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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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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]

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[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]

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[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.

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[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.

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[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 when the prohibition of export subsidies becomes applicable to them. 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 – as referring to the point in time when the Article 3.1(a) prohibition would "kick in" for any given developing country.

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.

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[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.

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,

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[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 47/2015-20**20**". 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]

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[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.