguished from the complainant's arguments, which need not be set out in the panel request.[29] The legal basis of the complaint refers to "a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular Agreement".[30] In contrast, the arguments are "adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision … [and] are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties".[31]

2.16. In a prior dispute involving claims under Articles 3.1(b) and 3.2 of the SCM Agreement, the panel expressed the view that "an explanation about … the type of subsidy at issue … the granting or maintaining of that subsidy, the use of domestic over imported goods, and the notion of contingency" would be "the … subject matter of the *arguments*".[32]

2.17. In assessing the sufficiency of the panel request, a panel must "ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".[33] Ensuring compliance with the spirit of Article 6.2 of the DSU requires ensuring the panel request fulfils its two purposes, which, to recall, are to define the jurisdiction of the panel and to "serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response".[34]

2.18. The assessment of the sufficiency of the panel request must be based on the panel request on its face, read as a whole, on the basis of the language used[35], and "as it existed at the time of its filing".[36] Therefore, defects in the panel request cannot be cured by the parties' subsequent submissions[37], although "subsequent events in [the] panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request".[38]

2.19. The requirement to assess the sufficiency of the panel request on the face of the measure does not mean that the panel is precluded from including in its assessment documents that are referenced in the panel request, but whose text is not reproduced in the panel request itself. As the Appellate Body has explained:

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[27] Appellate Body Report, *Korea − Dairy*, para. 127.

[28] Appellate Body Report, *Korea − Dairy*, para. 131.

[29] Appellate Body Reports, *EC − Selected Customs Matters*, para. 153; *Korea − Dairy*, paras. 123 and 139; and *EC − Bananas III*, para. 141.

[30] Appellate Body Report, *Korea − Dairy*, para. 139. See also, e.g. Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.14; and Communication from the Panel dated 25 May 2012, *Canada − Renewable Energy / Canada − Feed-in Tariff Program*, para. 20.

[31] Appellate Body Report, *Korea − Dairy*, para. 139. See also, e.g. Panel Report, *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EC)*, para. 7.381.

[32] Communication from the Panel dated 25 May 2012, *Canada − Renewable Energy / Canada − Feed-in Tariff Program*, para. 22. (emphasis original)

[33] Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 108 (referring to Appellate Body Reports, *EC − Bananas III*, para. 142; *US − Continued Zeroing*, para. 161; *US − Carbon Steel*, para. 127; *US − Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; and *China − China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.13).

[34] Appellate Body Report, *US − Continued Zeroing*, para. 161. See also para. 2.6 above.

[35] Appellate Body Reports, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 108 (referring to Appellate Body Reports, *EC − Bananas III*, para. 142; *US − Continued Zeroing*, para. 161; *US − Carbon Steel*, para. 127; *US − Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169); and *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.13.

[36] Appellate Body Report, *Argentina − Import Measures*, para. 5.42.

[37] Appellate Body Reports, *Argentina − Import Measures*, para. 5.42; *EC and certain member States − Large Civil Aircraft*, para. 642; and Panel Report, *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EC)*, para. 7.375.

[38] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 642. See also, e.g. Appellate Body Report, *Argentina − Import Measures*, para. 5.42; and Panel Report, *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EC)*, para. 7.375.

> The term "on its face" … must not be so strictly construed as to preclude automatically reference to sources that are identified in its text, but the contents of which are accessible outside the panel request document itself.
>
> It is common practice, for example, for panel requests identifying legislation, regulations, or other similar instruments as measures at issue to provide information that enables the respondent and potential third parties to access the text of the measures themselves, rather than to copy the entire text of these instruments into the body of the panel requests, or to attach them as annexes. Such information may consist of the title, date of enactment or entry into force, the official number of the law or regulation, and the citation to the government regulatory bulletin in which it was published.
>
> …
>
> So long as a panel request seeks to identify the specific measure at issue through reference to a source where that measure's contents may readily be found and accessed, such contents may be the subject of scrutiny in assessing whether that request identifies the specific measures at issue within the meaning of, and in conformity with, Article 6.2 of the DSU.[39]

2.20. Having recalled the standard set out in Article 6.2 of the DSU, we now turn to applying it to the panel request before us.

2.3 Whether the United States' panel request meets the applicable legal standard

2.21. To recall, India argues that the panel request fails to identify the specific measures at issue and fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly[40], thus failing to fulfil the requirements of Article 6.2 of the DSU. We discuss, first, whether the panel request identifies the specific measures at issue as required by Article 6.2 (section 2.3.1); and, second, whether the panel request provides a summary of the legal basis meeting the requirements of Article 6.2 (section 2.3.2).

2.22. Before doing so, we recall that the assessment of the sufficiency of the panel request must be based on the panel request on its face, read as a whole[41], but that this includes the text of legal instruments that are referenced in the panel request through "information that enables the respondent and potential third parties to access the text of the measures themselves".[42]

2.23. The United States' panel request identifies twenty-five legal instruments[43] by reference to their title and date, as well as, in most cases, the issuing authority and, in some cases, the citation to a legal gazette or other repository where the legal instrument can be found. As the Panel has verified, these references are sufficient to locate and access the text of the measures themselves.[44] The Panel has therefore included the text of these legal instruments in its assessment of the sufficiency of the panel request.

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[39] Appellate Body Report, *Argentina – Import Measures*, paras. 5.48-5.49 and 5.51. See also, ibid. para. 5.57.

[40] India's first written submission, para. 19. See also, ibid. paras. 20-70.

[41] Appellate Body Reports, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108 (referring to Appellate Body Reports, *EC – Bananas III*, para. 142; *US – Continued Zeroing*, para. 161; *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169); and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13.

[42] Appellate Body Report, *Argentina – Import Measures*, paras. 5.48-5.51. See also, ibid. para. 5.57.

[43] Instruments Nos. 1-5, 7-15, and 17-27 (items 6 and 16 are cross-references to Instruments Nos. 1-5).

[44] The Panel located these legal instruments by conducting a simple web search for the identifiers provided in the panel request. Annex A to this preliminary ruling lists the web pages at which the Panel was able to access the referenced legal instruments; for ease of reference, in a separate column, Annex A also indicates which exhibits, if any, correspond to these legal instruments. Equally, for ease of reference, the corresponding exhibit, if any, is indicated in the relevant footnotes.

2.3.1 Whether the United States' panel request identifies the specific measures at issue

2.24. The description of the measures that the United States provided in its panel request comprises two parts. First, the panel request states that it "appears that India provides export subsidies through" five named programmes, which the United States lists in its request.[45] Second, the panel request explains that "[t]he export subsidies provided through these programs are reflected in legal instruments that include [those listed in the panel request], operating separately or collectively, as well as any amendments, or successor, replacement, or implementing measures"[46], and it goes on to list such legal instruments for each of the five programmes. The panel request, therefore (a) indicates that the measures appear to be export subsidies; (b) states the name of the programmes under which the alleged export subsidies are provided; and (c) cites a number of legal instruments that, operating separately or collectively, reflect those alleged subsidies.

2.25. We now examine, for each program, whether the panel request sufficiently identified the measure at issue.

2.3.1.1 The First Programme: Export Oriented Units Scheme and sector specific schemes, including Electronics Hardware Technology Park Scheme and Bio-Technology Parks Scheme

2.26. The first programme through which, according to the panel request, India "appears … [to] provide[] export subsidies" is described, in that request, as "Export Oriented Units Scheme and sector specific schemes, including Electronics Hardware Technology Park Scheme and Bio-Technology Parks Scheme"[47] (the First Programme). The panel request lists five instruments in connection with this programme, as "legal instruments" in which the measure is "reflected … operating separately or collectively".[48] These five instruments are listed as Nos. 1-5.[49]

2.27. Instrument No. 1 is described as "*Foreign Trade Policy [1st April 2015 − 31st March 2020]* (Ministry of Commerce and Industry, Notification 01/2015-2020, April 1, 2015), as modified by *Foreign Trade Policy [1st April, 2015-31st March, 2020] Mid-Term Review, Updated As On 5th December, 2017* (Ministry of Commerce and Industry, Notification 41/2015-2020, December 5, 2017)" (FTP). It is a lengthy and multifaceted document, setting out provisions relating to trade that range, just by way of example, from trade facilitation to complaints from foreign buyers regarding the quality of products exported from India.[50]

2.28. Chapter 6 of the FTP, however, provides specifically for the measures comprising the First Programme. Chapter 6 is entitled "Export Oriented Units (EOUs), Electronics Hardware Technology Park (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs)". This corresponds largely with the name of the schemes listed by the United States as the First Programme, except that (a) the United States' panel request refers to "sector-specific schemes, including" those named in the request; and (b) chapter 6 of the FTP covers a fourth scheme, namely, "Software Technology Parks", which is not named in the panel request.

2.29. Chapter 6 of the FTP comprises 29 sections, four of which are no longer in force.[51] Section 6.00 explains that "[u]nits undertaking to export their entire production of goods and services (except permissible sales in DTA [(domestic tariff area)]) may be set up under" the schemes provided for in that chapter, and sets forth the schemes' objectives. Section 6.08 sets forth exceptions to the requirement that "the entire production" of units under the schemes in chapter 6 be exported.

2.30. Section 6.01 addresses "Export and Import of Goods". It sets forth rules on (a) what the units established under these schemes may export, import or procure, and under what conditions;

[45] United States' panel request, p. 1.
[46] United States' panel request, p. 1.
[47] United States' panel request, p. 1.
[48] United States' panel request, p. 1.
[49] United States' panel request, p. 1.
[50] Foreign Trade Policy, (Exhibit USA-3), chapter 1b, section 2.06 and chapter 8, respectively.
[51] Sections 6.06 and 6.26-6.28 are marked "deleted".

(b) exemptions from duties and taxes for import or procurement of goods[52]; and (c) the applicability of the "State Trading regime" to EOU manufacturing units.[53]

2.31. Sections 6.02 and 6.03 bring the importation of second hand capital goods and the leasing of capital goods within the remit of the schemes in chapter 6. Section 6.16 provides that units may be set up under these schemes also for reconditioning, repair, and re-engineering, but that certain provisions of chapter 6 shall not apply to these activities.

2.32. Section 6.04 sets out a net foreign exchange earnings requirement for units under the schemes in chapter 6; section 6.09 lists "supplies effected from" such units that count for fulfilment of the positive net foreign exchange requirement; and section 6.10 explains that such units may export through others subject to certain conditions.

2.33. Section 6.11 sets forth "benefits", "exemption[s]" and other entitlements of units under the schemes in chapter 6 for supplies from the domestic tariff area. And section 6.12 provides for "Other Entitlements" of units under the schemes in chapter 6. There are six such other entitlements, of rather varying nature.

2.34. Section 6.05 provides for the process of application and approval of units under the schemes in chapter 6; section 6.18 provides for leaving the schemes; section 6.19 provides for conversion of units from a scheme to another and from domestic tariff area units into units under one of the schemes; section 6.20 contains provisions on monitoring of the net foreign exchange requirement; section 6.24 envisages implementing powers; and section 6.25 provides for "Revival of Sick Units".

2.35. Chapter 6 also sets forth rules on (a) transfer of manufactured goods between units (section 6.13); (b) subcontracting of production processes (section 6.14); (c) material that units were unable to use and capital goods that have become "obsolete/surplus" (section 6.15); (d) replacement/repair goods (section 6.17); (e) export through exhibitions and the like (section 6.21); (f) personal carriage of goods (section 6.22); and (g) imports and exports by post (section 6.23).

2.36. Thus, as a whole, chapter 6 sets out (a) the conditions for setting up units under the four schemes named in this chapter, three of which are the schemes named in the panel request; (b) rules on what these units may and may not do and the extent to which the entitlements vary depending on certain circumstances; (c) the "entitlements" of these units; and (d) rules for the programme's administration. Therefore, chapter 6 describes a relatively cohesive regime regarding the programme named in the panel request.

2.37. Instrument No. 2, "Appendices and Aayat Niryat Forms"[54], sets forth numerous forms for the administration of schemes provided for in the FTP, including those in chapter 6 of the FTP, as well as more detail on the schemes set out in chapter 6 of the FTP such as approval criteria, and miscellaneous provisions, e.g. on sale of surplus power.[55]

2.38. Instrument No. 3 bears the Handbook of Procedures, as revised pursuant to section 1.03 of the FTP, which sets out procedures to be followed in the implementation of, among others, the FTP.[56] Chapter 6 of the Handbook of Procedures bears almost exactly the same title as chapter 6 of the FTP, namely, "Export Oriented Units (EOUs), Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs), Scheme [sic] and Bio-Technology Parks (BTPs)". To recall, these schemes, except for the Software Technology Parks Scheme, are those named in the panel request as comprising the First Programme.

2.39. Chapter 6 of the Handbook of Procedures sets out more detailed rules than those in the FTP on the requirements that units must comply with in order to benefit from the schemes, as well as rules on the administration of the programme, including on the approval process, competent authorities, and timeframes to decide upon applications. This chapter does not appear to provide

[52] Foreign Trade Policy, (Exhibit USA-3), subsections 6.01(d)(ii), (d)(iii), (f), and (k).
[53] Foreign Trade Policy, (Exhibit USA-3), subsection 6.01(e).
[54] Appendices and Aayat Niryat forms, (Exhibit USA-6).
[55] "No duty shall be required to be paid on sale of surplus power from an EOU unit to another EOU/SEZ unit". (Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6B, para. 4(ii)).
[56] Handbook of Procedures, (Exhibit USA-5), p. 1; Foreign Trade Policy, (Exhibit USA-3), section 1.03.

more detail about the entitlements of units under the schemes, although it does provide that "[a]pplication for grant of all entitlements may be made to the DC [(Development Commissioner)] concerned".[57]

2.40. Instrument No. 4 amends some of the "sector-specific requirements for EOUs" in appendix 6B (to the FTP), which is part of Instrument No. 2. The amendment relates to the eligibility under EOU schemes of activities pertaining to the reprocessing of textiles. Instrument No. 5 removes the bond requirement from certain provisions relating to the schemes comprising the First Programme.[58]

2.41. Thus, the panel request identifies the alleged export subsidies comprising the first measure through a combination of (a) the names of the programmes under which the alleged subsidies are provided; and (b) the legal instruments reflecting the alleged subsidies. While some of these legal instruments are broad, the combination of the programmes' names and the legal instruments identifies the relevant portions of those legal instruments. Further, the legal instruments set out the manner of operation of the programmes, including conditions of eligibility, manner of administration, and entitlements under each programme.

2.42. Chapter 6 of Instrument No. 1, the FTP, describes not one, but a number of entitlements available to units under the schemes named in this chapter.[59] This raises the question of whether the complainant should have singled out each entitlement in its panel request in order to identify the measure at issue. India argues that "the precise incentive offered within the 'scheme' … must be considered as the measure at issue".[60] India also argues that the panel request is akin to the portion of the panel request in *Australia − Apples* that was held by that panel to be outside its terms of reference.[61]

2.43. In *Australia − Apples*, New Zealand's panel request challenged "measures specified in and required by Australia pursuant to the *Final import risk analysis report for apples from New Zealand* [(FIRA)]", and, "[i]n particular," a list of 17 specific requirements.[62] The list of measures was followed by a listing of several provisions of the SPS Agreement alleged to be violated.[63] The panel in that case found that, while the 17 requirements had been identified with sufficient specificity to fall within its terms of reference, "given the length and complexity of Australia's *FIRA* … the broad reference in New Zealand's panel request to the 'measures specified in and required by Australia pursuant to the [FIRA]' fail[ed] to satisfy the requirement of sufficient clarity in the identification of the … measure[]".[64]

2.44. However, the situation in the present case is not the same as that of the "broad reference" in *Australia − Apples*. In the present case, the complainant has explained that it is challenging export subsidies under three named programmes, and has listed legal instruments in which those subsidies are reflected. This is not the same as referring to "measures specified in and required by [a Member] pursuant to a [risk analysis]"[65], because the latter formulation leaves entirely open the type of measures that could be "specified and required", mentioning only that the measures will have some connection ("specified in", or "required … pursuant to") to the risk analysis in question.

2.45. In the case before the Panel, the complainant has challenged, in its panel request, alleged subsidies provided under a set of three named programmes, whose names in the panel request correspond to those in the legislation referenced in that request. The referenced legislation appears to set out a relatively cohesive and comprehensive regime for these programmes. Given the text of the panel request and of the referenced legislation, the fact that these programmes envisage not one entitlement, but several entitlements for participating units does not entail that the measure has not been sufficiently identified. To borrow the words of the Appellate Body in *EC − Bananas III*, subject to our consideration of India's further arguments, below, the panel request appears to

[57] Handbook of Procedures, (Exhibit USA-5), section 6.18.

[58] These provisions are set out in the Handbook of Procedures comprising Instrument No. 3 (Exhibit USA-5), and in the Appendices comprising Instrument No. 2 (Exhibit USA-6).

[59] These entitlements are set out in FTP, sections 6.01, 6.11, and 6.12, as just described. (Foreign Trade Policy, (Exhibit USA-3)).

[60] India's first written submission, para. 34.

[61] India's first written submission, para. 40.

[62] Request for the establishment of a panel by New Zealand, *Australia − Apples*, WT/DS367/5, p. 1.

[63] Request for the establishment of a panel by New Zealand, *Australia − Apples*, WT/DS367/5, p. 3.

[64] Preliminary ruling by the Panel, *Australia − Apples*, WT/DS367/7, paras. 8-9.

[65] Preliminary ruling by the Panel, *Australia − Apples*, WT/DS367/7, para. 9.

"contain[] sufficient identification of the specific measures at issue to fulfil the requirements of Article 6.2 of the DSU".[66]

2.46. India also argues that for all measures, including the alleged subsidies under the First Programme, the panel request merely "list[s] the identified Schemes", "stipulate[s] the title of each programme … and thereafter, provides only a list of legal instruments that have implemented the Identified Program".[67] According to India, this means that the request "does not clarify whether the challenged measure is the alleged 'scheme' … or the 'legal instruments'".[68] The United States responds that it has identified the measures "by the very name India itself calls each measure"[69], and has taken "the additional step of referencing legal instruments to facilitate … understanding of the measures subject to the dispute".[70]

2.47. India's description does not correspond to the text of the panel request. The panel request explains that India "provides export subsidies through"[71] the programmes that are named in the panel request, and it then continues to explain that "[t]he export subsidies provided through these programs are reflected in legal instruments that include" those listed in the panel request.[72] Thus, the panel request does clarify the relationship between the programmes, or schemes, and the cited legal instruments.

2.48. Based on its view that the panel request can only be challenging *either* the scheme *or* the legal instrument, India further argues that the panel request is insufficient in either case, i.e. whether the United States "seeks to challenge the 'schemes'"[73], or whether the United States "claims that the cited 'legal instrument' are the measures at issue".[74]

2.49. According to India, if the object of the United States' challenge are the schemes, the United States failed to identify "the precise measure within the 'scheme' that is deemed to violate Articles 3.1(a) and 3.2 of the SCM Agreement", particularly as the "'schemes' are policy programmes that" have multiple objectives.[75] Instead, the United States "merely cited the name of the programmes".[76] Alternatively, India continues, if the object of the United States challenge is the legal instruments, then the request does not provide sufficient clarity because the legal instruments "are protracted/extensive in nature" and the United States failed to identify "the specific paragraph or provision within such legal instruments".[77]

2.50. India seeks to separate the various elements of the panel request and read them in isolation. However, a panel request must be assessed "as a whole".[78] When reading the panel request as a whole, the very combination of those elements permits the identification of the measures at issue, as set out above.[79] The fact that the panel request lists the programme names allows the identification of the relevant portions of the cited legal instruments; and the identification of the legal instruments provides greater specificity and precision in the identification of the programmes.

2.51. In a similar vein, India indicates that the panel request "merely" lists legal instruments.[80] However, the panel request does not merely list legal instruments. As described above, the panel request sets forth programme names, explains that the programmes are reflected in certain legal

[66] Appellate Body Report, *EC − Bananas III*, para. 140.
[67] India's first written submission, para. 32.
[68] India's first written submission, para. 33.
[69] United States' second written submission, para. 18. See also, ibid. para. 13.
[70] United States' second written submission, para. 13. See also, ibid. para. 18. The United States further notes that there is "no specific requirement in Article 6.2 concerning the manner … for identifying a specific measure at issue[,] [provided] its content is adequately described in the Panel request". (ibid. para. 17 (quoting Panel Report, *US − FSC (Article 21.5 − EC II)*, para. 7.82)).
[71] United States' panel request, p. 1.
[72] United States' panel request, p. 1.
[73] India's first written submission, para. 34.
[74] India's first written submission, para. 35.
[75] India's first written submission, para. 34.
[76] India's first written submission, para. 34.
[77] India's first written submission, para. 35.
[78] See para. 2.18 above.
[79] See paras. 2.26- 2.41 above.
[80] India's first written submission, paras. 38 and 41.

instruments, and then lists legal instruments in which provisions relating to those programmes can be found.

2.52. India further notes that Instruments Nos. 1, 2, and 3 are referred to in connection with three programmes, namely the First Programme, Second Programme and Third Programme listed in the panel request. According to India, first, this "suggest[s] that the same measures are being challenged with regards to three different schemes".[81] Second, these instruments "implement a variety of India's policy objectives"[82], the United States fails to indicate "the specific measure within"[83] these instruments that it is challenging, and yet it "is absurd" to conceive that the United States would challenge them "in their entirety".[84]

2.53. These arguments appear to have their foundation in the fact of parsing, and viewing in isolation, the various elements of the panel request. While it is true that Instruments Nos. 1, 2, and 3 are multifaceted, the panel request indicates the names of the programmes under which the alleged export subsidies are provided, and these names allow the identification of the portions of the cited legal instruments that are relevant to each of the challenged measures. Similarly, when the programme names and the legal instruments are considered together, the reason why Instruments Nos. 1, 2, and 3 are cited as instruments "reflect[ing]"[85] three programmes also becomes apparent: these instruments contain distinct portions (in Instruments Nos. 1 and 3, distinct chapters) devoted to each of the programmes.

2.54. Thus, based on the text of the panel request and the instruments reflected therein, the Panel concludes that the panel request sufficiently identifies the alleged export subsidies comprising the first measure, and allegedly provided under named programmes, through a combination of (a) the names of the programmes under which the alleged subsidies are provided; and (b) the legal instruments reflecting those alleged subsidies. In this way, the panel request meets the requirement in Article 6.2 of the DSU to "identify the specific measures at issue".

2.3.1.2 The Second Programme: Merchandise Exports from India Scheme

2.55. The second programme through which, according to the panel request, India "appears … [to] provide[] export subsidies" is described, in that request, as "Merchandise Exports from India Scheme"[86] (the Second Programme). The panel request lists 14 instruments in connection with this programme, as "legal instruments" in which the measure is "reflected … operating separately or collectively".[87] These five instruments are listed as Nos. 1-5 and 7-15.[88]

2.56. Instrument No. 1 is the FTP. As noted above, the FTP is broad and multifaceted. However, the FTP bears a chapter on "Exports from India Schemes"[89], which explains that there shall be two such schemes, one for merchandise exports and one for services exports.[90] The scheme "for exports of Merchandise" is the "Merchandise Exports from India Scheme (MEIS)"[91], i.e. the programme named in the panel request. The FTP provides for this programme in sections 3.00 to 3.06, and 3.14 to 3.24, of chapter 3.[92]

2.57. These provisions set out (a) the objective of the scheme (sections 3.00 and 3.03); (b) the "Nature of Rewards" (section 3.02); (c) the conditions for eligibility; (d) the manners in which the rewards can be utilized; (e) the "Privileges of Status Holders" under the Scheme (section 3.24) and conditions for grant of such status; and (f) rules relating to the administration of the scheme.

[81] India's first written submission, para. 43.
[82] India's first written submission, para. 45.
[83] India's first written submission, para. 46.
[84] India's first written submission, para. 48.
[85] United States' panel request, p. 1.
[86] United States' panel request, pp. 1-2.
[87] United States' panel request, p. 1.
[88] United States' panel request, p. 2.
[89] Foreign Trade Policy, (Exhibit USA-3), chapter 3.
[90] Foreign Trade Policy, (Exhibit USA-3), section 3.01.
[91] Foreign Trade Policy, (Exhibit USA-3), section 3.01.
[92] Sections 3.03-3.06 pertain solely to the Merchandise Exports from India Scheme. Sections 3.00-3.02 and 3.14-3.24 relate to both this scheme and the "Service Exports from India Scheme".

2.58. In particular, section 3.02, on "Nature of Rewards", explains that "Duty Credit Scrips shall be granted as rewards under MEIS" and "shall be freely transferable", and goes on to describe the three types of uses to which these duty credit scrips can be put[93], i.e. payment of customs duties on certain goods, payment of excise duties on certain goods, and payment of certain other dues such as application fees and value shortfalls in export obligation.[94]

2.59. Section 3.04 of the FTP, on "Entitlement under MEIS", explains that "exports of [certain goods to certain markets] shall be rewarded under MEIS". As we will see shortly, the relevant goods and markets are set out in Instrument No. 7 and its amendments.

2.60. Instrument No. 2 contains a number of appendices and forms expressly related to MEIS, including application forms.[95]

2.61. Instrument No. 3, the Handbook of Procedures, bears a chapter encompassing MEIS[96], which sets forth more detailed rules for the application of chapter 3 of the FTP.

2.62. Instrument No. 4 amends some of the "sector-specific requirements for EOUs" in Appendix 6B to the FTP. Appendix 6B relates to the First Programme[97], and it is not clear to the Panel how the reference to Instrument No. 4 is relevant to identify the measure at issue. Similarly, Instrument No. 5 removes the bond requirement from certain provisions under the First Programme, and it is not clear to the Panel how the reference to Instrument No. 5 is relevant to identify the measure at issue.[98]

2.63. Instrument No. 7 bears Appendix 3B, which identifies the relevant goods and markets for purposes of section 3.04 of the FTP, namely, the goods that must be exported, and the markets to which they must be exported, to obtain rewards under MEIS.[99] Instrument No. 8 bears amendments to Appendix 3B.[100] Instrument No. 9 bears the "Harmonised and Consolidated Table 2 of Appendix 3B as per Public Notice No. 61/2015-20".[101] Instrument No. 10 bears corrections to descriptions of products in table 2 of Appendix 3B.[102] Equally, Instruments Nos. 11 to 15 amend, correct or harmonize Appendix 3B.[103]

2.64. Thus, similar to the first measure, the panel request identifies the alleged export subsidies comprising the second measure through a combination of (a) the name of the programme under which the alleged subsidies are provided; and (b) the legal instruments reflecting the alleged subsidies. Again, while some of these legal instruments are broad, the combination of the programme's name and the legal instruments identifies the relevant portions of most of those legal instruments (except for Instruments Nos. 4 and 5, addressed in the next paragraph). Further, the legal instruments set out the manner of operation of the programmes, including the conditions of eligibility, the manner of administration, and the entitlements under the programme.

2.65. Unlike the situation for the First Programme, on the face of the panel request, the relationship between Instruments Nos. 4 and 5 and the Second Programme is not clear. Instruments Nos. 4 and 5 appear to relate to the First Programme. We are therefore puzzled by the reference to these instruments. At the same time, while the reference to these two legal instruments does not add to the understanding of the Second Programme, it does not detract from it either, particularly in light of these two instruments' narrow focus. We also note that India, while raising specific arguments on

[93] Foreign Trade Policy, (Exhibit USA-3), section 3.02.
[94] Foreign Trade Policy, (Exhibit USA-3), section 3.02, together with section 3.18.
[95] Appendices and Aayat Niryat forms, (Exhibit USA-6).
[96] Handbook of Procedures, (Exhibit USA-5), pp. 86-100. The programme related to services is also covered, but separately identified.
[97] Instrument No. 4 http://dgft.gov.in/sites/default/files/pn3116_2.pdf (accessed 13 November 2018). Appendix 6B without this amendment is contained in Appendices and Aayat Niryat forms, (Exhibit USA-6), pp. 167-168.
[98] Instrument No. 5 http://dgft.gov.in/sites/default/files/PN2516_0.pdf (accessed 13 November 2018).
[99] Public Notice 2/2015-2020, (Exhibit USA-11).
[100] Public Notice 27/2015-2020, (Exhibit USA-12).
[101] Public Notice 61/2015-20, (Exhibit USA-13).
[102] Public Notice 1/2015-2020, (Exhibit USA-14).
[103] Public Notice 17/2015-2020, (Exhibit USA-15); Public Notice 22/2015-2020, (Exhibit USA-16); Public Notice 42/2015-2020, (Exhibit USA-17); Public Notice 44/2015-2020, (Exhibit USA-18); and Public Notice 60/2015-2020, (Exhibit USA-19).

Instruments Nos. 1, 2, and 3, has not raised any specific argument relating to the reference to Instruments Nos. 4 and 5 under the Second Programme. Overall, therefore, we consider that the listing of these two legal instruments under the Second Programme is not such as to change our analysis of the sufficiency of the panel request.

2.66. India puts forward the same arguments regarding the Second Programme, and the United States provides the same response, as those we have already considered under the First Programme, in paragraphs 2.46 to 2.53 above. The reasoning set out there applies in the same way to the Second Programme as it did to the First Programme, because the relevant fact pattern regarding the identification of the Second Programme is the same. The panel request does not, and need not, sever the programme names from the legal instruments. Instead, it is the very combination of the different elements in the panel request that permits the identification of the "specific measures at issue" as required by Article 6.2. Similarly, it is this combination that permits the identification of the relevant portions of Instruments No, 1, 2, and 3, which are otherwise indeed broad in scope.

2.67. Therefore, by identifying the second measure through a combination of the name of the programme under which the alleged export subsidies are provided, and the legal instruments reflecting them, the panel request meets the requirement in Article 6.2 of the DSU to "identify the specific measures at issue".

2.3.1.3 The Third Programme: Export Promotion Capital Goods Scheme

2.68. The third programme through which, according to the panel request, India "appears … [to] provide[] export subsidies", is described, in that request, as "Export Promotion Capital Goods Scheme"[104] (the Third Programme). Nine instruments are listed in connection with this scheme, as "legal instruments" in which the measure is "reflected … operating separately or collectively".[105] These nine instruments are listed as Nos. 1-5 and 17-20.[106]

2.69. To recall, Instrument No. 1 sets out the FTP.[107] Chapter 5 of the FTP is entitled "Export Promotion Capital Goods (EPCG) Scheme"[108], a title that matches exactly the programme's name as used in the United States' panel request. This chapter runs for six pages.[109] At section 5.01, it explains that the "EPCG scheme" (a) "allows import of capital goods … at Zero customs duty"; (b) allows for the exemption from certain other taxes; and (c) in some cases allows for advantages also in connection with the procurement of capital goods "from indigenous sources".[110] Section 5.01 continues by providing that "[i]mport under EPCG Scheme shall be subject to an export obligation", whose content is further detailed in chapter 5 of the FTP.[111]

2.70. The FTP then continues by setting out conditions that apply to the EPCG Scheme, the scheme's coverage, and other provisions[112], such as the possibility for exporters who "intend to import capital goods on full payment of applicable duties, taxes and cess in cash" to obtain "Post Export EPCG Duty Credit Scrip(s)".[113]

2.71. Instrument No. 2[114] contains a number of appendices and forms expressly related to the EPCG Scheme, e.g. application forms.

2.72. Instrument No. 3, the Handbook of Procedures, bears a chapter entitled "Export Promotion Capital Goods (EPCG) Scheme".[115] This chapter sets out more detailed provisions for the application of chapter 5 of the FTP, including on (a) authorisation procedures; (b) additional conditions for fulfilment of the export obligation under the scheme; (c) monitoring of the export obligation;

[104] United States' panel request, pp. 1-2.
[105] United States' panel request, p. 1.
[106] United States' panel request, pp. 2-3.
[107] Foreign Trade Policy, (Exhibit USA-3), second page.
[108] Foreign Trade Policy, (Exhibit USA-3), p. 85.
[109] Foreign Trade Policy, (Exhibit USA-3), pp. 85-90.
[110] Foreign Trade Policy, (Exhibit USA-3), p. 85.
[111] Foreign Trade Policy, (Exhibit USA-3), p. 85.
[112] Foreign Trade Policy, (Exhibit USA-3), pp. 86-90.
[113] Foreign Trade Policy, (Exhibit USA-3), p. 89.
[114] Appendices and Aayat Niryat forms, (Exhibit USA-6).
[115] Handbook of Procedures, (Exhibit USA-5), p. 144

(d) reductions in the export obligation in certain circumstances; and (e) criminal liability "[i]n case of failure to fulfil export obligation or any other condition of authorisation".[116]

2.73. Instrument No. 4 amends some of the "sector-specific requirements for EOUs" in Appendix 6B to the FTP. Appendix 6B relates to the First Programme[117], and it is not clear to the Panel how the reference to Instrument No. 4 is relevant to identify the measure at issue. Similarly, Instrument No. 5 removes the bond requirement from certain provisions under the First Programme, and it is not clear to the Panel how the reference to this instrument is relevant to identify the measure at issue.[118]

2.74. Instrument No. 17 lists services that can be counted "towards discharge of Export Obligation under the Export Promotion Capital Goods (EPCG) Scheme"[119], thus setting out details for the implementation of the EPCG Scheme.

2.75. Instrument No. 18 amends some of the forms to be used in the application of the EPCG Scheme, as set out in Instrument No. 2.[120]

2.76. Instrument No. 19 sets out details for the application, in a particular year, of a provision in the Handbook of Procedures, namely, the provision under which the average annual export obligation under the EPCG Scheme can be reduced for sectors or products whose overall exports declined by more than 5%.[121]

2.77. Instrument No. 20 amends the provisions for assessing compliance with the annual average export obligation under the EPCG Scheme, and the list of capital goods that cannot be imported under the EPCG, or that can only be imported subject to conditions.[122]

2.78. Thus, similar to the first and second measures, the panel request identifies the alleged export subsidies comprising the third measure through a combination of (a) the name of the programme under which the alleged subsidies are provided; and (b) the legal instruments reflecting them. Again, while some of these legal instruments are broad, the combination of the programme's name and the legal instruments identifies the relevant portions of most of those legal instruments (except for Instruments Nos. 4 and 5, addressed in the next paragraph). Further, the legal instruments set out the manner of operation of the programmes, including conditions of eligibility, manner of administration, and entitlements under the programme.

2.79. Also similar to the Second Programme, we were puzzled, on the face of the panel request, about the relevance of Instruments Nos. 4 and 5 to the Third Programme. Instruments Nos. 4 and 5 seem to relate to the First Programme. At the same time, considering the panel request as a whole, the reference to these two legal instruments does not ultimately detract from the identification of the measure, particularly in light of these two instruments' narrow focus. We also recall that India, while raising specific arguments on Instruments Nos. 1, 2 and 3, has not raised

[116] Handbook of Procedures, (Exhibit USA-5), pp. 144-158.
[117] Instrument No. 4 http://dgft.gov.in/sites/default/files/pn3116_2.pdf (accessed 13 November 2018). Appendix 6B without this amendment is contained in Appendices and Aayat Niryat forms, (Exhibit USA-6), pp. 167-168.
[118] Instrument No. 5 http://dgft.gov.in/sites/default/files/PN2516_0.pdf (accessed 13 November 2018).
[119] Instrument No. 17 http://dgft.gov.in/sites/default/files/PN0417_0.pdf (accessed 13 November 2018), p. 1.
[120] Instrument No. 18 http://dgft.gov.in/sites/default/files/P.N.%2008%20dated%2006.05.16%20English.pdf (accessed 13 November 2018). Instrument No. 2 is set out in Appendices and Aayat Niryat forms, (Exhibit USA-6).
[121] Instrument No. 19 http://dgft.gov.in/sites/default/files/PolicyCircular03%20dated21.11.2017_0.pdf (accessed 13 November 2018).
[122] Instrument No. 20 http://www.eximguru.com/notifications/new-appendices-5-e-and-82417.aspx (accessed 13 November 2018). There is a slight discrepancy between the title of this Instrument as accessed at this link and the title provided in the panel request: the panel request refers to "Public Notice 47/2015-2010", whereas the title accessed at this link refers to "Public Notice 47/2015-2020". The other identifiers, however, match; moreover, "2015-2020" appears to be a reference to the FTP 2015-2020, further confirming that the ending in "-10" is a typographical error.

any specific argument relating to the reference to Instruments Nos. 4 and 5 under the Second Programme.[123]

2.80. India's arguments and the United States' response regarding the Third Programme are the same as those we have discussed under the First Programme, in paragraphs 2.46 to 2.53 above. The reasoning, set out there, applies in the same way to the Third Programme as it did to the First and Second Programmes, because the relevant fact pattern regarding the identification of the measure in the panel request is the same. The panel request does not, and need not, sever the programme names from the legal instruments. Instead, it is the very combination of the different elements in the panel request that permits the identification of the "specific measures at issue" as required by Article 6.2. Similarly, it is this combination that permits the identification of the relevant portions of Instruments Nos. 1, 2, and 3, which are otherwise indeed broad in scope.

2.81. Therefore, by identifying the alleged export subsidies comprising the third measure through a combination of (a) the name of the programme under which the alleged subsidies are provided; and (b) legal instruments reflecting the alleged subsidies, the panel request meets the requirement in Article 6.2 of the DSU to "identify the specific measures at issue".

2.3.1.4 The Fourth Programme: Special Economic Zones

2.82. The fourth programme through which, according to the panel request, India "appears … [to] provide[] export subsidies", is described, in that request, as "Special Economic Zones"[124] (the Fourth Programme). Six instruments are listed in connection with this scheme, as "legal instruments" in which the measure is "reflected … operating separately or collectively".[125] These six instruments are listed as Nos. 21-26.[126]

2.83. Instrument No. 21 is the Special Economic Zones Act, 2005, No. 28 of 2005 ("Special Economic Zones Act").[127] It makes provision "for the establishment, development and management of the Special Economic Zones for the promotion of exports".[128] In particular, it (a) sets out procedures for establishing special economic zones[129]; (b) establishes bodies charged with approving and administering special economic zones[130]; (c) sets out "special fiscal provisions for special economic zones"[131], as well as separately providing for "Modifications to the Income-tax Act, 1961"[132]; and (d) sets forth other "Miscellaneous" provisions relating to special economic zones.[133]

2.84. Instrument No. 22 consists of the Special Economic Zones Rules, 2006, incorporating amendments up to July 2010 ("Special Economic Zones Rules").[134] These rules were adopted in the "exercise of the powers conferred by section 55" of the Special Economic Zones Act[135], which we have just discussed. The Special Economic Zones Rules set out more detailed provisions for the implementation of the Special Economic Zones Act. These rules relate to (a) the procedure for establishing special economic zones (Chapter II), and for establishing a unit within a special economic zone (Chapter III); (b) the "terms and conditions subject to which entrepreneur and developer shall be entitled to exemptions, drawbacks and concessions" (Chapter IV); (c) the conditions subject to which goods may be removed from a special economic zone to the domestic tariff area (Chapter V); (d) rules relating to the requirement that units achieve net foreign exchange earnings (Chapter VI); (e) rules on appeals (Chapter VII); (f) miscellaneous provisions (Chapter VIII

[123] See para. 2.65 above.
[124] United States' panel request, pp. 1 and 3.
[125] United States' panel request, p. 1.
[126] United States' panel request, p. 3.
[127] Special Economic Zones Act, (Exhibit USA-22).
[128] Special Economic Zones Act, (Exhibit USA-22), p. 1.
[129] Special Economic Zones Act, (Exhibit USA-22), Chapter II.
[130] Special Economic Zones Act, (Exhibit USA-22), Chapters III, IV, V, and VII.
[131] Special Economic Zones Act, (Exhibit USA-22), Chapter VI.
[132] Special Economic Zones Act, (Exhibit USA-22), Second Schedule.
[133] Special Economic Zones Act, (Exhibit USA-22), Chapter VIII. In addition, Chapter I sets out the short title, territorial and temporal scope of application of the act, and definitions for purposes of the act; and the Third Schedule sets out amendments to three further acts.
[134] Special Economic Zones Rules, (Exhibit USA-28), pp. 1-2.
[135] Special Economic Zones Rules, (Exhibit USA-28), p. 3.

and Annexures I and following); and (g) forms needed in the application of the Special Economic Zones Rules.[136]

2.85. Instrument No. 23 bears amendments, dated June 2010, to the Special Economic Rules that we just discussed as Instrument No. 22.[137] These amendments, however, are already reflected in Instrument No. 22, which as its title indicates incorporates amendments up to July 2010.

2.86. Instruments No. 24 bears amendments, dated June 2017, to the Special Economic Rules that we discussed as Instrument No. 22.[138] These June 2017 amendments relate to the conditions under which a unit may subcontract production and still benefit from exemptions, drawbacks, and concessions under the Special Economic Zones Rules.[139]

2.87. Instrument No. 25 "exempts all goods or services or both imported by a unit or a developer in the Special Economic Zone, from the whole of the integrated tax leviable thereon under sub-section (7) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) for authorised operations".[140]

2.88. Instrument No. 26 is the "Income Tax Act, 1961, as amended".[141] The Income Tax Act, 1961, is "[a]n Act to consolidate and amend the law relating to income-tax and super-tax"[142]; it is a very extensive piece of legislation, broad in scope, and spanning more than a thousand pages. In this case, listing the Income Tax Act, 1961, alone, could hardly meet the requirement to identify the "specific measure at issue" under Article 6.2 of the DSU. However, the panel request does not list this act alone. Instead, it lists this act as one of the instruments under the Special Economic Zones programme in which the alleged export subsidies are "reflected", together with a number of other legal instruments, which we have discussed above.[143] We will therefore consider Instrument No. 26 in this context.

2.89. A search in the text of the act for the programme name provided in the panel request, i.e. "Special Economic Zones", identifies provisions relating to special economic zones, typically accompanied by a note explaining that they were inserted by the Special Economic Zones Act. Moreover, Instrument No. 21, the first instrument listed in the panel request in connection with the Special Economic Zones programme (a) provides, in the chapter setting out "Special Fiscal Provisions for Special Economic Zones", that the Income Tax, 1961, shall apply to developers and entrepreneurs for operations in special economic zones or units "subject to the modifications specified in the Second Schedule"[144]; and (b) in the Second Schedule, sets out ten "Modifications to the Income Tax Act, 1961".[145] These modifications relate to ten sections or subsections of the Income Tax Act, 1961, and provide in particular for certain exemptions and deductions relating to business in special economic zones.[146]

[136] Special Economic Zones Rules, (Exhibit USA-28).
[137] Instrument No. 23 http://sezindia.nic.in/upload/uploadfiles/files/20SEZ_Rule_amendment_10.pdf (accessed 13 November 2018).
[138] Instrument No. 24 http://sezindia.nic.in/upload/uploadfiles/files/amendmentrule2006.pdf (accessed 13 November 2018).
[139] The amendments relate to Rule 41, "Sub-contracting", of Chapter IV ("terms and conditions subject to which entrepreneur and developer shall be entitled to exemptions, drawbacks and concessions"). (Instrument No. 24 http://sezindia.nic.in/upload/uploadfiles/files/amendmentrule2006.pdf (accessed 13 November 2018)).
[140] Notification 15/2017, (Exhibit USA-27).
[141] United States' panel request, p. 3.
[142] Instrument No. 26, "as amended by Finance Act 2008" http://www.icnl.org/research/library/files/India/IndiaIncomeTax1961.pdf (accessed 22 November 2018), p. 1. With its first written submission, the United States has submitted excerpts of the Income Tax Act, 1961, as Exhibits USA-29 and USA-30; however, the Panel does not rely on these excerpts (which are more specific than the reference to the Income Tax Act, 1961, as a whole) in its assessment under Article 6.2 of the DSU, since the question before the Panel is whether the panel request, as it existed at the time of filing, was sufficiently specific.
[143] United States' panel request, pp. 1 and 3.
[144] Special Economic Zones Act, (Exhibit USA-22), p. 15, Chapter VI, Section 27.
[145] Special Economic Zones Act, (Exhibit USA-22), pp. 26-32.
[146] Special Economic Zones Act, (Exhibit USA-22), pp. 26-32. The ten sections and subsections are: Sections 10, 10A, 10AA, 54GA, 80-IA, 80-IAB, 80LA, 115JB, 115-0, and 197A.

2.90. Therefore, reading the text of the panel request as a whole, including the name of the Fourth Programme and the Special Economic Zones Act, it is possible to identify the specific portions of the Income Tax Act, 1961, which relate to the Fourth Programme listed in the panel request, namely, the Special Economic Zones programme.

2.91. Therefore, the panel request identifies the alleged export subsidies comprising the fourth measure through a combination of (a) the name of the programme under which the alleged subsidies are provided; and (b) the legal instruments reflecting the alleged export subsidies. Again, while some of these legal instruments are broad, the combination of the programme's name and the legal instruments, as well as the interlinkages between legal instruments, identify the relevant portions of the legal instruments cited in the panel request. Further, these legal instruments set out the manner of operation of the programme, including conditions of eligibility, rules for the administration of the programme, and "special fiscal provisions"[147] under the programme, such as "exemptions, drawbacks and concessions".[148] At the same time, the entitlements available under this fourth programme are many.[149]

2.92. India makes two sets of arguments regarding the fourth measure. First, for all five measures, India argues that the panel request fails to clarify whether the challenge is addressed to the programme or the legal instruments, and that, either way, the request is insufficient. The Panel has considered this set of arguments in paragraphs 2.46 to 2.51 above, with reference to the First Programme. The reasoning set out there applies in the same way to the Fourth Programme, because the relevant fact pattern regarding the identification of the Fourth Programme is the same. The panel request does not, and need not, sever the programme names from the legal instruments. Instead, it is the very combination of the different elements in the panel request that permits the identification of the "specific measures at issue" as required by Article 6.2.

2.93. Second, India argues that the panel request fails to identify the fourth measure with the required precision, because of the scope and breadth of the six legal instruments listed in the panel request in connection with this measure. India explains that "the legal instruments stipulated in these paragraphs regulate a wide variety of India's policy objectives".[150] In particular, India explains that the Special Economic Zones Act "is 53 pages long and addresses a variety of policy objectives"[151], leaving "India [to] wonder and guess as to which measures *within* the cited legal instruments are allegedly in violation of Articles 3.1(a) and 3.2 of the SCM Agreement".[152] India further explains that the Income Tax Act, 1961, "is 1067 pages long and provides the entirety of India's direct taxation regime and administration"[153], so that challenging it in its entirety would be "absurd".[154]

2.94. It is definitely correct that certain of the legal instruments cited in the panel request are very extensive. However, these legal instruments are not cited in isolation. Instead, they are cited in combination with the programme's name, and in combination with each other. In the request before the Panel, it is the combination of these elements that allows the proper identification of the measures at issue. In particular, as regards the Income Tax Act, 1961, it is the combination of these elements that puts the reader on notice that the complainant is not challenging the Income Tax Act in its entirety, but rather the special rules in this Act pertaining to the Special Economic Zones programme.

2.95. As for the Special Economic Zones Act, we agree that the Act is quite comprehensive in scope in that it sets out the legal framework for the establishment of such zones and of units therein, rules for the administration of the Special Economic Zones programme, special fiscal rules for participating entities, conditions of eligibility, and other rules. However, the United States is challenging the alleged export subsidies provided under the Special Economic Zones programme, which means that

[147] See para. 2.83 above.
[148] See para. 2.84 above.
[149] For example, Instrument No. 21 provides for numerous duty, tax, excise tax, or cess exemptions: see, e.g. section 7 and First Schedule (referring to taxes, duties and cess under 21 separate acts), section 26(i)(a)-(g), section 27 and Second Schedule, section 50(a), and section 55 (2)(h). (Special Economic Zones Act, (Exhibit USA-22)).
[150] India's first written submission, para. 51.
[151] India's first written submission, para. 52.
[152] India's first written submission, para. 54. (emphasis original)
[153] India's first written submission, para. 56.
[154] India's first written submission, para. 56.

it is proper for the panel request to refer, among other elements, to the legal instrument that comprehensively sets out the legal framework for this programme.

2.96. We also agree that the Fourth Programme envisages not one, but a number of entitlements available to participating entities. Similar to the First Programme, this raises the question whether the complainant should have singled out each entitlement in its panel request in order to identify the measure at issue. India argues that "the precise incentive within the 'scheme' … must be considered as the measure at issue".[155] India also argues that the panel request before the United States is akin to the portion of the panel request in *Australia − Apples* that was held by that panel to be outside the terms of reference.[156]

2.97. We refer to our discussion of the relevant portion of *Australia − Apples* in paragraphs 2.43 to 2.44 above. The situation in the present case is not the same as that of the umbrella reference to measures in *Australia − Apples*. In the present case, the complainant has explained that it is challenging export subsidies provided under the Special Economic Zones programme, as reflected in the legal instruments listed in the panel request. This is not the same as referring to "measures specified in and required by [a Member] pursuant to the [risk analysis]"[157], because the latter formulation leaves entirely open the type of measures that could be "specified and required", mentioning only that the measures will have some connection ("specified in", or "required … pursuant to") to the risk analysis in question.

2.98. The situation in the present case is reminiscent of *EC − Bananas III*, where the complainants identified the measure by describing it as "a regime for the importation, sale and distribution of bananas", and by referring to the specific regulation establishing the regime, as well as "subsequent EC legislation, regulations and administrative measures … which implement, supplement and amend that regime".[158] In that case, the defendant argued, among other things, that the panel request had failed to identify the specific measure at issue because it was challenging a "regime", without further precision.[159] The panel, upheld by the Appellate Body, found that the measure had been properly identified[160], and it did so in spite of the absence of references to specific aspects of the regime or of the regulation establishing the regime.

2.99. In this case, based on the text of the panel request and of the referenced legislation, we conclude that the panel request properly identifies the challenged measures, through a combination of the name of the programme under which the alleged subsidies are provided, and of the legal instruments reflecting the alleged export subsidies. The text of the panel request and of the referenced legislation identifies a relatively cohesive and comprehensive regime comprising the Fourth Programme, and the fact that the panel request does not single out the relevant provisions of the cited legal instruments, or that the Fourth Programme envisages not one, but many entitlements, does not entail that the measure has not been sufficiently identified.

2.3.1.5 The Fifth Programme: Duty-free imports for exporters program

2.100. The fifth programme through which, according to the panel request, India "appears … [to] provide[] export subsidies", is described, in that request, as "Duty-free imports for exporters program"[161] (the Fifth Programme). The panel request also lists one "legal instrument[]" in which the measure is "reflected", namely, Instrument No. 27.

2.101. The panel request refers to Instrument No. 27 as "Notification No. 50/2017-Customs" ("Notification No. 50/2017"), "including Conditions 10, 21, 28, 32, 33, 36, 60, 61, 101".[162]

[155] India's first written submission, para. 34.
[156] India's first written submission, para. 40.
[157] Preliminary ruling by the Panel, *Australia − Apples*, WT/DS367/7, para. 9.
[158] Request for the establishment of a panel by Ecuador, Guatemala, Honduras, Mexico, and the United States, *EC − Bananas III*, WT/DS27/6, p. 1.
[159] Panel Report, *EC − Bananas III*, para. 7.24.
[160] Panel Report, *EC − Bananas III*, para. 7.27; Appellate Body Report, *EC − Bananas III*, para. 140.
[161] United States' panel request, pp. 1 and 3.
[162] United States' panel request, p. 3.

2.102. The Fifth Programme is the only one whose name as stated in the panel request does not appear word for word in the referenced legal instrument.

2.103. Notification No. 50/2017 sets forth certain caps, for certain products, to the import duties and integrated tax that would otherwise be levied on those goods under the legislation in force, subject, in certain instances, to conditions specified in Notification No. 50/2017.[163] The United States' panel request singles out nine such conditions, which we will now review.

2.104. Under Condition No. 10, the goods must be "imported by an exporter of sea-food products for use in processing sea-food products for export"; "the total value of the goods imported [must] not exceed 1% of the FOB value of exports of sea-food products exported during the preceding financial year"; and certain administrative requirements must be complied with.[164] Condition No. 10 is attached to the duty-free treatment[165] of the items in List 1 of Notification No. 50/2017[166] when used "in the processing of sea-food".[167]

2.105. Under Condition No. 21, the goods must be imported "for use in the manufacture of handicrafts for export" and "the value of the goods imported [must] not exceed 5% of the FOB value of handicrafts exported during the preceding financial year".[168] Condition No. 21 attaches to the duty-free treatment of the goods listed at item 229 of the table in Notification No. 50/2017.[169]

2.106. Similarly, Conditions Nos. 28, 32, 33, and 101 require that the goods be imported for use in the manufacture of certain goods for export[170], and that the imported goods not exceed a certain percentage of the value of exports; and each of these four conditions attaches to the duty-free treatment of the imported goods.[171]

2.107. Condition No. 36 requires that imports of carpet samples not exceed 1% of the value of carpets exported the previous years, and attaches to the duty-free import of carpet samples.[172] Conditions No. 60 and 61 attach to the duty-free import, or the import at a reduced duty rate, of goods used for research and development purposes; and they provide that the value of imports benefiting from such duty-free treatment must not exceed 25%, and 1%, respectively, of the FOB value of exports during the preceding financial year.[173]

2.108. India argues that for all programmes, including the Fifth Programme, the panel request fails to clarify whether the challenge is addressed to the programme or the legal instruments, and that, either way, the request is insufficient.[174] The panel request, however, does clarify that the challenge is to export subsidies provided under certain programmes that, in turn, are reflected in the cited legal instruments. In the case of the Fifth Programme, the panel request explicitly lists nine "Conditions" that readily permit the identification, in the cited legal instrument, of the duty exemptions in question.

2.109. A panel request must be assessed as a whole and, when this is done, the combination of the elements in the request before this Panel permits the identification of the specific measures at issue as required by Article 6.2. Therefore, on the face of the panel request, read as a whole, the request properly identifies as a fifth measure at issue alleged export subsidies provided under Conditions Nos. 10, 21, 28, 32, 33, 36, 60, 61, and 101 of Notification No. 50/2017.

[163] Notification No. 50/2017, (Exhibit USA-36), p. 1.
[164] Notification No. 50/2017, (Exhibit USA-36), p. 53.
[165] Notification No. 50/2017, (Exhibit USA-36), p. 7, item 104, column 4 ("Nil").
[166] Notification No. 50/2017, (Exhibit USA-36), p. 78, List 1.
[167] Notification No. 50/2017, (Exhibit USA-36), p. 7, item 104, column 3.
[168] Notification No. 50/2017, (Exhibit USA-36), p. 56.
[169] Notification No. 50/2017, (Exhibit USA-36), pp. 15-16.
[170] Export of textile garments or leather garments (Condition 28); of leather footwear, synthetic footwear, or other leather products (Condition 32); of handloom made ups or cotton made-ups or man-made made ups (Condition 33); and of sports goods (Condition 101).
[171] Notification No. 50/2017, (Exhibit USA-36), items 288 and 311 (Condition 28), 312 (Condition 32), 313 (Condition 33), and 612 (Condition 101).
[172] Notification No. 50/2017, (Exhibit USA-36), item 327, Condition 36.
[173] Notification No. 50/2017, (Exhibit USA-36), items 430 and 431, and Conditions 60 and 61.
[174] See paras. 2.46-2.51 above, with reference to the First Programme.

2.3.2 Whether the United States' panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly

2.110. We now turn to examine whether the panel request provides a "brief summary of the legal basis sufficient to present the problem clearly" as required by Article 6.2.

2.111. The panel request, after setting out the measures in the manner examined above, reads:

> Consistent with Annex VII of the SCM Agreement, India is subject to the obligations of Article 3.1(a) of the SCM Agreement because India's gross national product per capita has reached $1,000 per annum. Through each program, as reflected in the instruments listed above, India provides subsidies contingent upon export performance. The measures appear to be inconsistent with Article 3.1(a) of the SCM Agreement, and India appears to have acted inconsistently with Article 3.2 of the SCM Agreement.

2.112. In this passage, the United States first addresses the applicability of Article 3.1(a) of the SCM Agreement. The United States asserts that "[c]onsistent with Annex VII of the SCM Agreement", India is now subject to the obligation in Article 3.1(a) "because India's gross national product per capita has reached $1,000 per annum". While India challenges this view on separate grounds, India has not challenged this statement under Article 6.2 of the DSU.

2.113. Next, the United States asserts that "[t]hrough each program, as reflected in the instruments listed above, India provides subsidies contingent upon export performance", which "appear to be inconsistent with Article 3.1(a) … and … Article 3.2 of the SCM Agreement". India's challenge to the sufficiency of the "brief summary of the legal basis" is directed at the connection between the measures identified in the panel request and the claims under Articles 3.1(a) and 3.2.[175]

2.114. India argues that the panel request fails to "plainly connect the challenged measures with the provisions of the covered Agreements claimed to have been infringed".[176] According to India, this is because the request "provides a list of legislations, without indicating the specific measure within that legislation that is being challenged", and "this failure is compounded by a failure to provide a narrative or brief description of how the legal instrument(s) is allegedly in violation of … Article 3.1(a) and 3.2 of the SCM Agreement."[177] The United States responds by noting, in particular, that the panel request must identify claims, not arguments[178], and that Article 6.2 of the DSU "imposes no obligation to set out 'detailed arguments as to which specific aspects of the measure at issue relate to which specific provisions of those Agreements'".[179]

2.115. We note that the request states that "[t]hrough *each* program, as reflected in the instruments listed above, India provides subsidies contingent upon export performance"[180], and that these measures appear to be inconsistent with Articles 3.1(a) and 3.2. Thus, the panel request connects the measures and the claims by explaining that the claims apply to the subsidies provided through "each" program. There is therefore no doubt as to "which allegations of error pertain to which particular measure or set of measures identified in the panel request".[181]

2.116. There appear to be three interrelated facets to India's argument, namely (a) that the United States provided a mere listing of broad legal instruments, and as a result failed to provide any guidance as to the portions of those legal instruments to which its claims relate; (b) that, even within the portions of those legal instruments that relate to the challenged programmes, the

[175] India's first written submission, paras. 62 and 66-67. See also, ibid. para. 57.
[176] India's first written submission, para. 57.
[177] India's first written submission, para. 62 (with reference to "[a]ll Identified Schemes and Legal Instruments 1, 2, 3, 6, and 16"). See also, ibid. paras. 66-67 and 69 (with reference to "[l]egal Instruments in Scheme 4, and Scheme 4").
[178] United States' second written submission, para. 20 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; and *Korea – Dairy*, para. 139).
[179] United States' second written submission, para. 20 (quoting Appellate Body Report, *EC – Bananas III*, para. 141).
[180] United States' panel request, p. 3. (emphasis added)
[181] Appellate Body Report, *China – Raw Materials*, para. 226.

United States failed to indicate the specific elements that it is challenging; and (c) that the narrative of the brief summary of the legal basis is insufficient.

2.117. The first facet of India's argument appears to be premised on an atomization of the panel request into disjointed programme names and legal instruments – the same approach taken by India in its arguments on the identification of measures in the panel request. On that basis, India argues, for example, that "[l]egal Instruments 1, 2 and 3 … address a wide variety of administrative procedures that enact India's numerous policy objectives"[182], and that the panel request fails to connect the claims to specific measures within these legal instruments.

2.118. However, as discussed in section 2.3.1, above, the panel request identifies the challenged export subsidies through a *combination* of (a) the names of the programmes under which the alleged subsidies are provided, and (b) the legal instruments reflecting those subsidies. Thus, the panel request does not merely challenge individual instruments in their isolation ("a list of legislations"[183]) under Articles 3.1(a) and 3.2, with no further guidance as to their connection with these claims. Instead, as already discussed, the programme names allow the identification, within the cited legal instruments, of the portions that are relevant to the United States' challenge. Thus, for example, the United States is not merely challenging the FTP (India's Foreign Trade Policy, Instrument No. 1) under Articles 3.1(a) and 3.2. Instead, it is challenging, under those provisions, alleged export subsidies provided under specific, named programmes that are each provided for in distinct chapters of the FTP.

2.119. The second facet of India's argument suggests that, from among the provisions relating to each programme, the United States should have explicitly identified the specific provisions that give rise to the violation of Articles 3.1(a) and 3.2.

2.120. However, having identified the measures, and having made clear that the claims brought relate to all measures, the complainant was not required, in its panel request, to "set[] out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those Agreements".[184]

2.121. The third facet of India's argument is that "where mere legal instruments are cited, the accompanying narrative provided in the Panel request is critical to determine the specific measures at issue and the manner in which they are connected to the stipulated WTO obligations."[185] While, as discussed, the text of the panel request contradicts the statement that "mere legal instruments are cited", we consider further India's allegation that the "accompanying narrative provided in the Panel request" was insufficient in elucidating the connection between the measures and the claims.

2.122. To recall[186], the summary of the legal basis provided in the panel request must be "sufficient to present the problem clearly", so as to serve the function of delimiting the panel's jurisdiction and the due process objective of notifying the respondent and third parties of the nature of the case.[187] It must allow the respondent to know "what case it has to answer, and what violations have been alleged so that it can begin preparing its defence".[188] This requires, among other things, that the panel request "plainly connect the challenged measure(s) with the provision(s) … claimed to have been infringed"[189], explaining "succinctly how or why the measure at issue is considered … to be violating the WTO obligation in question".[190]

2.123. In this case, the measures at issue, as discussed in section 2.3.1, are identified as the export subsidies provided under certain named programmes, and reflected in the legal instruments listed in the panel request. The brief summary of the legal basis indicates that:

[182] India's first written submission, para. 62.
[183] India's first written submission, para. 62.
[184] Appellate Body Report, *EC – Bananas III*, para. 141.
[185] India's first written submission, para. 69.
[186] See paras. 2.5-2.6, 2.13, and 2.16.
[187] Appellate Body Report, *Argentina – Import Measures*, para. 5.39.
[188] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[189] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.
[190] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

> Through each program, as reflected in the instruments listed above, India provides subsidies contingent upon export performance. The measures appear to be inconsistent with Article 3.1(a) of the SCM Agreement, and India appears to have acted inconsistently with Article 3.2 of the SCM Agreement.[191]

2.124. In this way, the panel request makes it clear that the allegations of violation of Articles 3.1(a) and 3.2 pertain to each of the listed measures. The panel request further states that the reason for the allegation of violation is that, in the complainant's view, these measures are subsidies contingent upon export performance.

2.125. The narrative provided to articulate the violation is not extensive. However, the brief summary of the legal basis in the Panel request before us is sufficient to meet the standard in Article 6.2, first, because the same claims are made for all measures, leaving no doubt as to "which allegations of error pertain to which particular measure or set of measures"[192]; and, second, because of the "specific content of the provisions invoked"[193] and the fact that they establish "one single, distinct obligation," not "multiple obligations".[194]

2.4 Ruling by the Panel

2.126. We therefore rule that the panel request before us identifies the specific measures at issue, and provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required by Article 6.2 of the DSU.

3 THE APPLICABILITY OF ARTICLE 4 OF THE SCM AGREEMENT

3.1. The United States is challenging certain Indian measures under Articles 3.1(a) and 3.2 of the SCM Agreement.[195] In the United States' view, the obligation in Article 3.1(a) applies to India.[196] The United States therefore requested consultations under Articles 4 and 30 of the SCM Agreement and Articles 1 and 4 of the DSU, and the establishment of a panel under Article 4.4 of the SCM Agreement and Article 6 of the DSU. Upon the United States' request, the DSB established the Panel in this dispute pursuant to Article 4.4 of the SCM Agreement and Article 6 of the DSU.[197]

3.2. India has sought a preliminary ruling that the provisions of Article 4 of the SCM Agreement cannot automatically apply to this dispute and that, therefore, they do not apply to this dispute at this stage.[198]

3.3. According to India, the United States has not demonstrated that Article 27 of the SCM Agreement no longer excludes India from the scope of application of Article 3.1(a), and until and unless the United States provides such demonstration, Article 4 does not apply to this dispute.[199] In the alternative, India argues that, even assuming that the United States does not bear the burden of demonstrating that Article 27 no longer excludes India from the scope of application of Article 3.1(a), the Panel must first "evaluat[e] India's substantive claim of the applicability of Article 27 of the SCM Agreement"[200] before Article 4 may apply.[201]

3.4. At the same time, however, India argues that whether its measures are in conformity with Article 27 of the SCM Agreement cannot be adjudicated upon at the preliminary stage and, instead,

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[191] United States' panel request, p. 3.
[192] Appellate Body Report, *China − Raw Materials*, para. 226.
[193] Preliminary ruling by the Panel, *Australia − Apples*, para. 11.
[194] Appellate Body Report, *Korea − Dairy*, para. 124. See also, e.g. Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, paras. 5.14-5.15.
[195] United States' consultations request, p. 3; panel request, p. 3.
[196] United States' consultations request, p. 3; panel request, p. 3.
[197] United States' panel request, pp. 1 and 3; Constitution note of the Panel, WT/DS541/5, para. 1.
[198] India's first written submission, paras. 10, 12-18, and 71-90; Communication dated 5 October 2018 from India to the Chairperson of the Panel, p. 1. See also Communication dated 16 October 2018 from India to the Chairperson of the Panel; and DSB, Minutes of the meeting held on 28 May 2018, WT/DSB/M/413, para. 7.3.
[199] India's first written submission, paras. 74-76 and 78-85.
[200] India's first written submission, para. 87.
[201] India's first written submission, paras. 85-90.

"is a legal issue that goes to the essence of the dispute, and therefore a matter to be adjudicated in subsequent panel meetings".[202]

3.5. The United States responds that under Articles 4.1 and 4.4 of the SCM Agreement, the "threshold for invoking the procedures of Article 4"[203] is whether the complainant "has reason to believe that a prohibited subsidy is being granted or maintained by another Member"[204], and, therefore, "Article 4 does not require that there first be a determination that Article 27 does not apply".[205] According to the United States, India's approach "would require a panel to pre-judge the very issue that is at the core of the dispute".[206] The United States then goes on to reiterate and expand upon its arguments that Article 27 does not exclude India from the scope of application of Article 3.1(a).[207]

3.6. Pursuant to Article 4.1 of the SCM Agreement, a Member may seek consultations with another under that provision when it "has reason to believe" that the other Member is granting or maintaining a prohibited subsidy, thus triggering the application of the provisions of Article 4. If consultations fail to settle the dispute within 30 days, the complaining Member may refer the matter to the DSB "for the immediate establishment of a panel" pursuant to Article 4.4 of the SCM Agreement.

3.7. At the same time, Article 27 of the SCM Agreement affords special and differential treatment to developing countries. One element of that special and differential treatment is that a subset of developing country Members' measures is not subject to the procedures of Article 4 of the SCM Agreement. Pursuant to Article 27.7 of the SCM Agreement:

> The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5.

3.8. One can envisage a range of situations facing a panel. One extreme would be a hypothetical case where it is undisputable that Article 27 excludes the applicability of Article 4. In such an event, it would be particularly appropriate for a panel to issue a preliminary ruling at the earliest stages of the dispute that the case may not proceed under Article 4. The other extreme would be a hypothetical case where a defendant invokes Article 27 frivolously, i.e. with no basis for doing so; there would then be no question that recourse to Article 4 was proper.

3.9. In between these two extremes lie cases where it is disputed whether Article 27 excludes the applicability of Article 4. In such cases, a preliminary ruling on the matter may require adjudicating upon the merits of the parties' arguments under Article 27.

3.10. The case before the Panel lies before the two extremes outlined above. The United States has provided the reasons in law and fact based on which it considers that Article 27 does not exclude the applicability of Article 3.1(a) and therefore of Article 4.[208] India disagrees, arguing that "the ordinary meaning of the text of Article 27.2(b) results in ambiguity and internal contradictions between provisions of Article 27 of the SCM Agreement"[209], and that therefore the Panel must depart from an interpretation based on ordinary meaning. The United States disputes India's interpretive argument, and takes the view that the ordinary meaning of "eight years from the entry into force of the WTO Agreement", in Article 27.2(b), is eight years from 1st January 1995.[210]

3.11. In these circumstances, the Panel considers that ruling on India's preliminary request would require adjudicating upon the parties' interpretive disagreement. However India, the party seeking

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[202] India's first written submission, para. 79. See also Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 5 ("the interpretation of these provisions goes to the essence of the dispute") and 6.

[203] United States' second written submission, para. 26.

[204] Agreement on Subsidies and Countervailing Measures, Article 4.1 (quoted in United States' second written submission, paras. 25-26).

[205] United States' second written submission, para. 26.

[206] United States' second written submission, para. 27.

[207] United States' second written submission, paras. 28-39.

[208] United States' consultations request, p. 3; panel request, p. 3; first written submission, paras. 24-26; and second written submission, paras. 28-39.

[209] India's second written submission, para. 10.

[210] United States' second written submission, para. 32.

a preliminary ruling, has also asked the Panel *not to* rule on the interpretive disagreement between the parties as part of such a preliminary ruling. According to India, whether its measures are in conformity with Article 27 is "a legal issue that goes to the essence of the dispute, and therefore a matter to be adjudicated in subsequent panel meetings".[211]

3.12. The Panel is receptive to India's request that the interpretive disagreement over Article 27 of the SCM Agreement be adjudicated upon as part of the full panel proceedings, and not at a preliminary stage. However, the Panel also considers that without ruling on that disagreement, in the situation before it, the Panel cannot rule that Article 4 of the SCM Agreement does not apply.

3.13. Therefore, the Panel declines to rule at this stage that Article 4 of the SCM Agreement does not apply to this dispute.

4 STATEMENT OF AVAILABLE EVIDENCE

4.1. India has sought a preliminary ruling that the statement of available evidence included in the United States' request for consultations does not meet the requirements of Article 4.2 of the SCM Agreement.[212]

4.2. India argues that this statement falls short of the requirements of Article 4.2 of SCM Agreement.[213] Specifically, India argues that the statement (a) includes no evidence of the character of the measure as a subsidy[214]; (b) "reproduces a verbatim list" of the legal instruments cited in the request for consultations[215]; and (c) provides no "basis for the[] identified programmes/schemes providing a subsidy" because it does "not indicate any specific chapter or paragraph" of the cited legal instruments.[216] In addition, India considers that the lack of "substantive difference" between the request for consultations and the panel request is further evidence of the United States' failure to appreciate the substantive standard in Article 4.2 of the SCM Agreement.[217]

4.3. The United States responds that India confuses evidence with arguments.[218] Article 4.2 requires a statement of the former, not the latter.[219] The United States considers that it has demonstrated in its first written submission that the cited evidence "is indeed evidence regarding the existence and nature of the subsidies in question".[220] Specifically, the statement "identified twenty-five separate legal instruments that gave the United States reason to believe that there are five Indian export subsidy programs that are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement", and "are the primary evidentiary basis for the U.S. claims".[221]

4.4. Article 4.2 of the SCM Agreement provides:

> A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.5. Thus, a complainant in a prohibited subsidies case must "indicate, in its request for consultations, the evidence that it has available to it, at that time, 'with regard to the existence and

[211] India's first written submission, para. 79. See also Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 5 ("the interpretation of these provisions [(i.e. Article 27 and Annex VII of the SCM Agreement)] goes to the essence of the dispute").

[212] India's first written submission, paras. 16-18. To recall, India argues that Article 4 of the SCM Agreement does not apply; India therefore presents its arguments under Article 4.2 of the SCM Agreement as alternative, in the event that the Panel does not accept India's position on the applicability of Article 4 of the SCM Agreement in the first place.

[213] India's first written submission, paras. 16-18.

[214] India's first written submission, paras. 96 and 100.

[215] India's first written submission, paras. 95 and 97.

[216] India's first written submission, para. 101.

[217] India's first written submission, paras. 102-103.

[218] United States' second written submission, paras. 41-43.

[219] United States' second written submission, para. 42 (referring to Panel Report, *Australia – Automotive Leather II*, para. 9.18).

[220] United States' second written submission, para. 41. See also, ibid. para. 44.

[221] United States' second written submission, para. 44.

nature of the subsidy in question'".[222] This must be "available evidence of the character of the measure as a 'subsidy' … and not merely evidence of the existence of the measure".[223]

4.6. Assessing whether a complainant has provided evidence of the "existence and nature" of a subsidy, under Article 4.2, is of course different from assessing whether the complainant has conclusively demonstrated the existence of a subsidy. Under Article 4.2, a panel must assess whether the statement describes or refers to evidence that is sufficient to give the complainant "reason to believe that a prohibited subsidy is being granted or maintained".[224] Moreover, this assessment must be grounded in the text of the statement of available evidence and of the documents it references. Therefore, the consistency of a statement of available evidence with Article 4.2 is capable of lending itself to a ruling at preliminary stage.

4.7. However, having considered the statement of available evidence in light of the legal standard and of the arguments of the parties, the Panel in this case considers it premature to rule on whether the statement of available evidence provides "evidence of the character of the measure as a 'subsidy'".[225] Instead, the Panel wishes to further explore certain questions of fact and law in the context of the substantive meeting with the parties.

4.8. Therefore, the Panel will not rule at this stage on whether the statement of available evidence meets the requirements of Article 4.2.

[222] Appellate Body Report, *US – FSC*, para. 161.
[223] Appellate Body Report, *US – FSC*, para. 161.
[224] Panel Report, *Australia – Automotive Leather II*, para. 9.19 (quoting SCM Agreement, Article 4.1).
[225] Appellate Body Report, *US – FSC*, para. 161.

ANNEX D-3

COMMUNICATION DATED 16 APRIL 2019 FROM THE PANEL TO THE PARTIES CONCERNING THE PANEL'S WORKING PROCEDURES AND TIMETABLE

16 April 2019

1.1. The Panel recalls its earlier communications on the matter of its decision to hold a single substantive meeting with the parties in the current proceedings[1], and recalls that it had reserved the right to schedule additional meetings if necessary. On 13 February 2019, during the substantive meeting with the parties, and on 15 February 2019, as part of the questions posed to the parties after the substantive meeting, the Panel asked each party whether and, if so, why, it considered that adding a second substantive meeting was necessary at that stage.[2] In view of the concerns expressed by India[3], the Panel further asked India whether it considered that the fact of holding a single substantive meeting had concretely, thus far, impaired or otherwise affected its ability to defend itself in this case; and if so, concretely, how this had been the case, and what steps it considered that the Panel should take to remedy that.[4]

1.2. On 4 March 2019, the parties responded to the Panel's questions and on 18 March each party commented on the other party's responses.

1.3. According to the United States, the "hundreds of pages of written submissions … lengthy opening and closing statements … two full days of questions and answers in the substantive meeting", together with the fact that parties were "answering up to 92 questions posed by the Panel with the opportunity to comment on each other's responses"[5], have "provided sufficient opportunity to develop the evidence and arguments to present to the Panel"[6], including "an opportunity to rebut all of the U.S. arguments at every stage of the proceeding".[7] The United States further noted that "the Panel granted India's request for a two-week extension to complete the answers to the Panel's questions to the parties"[8], and also that the 90-day deadline under Article 4 of the SCM Agreement had long passed.[9] Moreover, the United States also noted that "neither the parties nor the Panel raised any new issues, and … this is a *de jure* export subsidies dispute where the evidence … are the measures themselves".[10] Therefore, according to the United States, a second substantive meeting would be unnecessary and inappropriate.[11]

1.4. In response to the Panel's question on the need for a second substantive meeting, India reiterated its previous positions. In India's view, a second substantive meeting is necessary to ensure

[1] Working Procedures (22 August 2018), paras. 3, 5, and 15-16; timetable (22 August 2018); Communication dated 9 October 2018 from the Panel to the parties and third parties; Communication dated 19 October 2018 from the Panel to the parties and third parties; and Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting, paras. 2.1-2.21.

[2] Panel question No. 91. The Panel reminded the parties that, "[i]n the meantime, … the schedule remain[ed] as originally planned, i.e. it [did] not at th[at] moment include a second substantive meeting", and that therefore they should "respond to the … questions as fully as they would in the event that the Panel were not to hold a second substantive meeting". (Communication dated 15 February 2019 from the Panel to the parties)

[3] Communication dated 14 August 2018 from India to the Chairperson of the Panel, paras. 2 and 5-7; Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 8-13; India's first written submission, paras. 16, 18, 105-115 and 406; Communication dated 5 October 2018 from India to the Chairperson of the Panel; Communication dated 16 October 2018 from India to the Chairperson of the Panel; India's second written submission, para. 2; opening statement at the meeting of the Panel, para. 2; and closing statement at the meeting of the Panel, paras. 1 and 8-9.

[4] Panel question No. 92.

[5] United States' response to Panel question No. 91, para. 4. See also ibid. para. 3.

[6] United States' response to Panel question No. 91, para. 3.

[7] United States' comments on India's response to Panel question No. 91, para. 12.

[8] United States' response to Panel question No. 91, para. 5.

[9] United States' response to Panel question No. 91, para. 6.

[10] United States' comments on India's response to Panel question No. 91, para. 16.

[11] United States' response to Panel question No. 91, paras. 1-7.

conformity with the procedure established under the DSU[12], to provide effective deliberation and rebuttal opportunity to the parties[13], and to avoid setting a precedent contrary to the procedures followed in previous disputes.[14]

1.5. In response to the Panel's question of whether India considered that the fact of holding a single substantive meeting had concretely impaired or otherwise affected its ability to defend itself and, if so, how this had been the case, India asserted the following:

a. holding a single meeting had not provided the opportunity for a detailed discussion of "novel issues, such as issues pertaining to Footnote 1 and related Annexes of the SCM Agreement"[15], which "require detailed rebuttal to arguments advanced by the United States"[16];

b. holding a single meeting had not allowed "the discussion of the challenged schemes in a more detailed manner"[17]; and

c. "the responses to the questions posed by the Panel … would also require additional discussion between parties and the Panel"[18] and called for a second substantive meeting "in form of a rebuttal" of those responses.[19]

1.6. The Panel begins with India's broader concerns about the Panel's decision to schedule a single substantive meeting, departing from the working procedures in Appendix 3 of the DSU.[20] The Panel recalls that it set out the applicable legal standard and the balancing of case-specific considerations underpinning its decision in its communication of 22 January 2019.[21] The Panel refers to that discussion and will not repeat it here.[22] Instead, the Panel intends to ascertain whether, at this stage, pertinent considerations, prominently including due process, would warrant holding a further substantive meeting with the parties or taking other steps.

[12] India's response to Panel question No. 91, first para. and section (a).
[13] India's response to Panel question No. 91, first para. and section (b). See also India's comments on the United States' response to Panel question No. 91, para. 6.
[14] India's response to Panel question No. 91, first para. and section (c).
[15] India's responses to Panel question Nos. 92(a) and 92(b). See also responses to Panel question No. 91, section (b), first para.
[16] India's response to Panel question No. 92(b), second para.
[17] India's response to Panel question No. 92(a), first para. See also responses to Panel question No. 92(a), third para., No. 92(c), and No. 91, section (b), first para.
[18] India's response to Panel question No. 92(b), second para. See also responses to Panel question No. 92(a), third para., and No. 92(c).
[19] India's response to Panel question No. 91, section (c), third para. See also comments on the United States' response to Panel question No. 91, para. 2.
[20] India's responses to Panel question No. 91.
[21] Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting, paras. 2.11-2.21. See also Appellate Body Report, *Thailand – Cigarettes*, para. 150 ("ensuring due process requires a balancing of various interests, including systemic interests as well as those of the parties, and both general and case-specific considerations. In our view, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU").
[22] Both parties repeated in their responses to the Panel's questions arguments on the past practice under Article 21.5 of the DSU and Article 4 of the SCM Agreement. Regarding past Article 21.5 proceedings, the United States noted that panels in such cases, faced with a similar 90-day deadline, chose to hold a single substantive meeting, whereas India argued that Article 21.5 proceedings are different from original panel proceedings; regarding panels in past Article 4 proceedings, India reiterated that they held two substantive meetings with the parties. The United States noted that in none of the Article 4 panel proceedings that India relied upon was there any indication that either party requested the panel to hold only one substantive meeting. See India's response to Panel question No. 91, section (c); United States' response to Panel question No. 91, para. 7; India's comments on the United States' response to Panel question No. 91, paras. 4-5; United States' comments on India's response to Panel question No. 91, paras. 4 and 13-14. The Panel noted these arguments in its Communication dated 22 January 2019 but did not ground its decision in them. The Panel's decision was grounded in its interpretation of Articles 11, 12.1, and 12.10, and Appendix 3, of the DSU, and Article 4 of the SCM Agreement, and in the case-specific considerations it set out. See Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting, paras. 2.8-2.9 and 2.11-2.21.

1.7. The Panel takes note of, and agrees with, the United States' description of the extensive opportunity that parties have had to make their case and rebut the other party's case, as well as on the need to bring proceedings to a close. The parties' opportunity to make their case and rebut the adverse case has included extensive filings, two full days of hearings, responses to almost a hundred questions from the Panel and comments on each other's responses, and has further included a doubling of the time for filing responses to the Panel's questions, at India's request.

1.8. Nonetheless, because of the fundamental importance of due process in the Panel's conduct of proceedings, before reaching a final decision on whether to modify its Working Procedures and timetable, the Panel wishes to ascertain whether its decision to hold a single substantive meeting has *concretely* impaired the due process rights of India, who had opposed the Panel's decision to hold a single meeting, so that, if it has, the Panel can decide on the appropriate remedial steps.

1.9. For this purpose, the Panel turns to India's answer to Panel question No. 92. India refers to three ways in which it considers that holding a single substantive meeting has affected its ability to defend itself. First, India considers that there has been insufficient opportunity to discuss footnote 1 and the related Annexes of the SCM Agreement. Second, India considers that there has been insufficient opportunity to discuss the challenged schemes. Third, India considers that there is a need for further discussion of the parties' responses to the Panel's questions. Therefore, "India considers that the Panel should hold a second substantive meeting".[23]

1.10. With regard to footnote 1 and the related Annexes of the SCM Agreement, as well as the challenged schemes, the Panel observes that the parties have filed their first and second written submissions, made statements at the hearing, had the opportunity to ask questions of each other and third parties during and after the hearing, answered questions orally during the hearing, answered questions in writing, and commented on each other's written answers. Further, at India's request, parties obtained four full weeks to answer questions after the hearing. In this context, the Panel does not consider that there has been a lack of an "opportunity to explore in required depth"[24], or respond to, arguments on footnote 1 or on the challenged schemes, and it does not consider that this unspecified call for further discussion warrants a second substantive meeting.

1.11. With regard to the third concern identified by India, namely, the need for discussion and rebuttal of the parties' answers to the Panel's questions, the Panel notes, first, that the possibility for comment by each party on the other party's answers serves precisely that need. At the same time, since India anticipated that the answers to the Panel's questions would require a further substantive meeting, the Panel has reviewed and considered those responses[25], and the comments on those responses[26], before making its decision. Having done so, the Panel has found no point of fact or law in the answers, or in the comments on the answers, that would warrant holding a further substantive meeting with the parties at this stage, and no such point was identified specifically by India.

1.12. In sum, balancing the competing considerations in this case,[27] the Panel chose to depart from Appendix 3 of the DSU by scheduling a single substantive meeting with the parties, while reserving its right to schedule additional substantive meetings if required. After the filing of both sets of written submissions and the holding of the single hearing, the Panel sought the views of the parties on this matter, and in particular it asked India if it considered that the fact of holding a single substantive meeting had concretely affected its ability to defend itself in this case and, if so, concretely, how this had been the case and what steps the Panel could take to remedy that. In response, India identified no instance of its due process rights having been concretely affected. Instead, India generically referred to a need for further discussion of footnote 1 and the related Annexes of the SCM Agreement, of the measures at issue, and of parties' responses to the Panel's questions. In light of this, and in light of the exchanges already had so far on the subjects referred to by India, for which, moreover, the Panel has granted considerable time, the Panel does not consider that there is a need to depart from the structure of proceedings as originally envisaged in this dispute. Nor has

[23] India's response to Panel question No. 92(c).
[24] India's response to Panel question No. 92(a), first para.
[25] Submitted on 18 March 2019.
[26] Submitted on 1 April 2019.
[27] See Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting, paras. 2.20-2.21.

the Panel's review of the two most recent sets of submissions, generically referred to by India as requiring a further substantive meeting, disclosed the need for such a further meeting. Thus, the Panel is satisfied that India's due process rights have been carefully preserved.

1.13. Therefore, the Panel has decided not to modify the Working Procedures and timetable by adding a second substantive meeting. In light of this decision, the Panel has also determined the timing of the further procedural steps in these proceedings, as set out in the attached proposed updated timetable.

1.14. The Panel notes that, if necessary, it has the authority to pose further questions in writing to the parties.

1.15. The Panel invites parties to submit any comments to the attached proposed updated timetable by 25 April 2019.

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