***India – Export Related Measures* (WT/DS541)**

Substantive Meeting of the Panel with the Parties

Opening Statement of the United States

February 12, 2019

1. Mr. Chairman, distinguished members of the Panel: The United States would like to thank you for serving on this Panel and to thank the Secretariat staff assisting you.

I. INTRODUCTION

2. At issue in this proceeding are five Indian export subsidy schemes that are inconsistent with the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). These schemes are: (1) Export Oriented Units ("EOU") Scheme and sector specific schemes, including the Electronics Hardware Technology Parks ("EHTP") Scheme and the Bio-Technology Parks ("BTP") Scheme; (2) Merchandise Exports from India Scheme ("MEIS"); (3) Export Promotion Capital Goods ("EPCG") Scheme; (4) Special Economic Zones ("SEZ"); and (5) Duty Free Imports for Exporters ("DFIS") Scheme.

3. In the SCM Agreement, Members recognized that export subsidies are inherently trade distortive and Members established a different standard than exists for actionable subsidies. A complaining Member need only show the existence of a subsidy and that it is contingent upon export performance. Special procedures in Article 4 of the SCM Agreement provide for expedited resolution of disputes involving export subsidies because of their inherently distorting trade effects and unfair competitive advantage.[1]

4. On the other hand, in Article 27 of the SCM Agreement, entitled *Special and Differential Treatment of Developing Country Members*, Members recognized the economic role subsidies may play for developing country Members.[2] While Article 27 provides for special and differential treatment for developing country Members in terms of the prohibition on export subsidies, Article 27 also provides for that special and differential treatment to come to an end. And it has come to an end for India.

5. We are here because India refuses to recognize that the prohibition of export subsidies now applies to it. To make matters worse, India continues to expand the scope of these prohibited export subsidy schemes. The United States detailed recent examples of the expansion of the MEIS, EOU, and EPCG schemes in 2017-2018.[3] After filing its Second Written

[1] United States First Written Submission, paras. 4-5.
[2] SCM Agreement, Article 27.1.
[3] United States First Written Submission, para. 2, n.4.

Submission in November 2018, India enacted additional, or expanded, benefits under the MEIS[4] and EPCG schemes.[5] India's actions betray its statement that it is making efforts to "reduce the impact of the duty and tax exemptions on government revenue."[6] Citing its alleged development needs, India proclaims that it will maintain these schemes.[7] India's measures have resulted in unfair preferential treatment, an unfair competitive advantage, and unfair results in the global trading system at the expense of other Members, including developing country Members.

6. In its submissions, the United States demonstrated that the schemes provide export subsidies, and thus the schemes are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.[8] In response, India makes a number of unfounded or irrelevant arguments. To maximize the time available for the Panel's questions, we will not, in this statement, repeat every argument in our written submissions or draw attention to all of the errors in India's submissions.

7. Instead, we will focus our statement on the central issue in this dispute: the challenged schemes. <u>First</u>, we will highlight the prominent features of each scheme that demonstrate that they are export subsidies. <u>Second</u>, we will rebut India's argument that four of the schemes are permissible remission or duty drawback schemes.[9] <u>Third</u>, the United States will refute India's argument that the SEZ scheme is not contingent, either in law or in fact, upon export performance because the SEZ Unit can earn positive net foreign exchange ("NFE") through domestic transactions. <u>Fourth</u>, we briefly discuss that Article 27 does not provide an eight-year phase out of export subsidies for India even considering the supplemental sources India has highlighted.

[4] *See*, *e.g.*, PN No. 49/2015-2020 (November 22, 2018) at http://dgft.gov.in/sites/default/files/PN 49dt. 22.11.18 english.pdf (expanding MEIS scheme for brown rice, parboiled rice, broken rice, and "other rice" to receive a 5% reward under MEIS); PN No. 60/2015-2020 (December 3, 2018) at http://dgft.gov.in/sites/default/files/PN 60dt. 17.12.2018-english_0.pdf (enacting a 5% MEIS benefit for exports of sal oil, kokam oil, and mango butter); PN No. 65/2015-2020 (December 17, 2018) at http://dgft.gov.in/sites/default/files/PN%2065%20English.pdf (increasing MEIS benefit rate from 5% to 10% for onions).
[5] *See* PN No. 61/2015-2020 at http://dgft.gov.in/sites/default/files/Pn%20English.pdf (adding PUF panels/doors for cold storage and furniture fixtures for hospitals as permitted imports under EPCG scheme).
[6] India First Written Submission, para. 6.
[7] India First Written Submission, para. 8.
[8] United States First Written Submission, paras. 18-23.
[9] *See*, *e.g.*, India Second Written Submission, para. 35.

8. The common theme running throughout India's positions is that the Panel should accept what India wishes the SCM Agreement says rather than what the text actually says. But applying the plain meaning of the SCM Agreement to the face of the measures and the corresponding instruments confirms that India's core arguments are without merit.

II. THE CHALLENGED SCHEMES ARE INCONSISTENT WITH INDIA'S OBLIGATIONS UNDER ARTICLE 3.1(A) AND 3.2 OF THE SCM AGREEMENT

9. Under the SCM Agreement, to establish a prohibited export subsidy, the complaining Member must show the following three elements: (1) a government or public body provides a financial contribution through the measure at issue; (2) the financial contribution confers a benefit; and (3) the resulting subsidy is contingent—in law or fact—upon export performance.[10] The United States has methodically detailed how the challenged schemes meet each of these elements, and we briefly highlight some of the relevant features of the schemes.

A. *Prima Facie Case Establishes that Schemes are Export Subsidies*

1. *EOU/EHTP/BTP*

10. The EOU/EHTP/BTP scheme meets all three elements for a prohibited export subsidy. First, the EOU/EHTP/BTP scheme provides a "financial contribution" where the government forgoes revenue—in the form of duties collected—that would otherwise be due.[11] The financial contribution includes an exemption from customs duties on imports, including raw materials, capital goods and other non-productive fixed assets and equipment; as well as exemptions from excise duty. Currently, EOU Units also enjoy exemptions from payment of goods and services tax and compensation cess.[12]

11. Second, under this scheme, participants are "better off" by not having to pay the duties they otherwise would have paid—and that non-participants pay—and therefore, these Units receive a benefit.

[10] SCM Agreement Articles 1.1(a); 1.1(b); and 3.1(a).
[11] *US-FSC(AB)*, para. 91.
[12] See Notification 35/2015-20.

12. India's argument that the proper benchmark is whether another exporter in India *could* also have access to the customs and excise duty exemptions that a Unit receives is incorrect.[13] In India's view, the EOU/EHTP/BTP scheme does not confer a benefit, or make a participant "better off," because every exporter in India has the option to participate, and it is the exporter's choice not to participate and receive the rewards.[14] By seeking to compare a recipient of a financial contribution to the situation of a hypothetical recipient of the same financial contribution, India engages in a tautology. Under India's logic, any prohibited export scheme would be consistent with the SCM Agreement because an exporter participating in prohibited export subsidies is not "better off" by receiving a benefit than a hypothetical exporter participating in the same program.

13. Instead, under the SCM Agreement the benefit analysis focuses on the comparison between the participant who receives the benefit of not paying customs duties and the enterprise that does not participate and receives no such exemption. In the case of the EOU scheme, the EOU Unit is "better off" and a benefit is conferred

14. <u>Third</u>, it is clear that the EOU/EHTP/BTP scheme is contingent upon export performance. EOU/EHTP/BTP Units agree to export their *entire* production and maintain a positive NFE, meaning they export more than they import. India thus ties the availability of rewards under the scheme to export performance. In addition, India monitors the participant's performance, and the participant must meet its NFE requirement or face cancellation of eligibility and face penal consequences.

15. Therefore, the United States has demonstrated that the EOU/EHTP/BTP scheme is a prohibited export subsidy.

2. *MEIS*

16. India's MEIS scheme also meets all three elements for a prohibited export subsidy. <u>First</u>, India provides MEIS participants with a financial contribution in the form of import duty scrips ("scrips") awarded to pay for customs and excise duties, fees, or a deficit in export obligation.

[13] India Second Written Submission, para. 84.
[14] India Second Written Submission, para. 84.

Scrips have cash value and are freely transferable. The MEIS scrips thus serve as a "direct transfer" under the SCM Agreement because the scheme awards a financial claim to the MEIS participant to offset customs duties and fees, or to sell the scrips on the open market for cash.

17. Second, the MEIS participants' receiving the scrips renders them "better off" than the market. An enterprise in the market that does not receive scrips or any equivalent value is less well off than an MEIS participant.

18. Third, in the MEIS scheme, the export contingency is transparent. The MEIS participant receives scrips conditioned and tied to the value of its exports, to what countries it sells its exports, and what products it exports. India also monitors the grant of these scrips and whether MEIS participants meet export performance. The final amount of scrips earned is contingent upon export performance.

19. Therefore, the MEIS scheme is a prohibited export subsidy scheme.

3. *EPCG*

20. The EPCG scheme also meets all three elements for a prohibited export subsidy. First, the EPCG scheme provides exemptions from customs duties, taxes and cess on the import of capital goods. These exemptions constitute a "financial contribution" where the government forgoes revenue that would otherwise be due in the absence of the challenged measure.[15]

21. Second, the EPCG participants are "better off" by not paying the import duties for the capital goods they import. Other entities in the market are required to pay import duties.

22. As discussed a few moments ago, the fact that non-participating exporters could have applied for and possibly participated in the scheme is the wrong comparison.[16] EPCG participants receive the benefit and non-EPCG participants do not receive the benefit.

23. Third, the EPCG scheme is conditioned and dependant on multiple export obligations (i.e., export performance). The EPCG participant must meet both a specific and average annual

[15] *US-FSC(AB)* para. 91.
[16] India Second Written Submission, para. 142.

export obligation. The EPCG scheme even incentivizes the early fulfilment of the export obligations to promote export performance. On the other hand, failure to meet these obligations may lead to fees and payment of the customs duties, taxes and cess saved. The EPCG scheme is contingent upon export performance.

24. Therefore, the EPCG scheme is a prohibited export subsidy scheme.

4. *SEZ*

25. The SEZ scheme similarly meets all three elements for a prohibited export subsidy. First, SEZ Units receive a financial contribution through corporate income tax deductions and exemptions from customs duty that constitute a "financial contribution" where the government forgoes revenue that would otherwise be due in the absence of the challenged measure.[17] SEZ Units are entitled to deduct 100% of profits from exports during the first five years of participation and then entitled to deduct 50% of profits from exports during the subsequent five years. India also provides SEZ Units exemption from customs and export duties, and from India's Integrated Goods and Services Tax (IGST).

26. Second, SEZ Units are "better off" and receive a benefit because the SEZ scheme provides corporate tax deductions and exemptions from customs and export duties, and IGST. Similarly situated enterprises that do not participate in the SEZ program do not receive such deductions and exemptions. India does not dispute these first two elements.[18]

27. Third, the SEZ subsidies are contingent both in fact and law upon export performance.[19] The SEZ subsidies are contingent in law because India requires the SEZ Unit to promise to make future exports and to maintain a positive NFE, a calculation that relies on the FOB value of exports. The SEZ Unit must meet these conditions to receive the tax deductions and duty exemptions of the scheme. Moreover, the SEZ scheme is contingent in fact upon export performance because the SEZ scheme's benefits are tied to actual or anticipated exportation or export earnings.[20] This is demonstrated by evidence including the preamble of the implementing measure of the SEZ Act,

[17] *US-FSC(AB)* para. 91.
[18] India Second Written Submission, para. 187.
[19] United States First Written Submission, paras. 121-38.
[20] SCM Agreement, Art. 3.1(a), n.4.

public statements of government officials, and the telling facts of the SEZ application, approval, and monitoring process. Again, SEZ benefits are also contingent in fact based on the SEZ Units including its anticipated FOB value of exports as a condition of participation, and an SEZ Unit must meet certain annual export and NFE earnings targets. The SEZ scheme's subsidies are contingent in law and fact upon export performance. Therefore, the SEZ scheme is a prohibited export subsidy scheme.

5. *DFIS*

28. The final program at issue is the DFIS scheme; the DFIS scheme also meets all three elements to be a prohibited export subsidy. <u>First</u>, the DFIS scheme provides an import duty exemption that constitutes a "financial contribution" where the government forgoes revenue that would otherwise be due in the absence of the challenged measure.[21] The DFIS scheme provides for earning an import duty exemption for exporting qualifying products *during the previous year* up to a certain value.

29. <u>Second</u>, the DFIS participants are "better off" by not paying the import duties up to the duty-free import entitlement earned from the prior year's export. A similarly situated non-participant enterprise receives no such import duty exemption. The fact that other exporters, non-participants, *could* have access to this program is irrelevant since it is not the proper comparison, as discussed above.[22]

30. <u>Third</u>, the DFIS scheme is contingent upon export performance. Under the DFIS scheme, to receive a duty free import entitlement, the participating enterprise must have exported qualifying products the previous year. Moreover, the value of the import duty exemption is tied to and conditioned on the value of the exports made in the previous year. The DFIS scheme grants subsidies contingent upon export performance.

31. Therefore, the DFIS is a prohibited export subsidy.

[21] *US-FSC(AB)* para. 91.
[22] India Second Written Submission, para. 207.

III. India's Defenses are Meritless

32. In response to the U.S. demonstration that these five schemes are prohibited export subsidies, India raises two principal arguments about its schemes and another argument asserting India is entitled to an eight year phase-out under the SCM Agreement.

33. First, India claims that four schemes are proper duty drawback schemes or remission of taxes scheme under the SCM Agreement. This argument fails because, as a general matter, the schemes do not require duty-free imports to be *inputs* as defined by the SCM Agreement, or the schemes do not require those inputs to be *consumed* in the production of exported products as mandated by the SCM Agreement.

34. Second, India claims that the SEZ scheme is not contingent in law or in fact on export performance because limited "exports" from SEZ units to other SEZ units can earn credit on an NFE calculation. This limited domestic situation does not eliminate the overwhelming export contingency of the SEZ scheme.

35. Third, India asserts that an eight-year phase out period to terminate its export subsidies applies to it after its graduation from Annex VII of the SCM Agreement based on supplemental information India provides. This is incorrect. A plain reading of the SCM Agreement shows that Articles 3.1(a) and 3.2 apply to India's measures now.

A. India's Schemes are Not Duty Drawback Schemes

36. Footnote 1 of the SCM Agreement describes where, "[i]n accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I to III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy."[23] India claims that the EOU, MEIS, EPCG, and DFIS schemes qualify for the exemption found in footnote 1 of the SCM Agreement.

[23] United States Second Written Submission, para. 66.

37. The United States points to the language "the exemption of an *exported product* from duties or taxes borne by the like product when destined for domestic consumption." Footnote 1 expressly applies only to the duties or taxes borne by the *exported product* and does not apply to the drawback and remission of duties and taxes on *imported inputs*.

38. Turning to the Annexes, as the United States emphasized in our Second Written Submission, Annex I, items (h) and (i), and Annex II emphasize that imported inputs must be "consumed" in the production of the exported product.[24] India's duty drawback/remission argument fails to explain how these schemes require the *consumption* of imported inputs in the *production* of exports.[25]

39. The schemes also extend import duty exemptions to products, such as capital goods and non-productive fixed assets, that are not inputs to begin with. Despite India's attempt at a creative interpretation of the SCM Agreement footnote 1 and Annexes I, II, and III, India fails to even relate the duty-free imports awarded, or the remission of taxes, with the production of the exported product the schemes promote. These schemes do not meet the fundamental requirements for a duty drawback or remission scheme.

40. Before the United States addresses India's duty drawback/remission theory, specifically for four of the challenged schemes, the United States rebuts some of India's general assertions. 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."[26] Elsewhere, India argues that the United States must

[24] *See, e.g.*, SCM Agreement, Annex II ("Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste."); *EU-PET* (*Pakistan)*, para. 5.68).

[25] *EU-PET (Pakistan)*, para. 5.71 (noting "once the Pakistani customs official is satisfied, on the basis of documentary evidence presented by the producing company, that the imported inputs were used to manufacture the finished product, (s)he releases the indemnity bond and the post-dated cheques deposited at the time of the importation of the inputs.").

[26] India Second Written Submission, para. 39.

offer a "data-driven, technical argument" to show that duty-free imported inputs are not consumed under the challenged schemes.[27]

41. India fails to mention that the section of Annex II it relies upon is one that is only applicable to a countervailing duty investigation.[28] Annex II states: "[i]n examining whether inputs are consumed in the production of the exported product, *as part of a countervailing duty investigation pursuant to this Agreement*. . . ." The plain language of the SCM Agreement shows that the guidelines of Annex II apply to countervailing duty investigations.

42. 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, DFIS) 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.

43. With regard to capital goods, India has repeatedly proposed that capital goods be included in the definition of "inputs" 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."[29] India's proposal was opposed and rejected.

44. For instance, a 2001 Chairman's Report[30] recalls that India's proposal "advocates including capital goods in the definition in footnote 61 of inputs consumed in the production process."[31] In other words, capital goods were not already included. The report recalls Members' concerns. These concerns include "issues of transparency and accuracy,"[32] and "whether an industry-wide averaging system could accurately capture the extent of depreciation

[27] India Second Written Submission, para. 78.
[28] SCM Agreement Annex II.
[29] *See* TN/RL/W/120 and TL/RL/GEN/153 at paras. 5-7.
[30] G/SCM/34 (IN Ex.-15).
[31] G/SCM/34, para. 20 (IN Ex.-15).
[32] G/SCM/34, para. 22 (IN Ex.-15).

of capital equipment associated with particular volumes of particular exported goods."[33] Other problems include hesitation regarding national differences in accounting standards that would make establishing a single depreciation schedule difficult.[34] Members noted that "in many cases a given piece of capital equipment may be used to make goods both for domestic consumption and for export."[35] This issue arises in the EPCG scheme.

45. Other concerns include "that different capital goods may be used to make a range of different products and that some goods may not easily be identifiable as either capital goods or final goods …. All of these issues would complicate the accurate calculation of the amount of depreciation of a capital good attributable to a unit of a given exported product."[36] Members also raised objections that "any multilateral approach to capital goods would need to be able to be applied by all WTO Members, and have voiced doubts in this respect over the system proposed by India."[37] The report on this issue concludes: "India was therefore disappointed that other Members interpreted the relevant provisions of the SCM Agreement in an over-restrictive manner."[38]

46. Contrary to India's assertion that "capital goods fall squarely within the definition of 'inputs' in Footnote 61 of the SCM Agreement,"[39] the SCM Agreement's history on footnote 61 and subsequent history shows that the question of whether to include capital goods as "inputs" was deliberated and the proposal was rejected.

47. The United States now rebuts some of India's specific arguments regarding how four of the five challenged schemes should qualify as duty drawback or remission schemes.

1. *EOU*

[33] G/SCM/34, para. 22 (IN Ex.-15).
[34] G/SCM/34, para. 23 (IN Ex.-15).
[35] G/SCM/34, para. 24 (IN Ex.-15).
[36] G/SCM/34, para. 24 (IN Ex.-15).
[37] G/SCM/34, para. 25 (IN Ex.-15).
[38] G/SCM/34, para. 31 (IN Ex.-15).
[39] India's Second Written Submission, para. 54.

48. According to India's Foreign Trade Policy, "an [E]OU/EHTP/STP/BTP Unit may export all kinds of goods and services except items that are prohibited in ITC (HS),"[40] and "[a]n EOU/EHTP/STP/BTP Unit may import and/or procure, from DTA or bonded warehouses in DTA/international exhibition held in India, all types of goods, including capital goods, required for its activities. . . ."[41] These imports shall "be without payment of duty of customs leviable thereon."[42] Review of the plain language of this measure shows no restriction on the types of products that the EOU enterprise may import, or that these imported products must be inputs consumed in the production of the exported product. In fact, according to the Handbook of Procedures, these imported goods can be capital goods such as pollution control equipment, quality assurance equipment, storage racks, office furniture, air conditioning systems, and security systems.[43]

49. India argues that the U.S. use of the term "approved activity" somehow "precludes the possibility of inputs being consumed . . . ."[44] That is not so. Some of the imported products that the EOU Units import duty-free may well be inputs in the production of exported products. The language of the Foreign Trade Policy and Handbook of Procedures demonstrates that this scheme extends import duty exemption to all kinds of products. The EOU scheme, on its face, extends import duty exemptions to products that are not inputs or consumed in the production of exported products or these products may not even be involved in the production process.

50. Because of the failure of the EOU/EHTP/BTP scheme to tie its duty free imports to, let alone show they are consumed in the production of, the exported product, this scheme is not a duty drawback scheme.

2. *MEIS*

51. India argues that the MEIS scheme is an "indirect tax rebate scheme which refunds indirect taxes already paid by exporters on production, distribution of exported products and on

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[40] Foreign Trade Policy 6.01(a) (Ex. US-03).
[41] Foreign Trade Policy 6.01(d)(ii) (Ex. US-03).
[42] Foreign Trade Policy 6.04 (Ex. US-03).
[43] Handbook of Procedures 6.04 (Ex. US-05).
[44] India Second Written Submission, para. 72.

inputs consumed"[45] and not in excess of taxes "accrued/paid."[46] India provides no evidence to prove this contention. According to India, the MEIS scrips are merely an indirect means to refund taxes exporters pay. It is unclear how India would know this information because the criteria for granting MEIS scrips are the product exported, the destination country of export, and the value of the export.[47] There is no requirement for an MEIS reward recipient to tie the scrips it receives to imports of certain products or domestically-procured inputs against which they incurred an indirect tax liability.

52. Moreover, there is no evidence that India ever asks MEIS participating companies to provide records of prior stage cumulative indirect taxes paid or request information about the types of inputs consumed or any other information that would allow it to assess the indirect taxes borne by the exported products. India MEIS scrips rewards and the alleged remission of indirect taxes are completely divorced from each other.

53. These facts show that the MEIS scheme is not a remission scheme.

3. *EPCG*

54. Next, despite finding no support in the SCM Agreement[48] that capital goods constitute "inputs" to consider for purposes of a duty drawback scheme, India still asserts that capital goods *should* qualify as inputs. As explained, the EPCG scheme does not qualify as a duty drawback scheme because Annex I, items (h) and (i), require the consumption of the imported product as an input in "the production of exported products."[49] The United States did not argue that imported capital goods are not *used* in the production of export products as India inaccurately states.[50] Rather, the United States showed that Annex I, item (i), addresses import charges "levied on imported inputs that are *consumed* in the production of the exported product (making normal allowance for waste)". Footnote 61 defines inputs as those "inputs physically incorporated" and "consumed," a definition that does not apply to capital goods. India tries to

[45] India Second Written Submission, para. 96.
[46] India Second Written Submission, para. 104.
[47] Foreign Trade Policy 3.04 (Ex. US-03).
[48] SCM Agreement, n.61.
[49] United States First Written Submission, para. 118.
[50] India Second Written Submission, para. 132.

contort this plain language and substitute "used" for "consumed" but again, the SCM Agreement clearly defines "inputs" – a definition that India cannot change.[51]

55. India argues that "to preclude capital goods, despite having exclusively negotiated for all inputs used in the production of an exported product to be subject to duty-free treatment, is to nullify its pre-existing rights as a WTO Member."[52] As discussed earlier, India notes that its proposal to apply the depreciation of capital goods within the meaning of "inputs physically incorporated" was proposed to the SCM Committee.[53] The SCM Committee considered and rejected the proposal. This dispute is not the proper forum for India to appeal the result it received in negotiations with the SCM Committee.

56. Therefore, despite India's disregard of the plain language in the SCM Agreement regarding capital goods that was agreed to by the Members, the EPCG scheme is not a qualifying duty drawback scheme.

4. *DFIS*

57. India argues that DFIS is a "straight forward" duty drawback program. As explained in the U.S. Second Written Submission, the obvious flaw in the DFIS that *past* export performance entitles a DFIS enterprise to a *subsequent* year import duty exemption makes DFIS a straight forward export promotion scheme.[54] DFIS imposes no obligation on the producer to use the exemption for imported inputs that will be consumed in the production of an exported product. In other words, the imported good could be used to produce a domestic product or an exported product, or sold to a third party. Moreover, as explained in our submissions, some of the products for which duty exemptions apply are not "inputs." This would include, for example, items under the DFIS such as capitals goods, DNA analyzers, centrifuges, x-ray equipment, and particle size analyzers that may be eligible for use of the duty exemption. As explained above regarding capital goods, these items do not qualify as "inputs" as defined in the SCM Agreement.

[51] India Second Written Submission, para. 134.
[52] India Second Written Submission, para. 134.
[53] India Second Written Submission, para. 51.
[54] United States Second Written Submission, para. 166.

58. Because the DFIS scheme awards a duty-free import entitlement based on past export performance, and the DFIS duty-free entitlement qualifies on the import of capital goods, the DFIS does not constitute a proper duty drawback scheme.

B. India's SEZ Scheme is Contingent in Law and Fact upon Export Performance

59. India argues that the SEZ scheme cannot be considered export contingent, in law or fact, despite the requirement that SEZ Units must achieve a positive NFE to remain eligible for benefits and avoid penalties. India notes a limited way in which SEZ Units may have transactions that occur within Indian territory count toward its NFE obligation.[55] The United States recalls that the preamble to the Special Economic Zones Act, 2005 states: "[a]n Act to provide for the establishment, development and management of the Special Zones for the promotion of *exports* and for matters connected therewith or incidental thereto."[56] India avers that by including a limited domestic means for an SEZ to increase its positive NFE calculation, the SEZ as a whole is not export contingent. This leap does not follow from the evidence.

60. India advances the argument that SEZ units will only predominately "export" to *other Units* to maintain a positive NFE. Such a fiction does not survive the Panel's scrutiny. To maintain a positive NFE, a Unit must ultimately export abroad and promote *foreign* export. The export contingency of a scheme is not lost even if some "exports" made domestically can count toward positive NFE.[57]

61. Moreover, India does not explain why the SEZ Scheme only incentivizes exports by SEZ Units and not sales to other SEZ Units. To recall, SEZ Units may deduct from income tax liability 100% of profits from exports for the first five years, and then 50% of profits from exports during the subsequent five years. Profits from domestic sales do not result in the same benefits to SEZ Units. If, as India claims, the SEZ Units are merely designed to increase the

[55] India Second Written Submission, paras. 168-75, 183, 184.
[56] Special Economic Zones Act of 2005, p. 1 (Ex. US-22)(emphasis added).
[57] *US-Upland Cotton*, (AB), para. 582.

production capacity of the SEZ Units, economic activity, investment, and employment opportunities,[58] it is puzzling why the incentives skew toward export rather than stay uniform.

62. Of course, the transparent reason for these different benefits is that, as stated on the first page of the SEZ Rules, the purpose of this scheme is "promotion of exports." In sum, the fact that SEZ Units can raise NFE by trading with other SEZ Units does not detract from the evidence that the SEZ scheme is contingent in law and fact on export performance.

C. <u>Article 27 Failed Proposals Do Not Support India's Position</u>

63. We next briefly discuss India's argument that it is entitled to an eight-year phase out of its export subsidies under Article 27 of the SCM Agreement.[59] The United States will not repeat our arguments that demonstrate that a plain reading of Article 27 shows that India has graduated from Annex VII of the SCM Agreement and that Articles 3.1(a) and 3.2 apply to it immediately.[60]

64. As discussed in the U.S. submissions, because the ordinary meaning of the text is not ambiguous or obscure, no resort to negotiating history is necessary.[61] However, even when considering the supplemental information India presents, there is no indication that any of India's requests were adopted.

65. In fact, as India explains, India, Bolivia, Egypt, Honduras, and Sri Lanka advanced India's current interpretation of Article 27 by proposing *adopting* the following language as a footnote to Article 27.2(b): "In the case of developing country Members included in Annex VII, the 8-year period should commence from the year in which they graduate out of Annex VII."[62] While India contends that this proposed language indicates that it wanted this additional phase-out period and thought the original language was ambiguous, its lack of adoption shows that the

[58] India Second Written Submission, para. 154.
[59] India Second Written Submission, paras. 7-31.
[60] United States Second Written Submission, paras. 53-64.
[61] United States, First Written Submission, para. 62-63.
[62] TN/RL/GEN/177/Rev 1,9 (Ex. IN-07).

very interpretation it seeks now to enforce through this Panel was not agreed by Members in the SCM Committee.

66. Again, as has been the common theme in this dispute, whether in looking at the SCM Agreement or the language of the measures, India advances a position based on the language and interpretation it wants, and ignores the reality of what the SCM Agreement and India's measures say. India's arguments simply cannot be sustained in light of the plain language we have examined.

IV. CONCLUSION

67. Based on the evidence and the law, the United States has demonstrated that the challenged schemes are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement. This concludes the U.S. opening statement. We look forward to answering the Panel's questions. Thank you.