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INDIA – EXPORT RELATED MEASURES

NOTIFICATION OF AN APPEAL BY INDIA UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 19 November 2019, from the delegation of India, is being circulated to Members.

1. Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, India hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law and legal interpretations covered in the report of the Panel in *India – Export Related Measures* (WT/DS541/R). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, India is simultaneously filing this Notice of Appeal with the Appellate Body Secretariat.

2. For the reasons to be further elaborated in its submission to the Appellate Body, India appeals, and requests the Appellate Body to modify or reverse legal interpretations leading to the legal findings and conclusions of the Panel, with respect to the following errors contained in the Panel Report:¹

a. The Panel has irrevocably violated India's due process rights in the facts and circumstances of this case and has failed to fulfill its mandate under the DSU

3. India considers that the Panel has violated India's due process right and violated its duty to conduct an objective assessment of the matter under Article 11 of the DSU by refusing to hold a second substantive meeting.² In not holding a second substantive meeting, the Panel has erred in: (a) its provision of special and differential treatment to India in the context of Article 12.10 of the DSU; (b) disregarding India's due process rights guaranteed by the DSU based on resource constraints on the part of the Secretariat; (c) failing to provide any rationale for its decision to not hold a Second Substantive Meeting, and alternatively even if rationale was provided, failing to provide a rationale relevant to the applicable legal standard. India submits that (d) that the resulting violation of due process goes to the heart of the procedure implemented by the Panel and critically affects the credibility of the Report.

4. India notes that the Panel's failure to perform its duties at different stages of the proceeding have irrevocably compromised the credibility of the Panel Report. Consequently, India requests for the Appellate Body to declare the entire Report moot and of no legal effect.

¹ Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to India's right to refer to other paragraphs of the Panel Report in the context of its appeal.

² Panel Report, Annex D-1, paras. 2.19-2.21. Panel Report, para. 1.14-1.15.

b. The Panel has erred in finding that the Panel Request made by the United States has met the standard provided in Article 6.2 of the DSU, and erred in finding that the list of legal instruments met the standard of available evidence under Article 4.2 of the SCM Agreement

5. India appeals the finding of the Panel that the request for the establishment of a panel made by the United States in WT/DS541/4 identified the 'specific' measures at issue in this dispute. India states that the Panel did not make an objective assessment of the matter, and did not apply the correct legal standard in determining whether the United States' Panel Request was specific. The Panel has also erred in considering that the identical list of legal instruments was sufficient to identify the specific measures at issue under Article 6.2 of the DSU and met the requisite standard of available evidence as per Article 4.2 of the SCM Agreement.

6. India requests the Appellate Body to reverse the Panel's findings that the Request for Establishment of a Panel by the United States in WT/DS541/4 met the standards of Article 6.2 of the DSU.³

c. The Panel has erred in its interpretation of Article 27.2(b) of the SCM Agreement as applicable to developing country members graduating from Annex VII(b) of the SCM Agreement

7. India challenges the interpretation of Article 27.2(b) and Annex VII of the SCM Agreement, as developed by the Panel. India submits that the Panel has erred in finding that Article 27.2(b) of the SCM Agreement does not apply to developing country members graduating from Annex VII(b).⁴ India also submits that the interpretation developed by the Panel is contrary to the general principles of treaty interpretation and that the interpretation developed by the Panel results in ambiguity and inconsistency between the provisions of Article 27 of the SCM Agreement.⁵ The interpretation developed by the Panel renders express words of Annex VII(b) ineffective⁶ and runs contrary to the object and purpose of the SCM Agreement;⁷ and denies the rights granted to developing country members by Annex VII(b) of the SCM Agreement.⁸

8. Consequently, India requests the Appellate Body to reverse the Panel's findings that Article 27.2(b) of the SCM Agreement does not apply to developing country members graduating from Annex VII(b),⁹ and find that developing country members graduating from Annex VII(b) are entitled to an eight-year phase-out period for eliminating their export subsidies.

d. India appeals the legal standard for footnote 1, as developed and applied by the Panel

9. India appeals the legal standard developed by the Panel under footnote 1 of the SCM Agreement, and submits that the Panel erred in (a) not evaluating all conditions of footnote 1 while evaluating its applicability, and (b) finding that the application of Part II of Annex II is not irrelevant outside countervailing duty investigations.¹⁰

10. India requests the Appellate Body to find that the legal standard as developed by the Panel for footnote 1 of the SCM Agreement is incorrect and that Part II of Annex II can be applied only in countervailing duty investigations.

³ Panel Report, Annex D-2, *inter alia* paras. 2.44, 2.54, 2.67, 2.81, 2.99 and 2.126. Panel Report, paras 7.122, 7.123, and 7.130.

⁴ Panel Report, paras. 7.40, 7.45, 7.53.

⁵ Panel Report, paras. 7.60, 7.61, 7.62, 7.63, 7.64.

⁶ Panel Report, paras. 7.46, 7.47, 7.48.

⁷ Panel Report, paras. 7.65, 7.66, 7.67, 7.68.

⁸ Panel Report, paras. 7.49, 7.50, 7.51, 7.52.

⁹ Panel Report, paras. 7.69, 7.72, 7.73, 7.74.

¹⁰ Panel Report, para. 7.182.

e. The panel has erred in finding that the exemption from Customs Duties on Importation under the EOU/EHTP/BTP Schemes are subsidies contingent on export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement

11. India appeals the said findings and conclusions arrived at by the Panel, that the EOU Scheme did not meet the requirements of footnote 1 of the SCM Agreement, and that the "Excessive Remission Principle" is not applicable in the case of the exemption from customs duties on importation under the EOU/EHTP/BTP Schemes. The Panel failed to carry out an objective assessment of the scheme. India also appeals the Panel's finding on the following grounds: (a) the Panel erred in finding the exemption from customs duties under the EOU/EHTP/BTP Schemes does not fall within the ambit of footnote 1 of the SCM Agreement;¹¹ (b) the Panel has erred by applying incorrect legal standards to find that the exemption from customs duty under the EOU/EHTP/BTP Schemes is a subsidy; (c) the Panel has applied incorrect legal test, namely, the 'three-step test' and 'better off' test,¹² and (d) the Panel has incorrectly found that the exemption from custom duties on importation under EOU/EHTP/BTP Schemes is contingent on export performance.¹³

12. India requests the Appellate Body to reverse the Panel's findings that the exemption 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, and find that EOU Scheme falls within the ambit of footnote 1, and if any additional duty is exempted under the scheme, needs to be evaluated in accordance to the excess remission principle.¹⁴

f. The Panel has erred in finding that the exemption from customs duties on the importation of capital goods under the EPCG Scheme are subsidies contingent on export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement

13. India appeals the Panel's findings that the EPCG Scheme provides subsidies contingent on export performance. India states that the Panel has erred in (a) finding that footnote 61 provides an exhaustive list of inputs;¹⁵ (b) in finding that Capital Goods are not "consumed" while manufacturing exported products;¹⁶ and (c) in disregarding India's argument that Capital Goods can be allowed as inputs as per Destination Principle embedded in Article VI:4 of GATT, Annex I to III of SCM Agreement and Ad Article XVI of GATT 96. The Panel erred in finding that "Capital Goods" cannot be considered as inputs consumed in the manufacture of exported product, and consequently, erred in holding that the exemption from customs duties on the importation of capital goods under the EPCG Scheme does not meet the requirements of footnote 1 of the SCM Agreement.¹⁷

14. India requests the Appellate Body to reverse the Panel's findings that the exemption from customs duties on importation under the EPCG Scheme is a subsidy contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement, as the Panel erred in not accepting India's arguments that capital goods are inputs consumed, and hold that the exemption from custom duties on importation under the EPCG Scheme meets the requirements of footnote 1 of the SCM Agreement.¹⁸

g. The Panel erred by finding that the MEIS Scheme grants subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement

15. India states that the Panel erred in finding that MEIS grants subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement : (a) in finding that MEIS scrips do not meet the conditions of footnote 1;¹⁹ and (b) in concluding that MEIS involves a

¹¹ Panel Report, para. 7.216.

¹² Panel Report, para. 7.310.

¹³ Panel Report, para. 7.498.

¹⁴ Panel Report, paras. 7.215, 7.216, 7.236 (first sentence), 7.326-7.327, 7.498, and 8.1(a).

¹⁵ Panel Report, para. 7.200.

¹⁶ Panel Report, para. 7.243.

¹⁷ Panel Report, para. 7.247.

¹⁸ Panel Report, paras. 7.247, 7.341, 7.458, 7.512 and 8(b).

¹⁹ Panel Report, paras. 7.289, 7.294,

direct transfer of funds.²⁰ India also appeals the Panels' finding that the MEIS scrips result in conferral of a benefit as per Article 1 of the SCM Agreement.

16. India requests the Appellate Body to reverse the findings of the Panel on the grounds stated above and find that the MEIS falls within the ambit of footnote 1 and therefore is not a prohibited export subsidy under Article 3.1(a) and 3.2 of the SCM Agreement.²¹

h. The Panel has erred in finding that the SEZ Scheme is a prohibited export subsidy under Articles 3.1(a) and 3.2 of the SCM Agreement

17. India appeals the findings of the Panel that the SEZ Scheme is a subsidy contingent on export performance. India states that the Panel failed to carry out an objective assessment of the scope of the term "exports" under the SEZ Scheme.²² India also states that the Panel failed to make an objective assessment of the positive NFE requirement under the SEZ Scheme²³ to find the positive NFE requirement under the SEZ Scheme imposes a condition of *de jure* export contingency on SEZ Units. Further, India submits that the Panel erred in applying the test of *de jure* export contingency to the SEZ Scheme.²⁴

18. India requests the Appellate Body to reverse the findings of the Panel on the grounds stated above and find that the SEZ Scheme is not a prohibited export subsidy under Article 3.1 and 3.2 of the SCM Agreement.²⁵

i. The Panel has erred in finding that Conditions 10, 21, 36, 60(II) & 61 in Customs Notification 50/2017 are subsidies contingent on export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement

19. India considers that the Panel has not objectively assessed Conditions 10, 21, 36, 60(ii) and 61 of DFIE Scheme. India appeals the finding of the Panel on the following grounds: (a) the Panel has not objectively assessed the applicability of evidence submitted by the United States for one product under Condition 10 (US Exhibit 90);²⁶ (b) the Panel has erred in considering that items imported duty free under Condition 60(ii) and 6 items imported under Condition 21 are goods not used in the production of exported products;²⁷ (c) The Panel has erred in applying the three-step test, specifically for Condition 36²⁸ (d) the Panel erred in finding export contingency for importation of research equipment under condition 61 of the DFIE Scheme.²⁹

20. In this appeal, India requests the Appellate Body to reverse the Panel's findings that Conditions 10, 21, 36, 60(ii) & 61 in the DFIE Scheme are subsidies contingent on export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.³⁰

21. India notes that the above grounds of appeal are without prejudice to the arguments developed in India's Appellant's Submission.

²⁰ Panel Report, paras. 7.432, 7.438.

²¹ Panel Report, paras. 7.289, 7.294, 7.432, 7.438 and 8.1(e).

²² Panel Report, paras. 7.351, 7.352, 7.353.

²³ Panel Report, paras. 7.522, 7.524, 7.525, 7.526, 7.527, 7.528, 7.529, 7.530, 7.531.

²⁴ Panel Report, paras. 7.529 and 7.530, footnote 775, 7.533.

²⁵ Panel Report, paras. 7.533 and 8.1(c).

²⁶ Panel Report, para. 7.256.

²⁷ Panel Report, para. 7.255.

²⁸ Panel Report, paras. 7.266, 7.419.

²⁹ Panel Report, paras. 7.541-7.542.

³⁰ Panel Report, paras. 7.267 (first sentence), 7.406, 7.419, 7.458, 7.542, and 8.1(d).