India – Export Related Measures
(DS541)

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TABLE OF ACRONYMS

Acronym	Full Name
SCM Agreement	The Agreement on Subsidies and Countervailing Measures
DSB	Dispute Settlement Body
DSU	Understanding on the Rules and Procedures Governing the Settlement of Disputes
WTO	World Trade Organization
EOU	Export Oriented Units
EHTP	Electronics Hardware Technology Park Scheme
BTP	Bio-Technology Parks Scheme
UAC	Units Approval Committee
BOA	Board of Approvals
LoP	Letter of Permission
LoI	Letter of Intent
NFE	Net Foreign Exchange
CIF	Cost, Insurance, Freight
DTA	Domestic Tariff Areas
MEIS	Merchandise Exports from India Schemes
RA	Regional Authorities
ITC (HS)	Indian Trade Classification (Harmonized System)
EPCG	Export Promotion Capital Goods Scheme
SEZ	Special Economic Zone

CST	Central Sales Tax
FOB	Free on Board

TABLE OF REPORTS

Short title	Full Citation
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001
Brazil – Aircraft (AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
Brazil – Aircraft (Panel)	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R
Brazil – Taxation (Panel)	Panel Report, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R / WT/DS497/R / Corr. 1 and Add. 1, circulated 30 August 2017
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
Canada – Aircraft (Panel)	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R
Canada – Aircraft (Article 21.5 – Brazil) (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000
Canada – Autos (AB)	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
Canada – Autos (Panel)	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R

Canada – Renewable Energy / Canada – Feed-in Tariff Program (Panel)	Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R
EC – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
EC – Large Civil Aircraft (Panel)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
Japan – DRAMs (Korea) (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – FSC (AB)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000
US – FSC (Article 21.5 – EC) (AB)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Large Civil Aircraft (2nd Complaint) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012

US – Tax Incentives (Panel)	Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/R, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R and Add. 1
US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R

TABLE OF U.S. EXHIBITS

Ex. No.	Description
US-01	"Statement of Revenue Impact under the Central Tax System," Receipts Budget 2018-2019
US-02	Data from Indian Export Promotion Councils participating in the Duty Free Import Scheme
US-03	*Foreign Trade Policy [1st April 2015 – 31st March 2020]* (Ministry of Commerce and Industry, Department of Commerce, 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, Department of Commerce, Notification 41/2015-2020, December 5, 2017) (excerpts)
US-04	Export Champions, Economic Times, February 12, 2018
US-05	*Handbook of Procedures [1st April 2015 – 31st March 2020]* (Ministry of Commerce and Industry, Department of Commerce, Public Notice No. 01/2015-2020, April 1, 2015), as modified by *Handbook of Procedures [1st April, 2015 – 31st March, 2020], Updated up to 05.12.2017* (Ministry of Commerce and Industry, Department of Commerce, Public Notice No. 43/2015-2020, December 5, 2017)
US-06	*(Appendices and Aayat Niryat Forms) of FTP 2015-2020, 1st April, 2015-31st March, 2020* (Ministry of Commerce and Industry, Department of Commerce, undated)
US-07	*Customs Tariff Act, 1975*, as amended (excerpts)
US-08	*Customs Act, 1962*, as amended, Section 12
US-09	Press Release, "Merchandise Export from India Scheme," Press Information Bureau, Government of India, Ministry of Commerce and Industry. August 8, 2016.
US-10	Government of India, Ministry of Commerce and Industry, Lok Sabha Unstarred Question No.3941, to be Answered on 27th March, 2017 and Answer.
US-11	*Public Notice 2/2015-2020, Subject: Merchandise Exports from India Scheme (MEIS) – Schedule of country group, ITC (HS) code wise list of products with reward rates under Appendix 3B notified* (Ministry of Commerce and Industry, Department of Commerce, April 1, 2015)
US-12	*Public Notice 27/2015-2020, Subject: Merchandise Exports from India Scheme (MEIS) – Additions/amendments in Table 1 (containing list of country groups) and Table 2 (containing ITC (HS) code wise list of products with reward rates) of*

	Appendix 3B (Ministry of Commerce and Industry, Department of Commerce, July 14, 2015)
US-13	*Harmonised and Consolidated Table 2 of Appendix 3B as per Public Notice No. 61/2015-20* (Ministry of Commerce and Industry, Department of Commerce, March 7, 2017)
US-14	*Public Notice 1/2015-2020 Subject: Amendments in Product Description in MEIS Schedule Table 2 of Appendix 3B* (Ministry of Commerce and Industry, Department of Commerce, April 13, 2017)
US-15	*Public Notice 17/2015-2020 Subject: Harmonizing MEIS Schedule in the Appendix 3B (Table 2) with ITC (HS), 2017* (Ministry of Commerce and Industry, Department of Commerce, August 22, 2017)
US-16	*Public Notice 22/2015-2020 Subject: Corrections/Amendments in Table 2 of Appendix 3B Foreign Trade Policy 2015-20* (Ministry of Commerce and Industry, Department of Commerce, August 31, 2017)
US-17	*Public Notice 42/2015-2020 Subject: Amendment in Appendix 3B of the Foreign Trade Policy 2015-20* (Ministry of Commerce and Industry, Department of Commerce, November 24, 2017)
US-18	*Public Notice 44/2015-2020 Subject: Amendments to Appendix 3B Foreign Trade Policy 2015-20* (Ministry of Commerce and Industry, Department of Commerce, December 5, 2017)
US-19	*Public Notice 60/2015-2020 Subject: Amendments/Corrections in Table 2 of Appendix 3B Foreign Trade Policy 2015-20* (Ministry of Commerce and Industry, Department of Commerce, February 15, 2018)
US-20	Highlights of the Foreign Trade Policy Review, 2015-2020, Mid Term Review (December 2017) (excerpt)
US-21	Committee on Subsidies and Countervailing Measures*, "Updating GNP Per Capita for Members Listed in Annex VII(b) as foreseen in Paragraph 10.1 of the Doha Ministerial Decision and in accordance with the Methodology in G/SCM/38*," July 11, 2017 and April 20, 2018
US-22	*The Special Economic Zones Act, 2005 No. 28 of 2005, issued June 23, 2005, Gazette of India, Extraordinary Part II Section I (Ministry of Law and Justice)*
US-23	Address by Shri Anand Sharma, Minister of Commerce, Industry and Textiles at the Release of Annual Supplement 2013-14 to the Foreign Trade Policy 2009-14, 18th April, 2013
US-24	Nirmala Sitharaman, SEZ Scheme of India is Quite Comprehensive, Daily News and Analysis, December 20, 2014

US-25	"Fact Sheet on Special Economic Zones," Ministry of Commerce and Industry, Department of Commerce
US-26	"Export Performances," Ministry of Commerce and Industry, Department of Commerce (Last Updated: March 5, 2018)
US-27	*Notification 15/2017-Integrated Tax (Rate)* (Ministry of Finance, Department of Revenue, June 30, 2017)
US-28	*The Special Economic Zones Rules incorporating amendments up to July, 2010* (Ministry of Commerce and Industry, February 10, 2006) (http://sezindia.nic.in/upload/uploadfiles/files/14_SEZ_Rules_July_2010.pdf)
US-29	*Income Tax Act, 1961*, as amended, section 10A and section 10AA
US-30	*Income Tax Act, 1961*, as amended, section 80A
US-31	*Customs Tariff Act, 1975*, as amended, Second Schedule
US-32	*The Integrated Goods and Services Tax Act, 2017*
US-33	Special Economic Zones in India, http://sezindia.nic.in/cms/introduction.php
US-34	Export Promotion Council for EOUs and SEZs, https://epces.in/view_section.php?lang=0&id=0,1,20
US-35	Export Promotion Schemes, Ministry of Electronics and Information Technologies
US-36	*Notification 50/2017-Customs* (Ministry of Finance, Department of Revenue, June 30, 2017)
US-37	*Notification 12/2012-Customs* (Ministry of Finance, Department of Revenue, March 17, 2012) (excerpt)
US-38	Chart with Conditions of Customs Notification 50/2017
US-39	*Council for Leather Exporters: Duty Free Import Scheme – an introduction*
US-40	*Apparel Export Promotion Council: Export Performance Certificate 2017-2018*
US-41	*Notification No. 01/2017- Integrated Tax (Rate)* (Ministry of Finance, Department of Revenue, June 28, 2017)
US-42	Dictionary Definitions

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.

2. These schemes are: (1) Export Oriented Units Scheme and sector specific schemes, including Electronics Hardware Technology Parks Scheme and Bio-Technology Parks Scheme; (2) Merchandise Exports from India Scheme; (3) Export Promotion Capital Goods Scheme; (4) Special Economic Zones; and (5) Duty Free Imports for Exporters. Through these programs, India grants subsidies contingent upon export performance to Indian exporters, including exemptions from certain duties, taxes, and fees, and credits to offset import duty liability.

3. These subsidies result in substantial benefits to Indian exporters. India's annual government budget reports and government websites provide the amount of revenue India has foregone providing these subsidies, and the data are staggering: billions of dollars in revenue that India has foregone in order to promote exports. Specifically:[1]

Benefits Conferred Under Selected Indian Export Subsidy Programs

Budget Year 2016-2017 (US$)

Name of Program	All Industries
Export Oriented Unit/Electronic Hardware Technology Park	$1,394,344,552
Merchandise Exports from India Scheme	$1,958,813,585
Export Promotion Capital Goods Scheme	$1,513,754,418

[1] "Statement of Revenue Impact under the Central Tax System," Receipts Budget 2018-2019, p. 44 (Ex. US-01). The revenue foregone for Export Oriented Units and Electronic Hardware Technology Parks includes the revenue foregone for Software Technology Parks, a related scheme. The estimate of revenue foregone for the Duty Free Import Scheme is based on data from the websites of the Indian Export Promotion Councils participating in the scheme (Ex. US-02).

Special Economic Zones	$1,517,903,796
Duty Free Import Scheme	$996,734,081
Total 2017 Estimate	**$ 7,381,550,432**

4. Export subsidies hold a unique status in the SCM Agreement. Members recognized that these subsidies are inherently trade distortive and 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 on export performance. Special procedures in Article 4 of the SCM Agreement provide for expedited resolution of disputes involving these subsidies.

5. Year after year, India increases the amount of the subsidies provided under these programs. These subsidies distort trade and provide Indian exporters with an unfair competitive advantage in the global trading system.

6. The United States respectfully requests that the Panel find that the challenged measures are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement and recommend that India withdraw these subsidies without delay.

II. PROCEDURAL BACKGROUND

7. On March 14, 2018, the United States requested consultations with India pursuant to Articles 1 and 4 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Articles 4 and 30 of the SCM Agreement. Pursuant to this request, India and the United States held consultations in Geneva, Switzerland on April 11, 2018.[2] The parties failed to reach a mutually satisfactory resolution to this dispute.

8. On May 17, 2018, the United States requested the establishment of a panel pursuant to Article 6 of the DSU and Article 4.4 of the SCM Agreement.[3] The Dispute Settlement Body

[2] Despite the 15-day period in which parties should enter into consultations pursuant to the SCM Agreement Article 4.12 and DSU Article 4.3, the United States agreed to consult with India 28 days after consultations were requested.

[3] Despite the 30-day period after which a panel may be requested pursuant to the SCM Agreement Article 4.4, the United States requested establishment of a panel 64 days after consultations were requested.

considered this request at its meeting of May 28, 2018, and established this Panel to consider this dispute.

9. Because this dispute raises solely prohibited export subsidy claims, Article 4.12 of the SCM Agreement, and its expedited timetable, applies. All WTO Members agreed to the provisions of Article 4.12 of the SCM Agreement which require an expedited timetable, and are listed as "special or additional rules and procedures" in Appendix 2 to the DSU. As a result, the rules and procedures of the DSU, including Article 12.10 of the DSU, apply subject to Article 4.12. Under this expedited schedule, unless Article 4 of the SCM Agreement expressly specifies a time period, the time-periods applicable under the DSU are shortened by half.[4]

III. RELEVANT LEGAL STANDARD

A. Rules of Interpretation and Standard of Review

10. As set out in Article 11 of the DSU, the Panel is "to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements" by "mak[ing] an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Pursuant to the Panel's terms of reference, as established by Article 7.1 of the DSU, the Panel is then to "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreements, as required by Article 19.1 of the DSU.

11. In assessing the "applicability of and conformity with the covered agreements," Article 3.2 of the DSU indicates that the Panel is to utilize customary rules of interpretation of public international law to discern the meaning of relevant provisions of the covered agreements. Previous WTO reports have recognized that Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflects such customary rules.[5] Article 31 of the Vienna Convention 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." A corollary of this customary rule of interpretation is that an "interpretation must give meaning and effect to all the terms of the treaty."[6]

B. Definition of Subsidy within the Meaning of Article 1.1 of the SCM Agreement

12. Article 1.1 of the SCM Agreement defines a subsidy as follows (in relevant part):[7]

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[4] SCM Agreement, Article 4.12 ("For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein").

[5] *See, e.g., US – Gasoline (AB)*, p. 17.

[6] *US – Gasoline (AB)*, p. 23.

[7] Article 1.2 of the SCM Agreement explains that a subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[8];
>
> [ ]
>
> and
>
> (b) a benefit is thereby conferred.

13. Thus, to constitute a subsidy for the purpose of the SCM Agreement, a government must (1) provide a financial contribution that (2) confers a benefit.[9]

14. Each of the Indian programs provides a financial contribution through either a direct government transfer of funds per Article 1.1(a)(1)(i) or the foregoing of revenue that is otherwise due to the government per Article 1.1(a)(1)(ii).

15. A direct government transfer of funds under Article 1.1(a)(1)(i) is to be understood more broadly than a cash payment by the government to a private entity. The relevant dictionary definition of "transfer" is to "[m]ove, take, or convey from one place . . . to another; transmit, transport; give or hand over from one to another."[10] "Funds" is defined in the dictionary as "[a] stock or sum of money, esp. as set apart for a particular purpose; [t]he money at a person's disposal; financial resources."[11] The Appellate Body in *US – Large Civil Aircraft (2nd complaint)* adopted these definitions in explaining that a direct transfer of funds to an enterprise under Article 1.1(a)(1)(i) includes "conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient."[12] The meaning of "funds" includes not only money but also financial resources and other financial claims more

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accordance with the provisions of Article 2. This requirement is met in this dispute since Article 2.3 of the SCM Agreement provides that "[a]ny subsidy falling under the provisions of Article 3 shall be deemed to be specific."

[8] Internal footnote omitted.

[9] *US – Carbon Steel (India) (AB)*, para. 4.8.

[10] *New Shorter Oxford English Dictionary*, Volume 2, p. 3368 (Ex.US- 42).

[11] *New Shorter Oxford English Dictionary*, Volume 1, p. 1042 (Ex. US-42).

[12] *US – Large Civil Aircraft* (*2nd complaint*) (*AB*), para. 614.

generally.[13] Such examples of financial resources or other financial claims can include debt forgiveness, extension of a loan maturity, and interest rate reduction.[14]

16. A proper interpretation of "foregoing of revenue" that is "due" under Article 1.1(a)(1)(ii) must begin with the terms "forego," "revenue," and "due." The relevant dictionary definition of "forgo" or "forego" is, in relevant part, "[g]o without, deny to oneself; let pass, omit to take or use; give up, renounce."[15] The relevant dictionary definition of "revenue" is "[t]he annual income of a government or State, from all sources, out of which public expenses are met."[16] The dictionary defines "due" as "[e]xpected, intended, or under engagement to arrive . . . or to do something at a specified time . . . [a]dequate [or] sufficient."[17] In this case, what is "due" is the amount that otherwise would have been expected or appropriate to collect. The phrase "foregoing of revenue that is otherwise due" thus encompasses those situations in which a government determines to give up income or money that otherwise would have been available to it. The Appellate Body reflected this understanding in *US – FSC*, where it described this type of contribution as conduct by the government to "[give] up an entitlement to raise revenue that it could 'otherwise' have raised."[18]

17. A financial contribution that confers a benefit meets the definition of a "subsidy" for the purpose of the SCM Agreement. The relevant dictionary definition of "benefit" is an "advantage," "good," or "gift."[19] A benefit is conferred if the recipient is given an advantage or made better off than it otherwise would have been absent the financial contribution.[20] Article 14 of the SCM Agreement, which relates to the determination of the amount of benefit under "Part V: Countervailing Measures" of the SCM Agreement, provides context to the determination of whether a recipient has received a "benefit" under Article 1.1(b). Article 14 provides examples (government provisions of: equity, loans, loan guarantees, and goods and services) that suggests comparing what the recipient received from the government versus what it otherwise could have obtained in the marketplace. The Appellate Body has reasoned that "the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by

[13] *US – Large Civil Aircraft* (*2nd complaint*) (*AB*), para. 614.

[14] *Japan – DRAMs (AB)*, para. 251.

[15] *New Shorter Oxford English Dictionary*, Volume 1, p. 1005 (Ex. US-42).

[16] *New Shorter Oxford English Dictionary*, Volume 2, p. 2579 (Ex. US-42).

[17] *New Shorter Oxford English Dictionary*, Volume 1, p. 1042 (Ex. US-42).

[18] *US – FSC (AB)*, para. 90.

[19] *New Shorter Oxford English Dictionary*, Volume 1, p. 214 (Ex. US-42).

[20] *US – Large Civil Aircraft (AB)*, paras. 635-36, 662 and 690 (citing *Canada – Aircraft (AB)*, para. 157) ("the word 'benefit', as used in Article 1.1(b) implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution.").

determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[21]

C. Definition of Prohibited Export Subsidy within the meaning of Articles 3.1(a) and 3.2 of the SCM Agreement

18. Where a Member has granted a subsidy as defined in Article 1.1 of the SCM Agreement, it will be prohibited as an export subsidy if the subsidy is inconsistent with the prohibitions in Articles 3.1(a) and 3.2 of the SCM Agreement.

19. Articles 3.1(a) and 3.2 of the SCM Agreement state:

> 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> > (a) subsidies contingent, in law or in fact,[4] whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[];
>
> 3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.
>
> FN 4: This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

20. Article 3.1(a) prohibits subsidies that are "contingent" upon export performance. The relevant dictionary definition of "contingent" is "[c]onditional; dependent *on*, *upon*; [d]ependent for its existence on something else."[22] In the export subsidy context, "the grant of a subsidy must be 'tied to' export performance."[23] Therefore, to find that a subsidy is an export subsidy, the subsidy must be conditioned, solely or as one of several other conditions, on export performance.

21. This export contingency can be demonstrated "in law" (*de jure*) or "in fact" (*de facto*). Contingency "in law" means that the challenged measure itself establishes the necessary conditionality; it can be demonstrated "on the basis of the words of the relevant legislation,

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[21] *US – Large Civil Aircraft (AB)*, paras. 662 (citing *Canada – Aircraft (AB)*, para. 157).

[22] *New Shorter Oxford English Dictionary*, Volume 1, p. 494 (Ex. US-42).

[23] *Canada – Autos (AB)*, paras. 100 and 104.

regulation or other legal instrument."[24] While the export contingency may be set out expressly, it also may be that the wording of the legal instrument necessarily implies the necessary contingency.[25]

22. In contrast, a *de facto* claim of export contingency is not established on the basis of the words of the instrument itself. In a *de facto* contingency case, "instead, the existence of this relationship of contingency, between the subsidy and ... export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case."[26]

23. 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)).

D. Article 3.1(a) of the SCM Agreement Applies to India

24. India is subject to the obligations of Article 3.1(a) and 3.2 of the SCM Agreement. Although Article 27 of the SCM Agreement provides a limited exception to Article 3.1(a), India no longer qualifies for that limited exception. Article 27 states:

> 27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.
>
> 27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:
>
> (a) developing country Members referred to in Annex VII.
>
> (b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

25. Annex VII of the SCM Agreement states:

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[24] *Canada – Aircraft (AB)*, para. 167.

[25] *Canada – Autos (AB)*, paras. 100, 123.

[26] *Canada – Aircraft (AB)*, para. 167.

> The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:
>
> (a) Least-developed countries designated as such by the United Nations which are Members of the WTO.
>
> (b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 *when GNP per capita has reached $1,000 per annum*[27]: 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. (emphasis added)

26. India's GNP per capita has reached $1,000, and India is therefore now subject to Article 3 of the SCM Agreement. The WTO Secretariat annually publishes GNP per capita of the Annex VII developing country Members using the three most recent years for which data are available.[28] On July 11, 2017, the WTO Secretariat released the calculation for the three most recent years for which data are available (2013-2015). These results showed that in each year from 2013-2015, India's GNP per capita exceeded $1,000 per annum. In April 2018, the Secretariat calculations showed the same for the years 2014, 2015, and 2016.[29] Accordingly, the exception to Article 3.1(a) of the SCM Agreement is no longer available to India.

IV. FACTUAL BACKGROUND AND LEGAL ANALYSIS OF THE PROGRAMS

27. Below, we provide a factual description of each of the challenged measures, and then demonstrate that the measure is inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

A. Export Oriented Units and Sector Specific Schemes

28. 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."[30] EOU, EHTP, and BTP units

[27] Footnote omitted.

[28] In the 2001 Decision of the Ministerial Conference on "Implementation-Related Issues and Concerns," Members decided 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. In 2003, Members also agreed on the methodology to calculate constant 1990 dollars.

[29] G/SCM/110/Add.14. (Ex. US-41). On April 20, 2018, the WTO Secretariat released the calculation for the three most recent years for which data are currently available (2014-2016); again, these results showed that in each year India's GNP per capita exceeded $1,000 per annum. G/SCM/110/Add.15 (Ex. US-41).

[30] *Foreign Trade Policy [1st April 2015 – 31st March 2020]* (Ministry of Commerce and Industry, Department of Commerce, 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

(collectively referred to as "units") agree to export their entire production of goods and services in exchange for exemption from import duties and taxes. We provide below (1) factual background of the EOU and sector specific schemes and (2) the prohibited export subsidy analysis.

1. Factual Background

29. Chapter 6 of The Foreign Trade Policy and Chapter 6 of the Handbook of Procedures outline the framework for the EOU/EHTP/BTP schemes. These government documents describe the application and approval process, the regulation of units' compliance with the terms and conditions of the programs, and the benefits conferred to program participants. One key requirement is that applicants must agree to export their entire production. Furthermore, throughout these documents, India stresses the requirement that an enterprise maintain a positive net foreign exchange. A positive net foreign exchange is determined by, generally speaking, subtracting the total value of imports from the total value of exports. As a result, only exporters can achieve a positive net foreign exchange.

30. EOU units play a large role in the Indian trading regime. According to the Commerce Secretary of India, "EOU and Special Economic Zones Schemes are important components of our export strategy and are contributing about one-third of the country's exports. These schemes also provide an integrated platform and conducive environment to international investors and Indian exporters for doing business."[31]

a. Approval and Monitoring of EOU/EHTP/BTP Units

31. *Approval*: Indian manufacturers and other exporters who agree to export their entire production apply for EOU, EHTP or BTP status which results in India providing financial rewards for exporting.[32] To begin the EOU program approval process, the Units Approval Committee[33] (UAC) or Board of Approvals (BOA) reviews the application to designate an exporter as an EOU unit.[34] The Central Government, State Government, Public or Private Sector Undertakings or any combination thereof sets up approved EHTP and BTP units.[35] If accepted,

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Industry, Department of Commerce, Notification 41/2015-2020, December 5, 2017) ("Foreign Trade Policy") 6.00(b) (Ex. US-03).

[31] Export Champions, Economic Times, February 12, 2018 (Ex. US-04).

[32] Foreign Trade Policy 6.00(a) (Ex. US-03).

[33] The UAC consists of the Chairperson: Development Commissioner; three Members: Jurisdictional Commissioner of Central Excise & Customs or nominee, Joint Director General of Foreign Trade or nominee, Joint Deputy Development Commissioner of Zone, and other nominee of any Department/Agency as special invitee. *Handbook of Procedures [1st April 2015 – 31st March 2020]* (Ministry of Commerce and Industry, Department of Commerce, Public Notice No. 01/2015-2020, April 1, 2015), as modified by *Handbook of Procedures [1st April, 2015 – 31st March, 2020], Updated up to 05.12.2017* (Ministry of Commerce and Industry, Department of Commerce, Public Notice No. 43/2015-2020, December 5, 2017) ("Handbook of Procedures") 6.32(a) (Ex. US-05).

[34] Handbook of Procedures 6.01(b)(i) (Ex. US-05); Foreign Trade Policy 6.05(a)(i) (Ex. US-03).

[35] Handbook of Procedures 6.01(d) & (e) (Ex. US-05).

the applicant receives a Letter of Permission (LoP)/Letter of Intent (LoI) initially valid for two years with the possibility for extensions.[36] These documents set out important details and impose benchmarks that are based on the information provided by the applicant[37] including: (1) the manufacture or service activity; (2) annual capacity; (3) projected annual export for first five years in dollar terms; and (4) Net Foreign Exchange (NFE) earnings.[38]

32. The LoP states that the "unit would be required to achieve a positive Net Foreign Exchange (NFE) as prescribed in the EOU Scheme for the block period as per Para 6.04 of FOREIGN TRADE POLICY, failing which it would be liable for penal action."[39] The applicant must also execute a legal understanding that requires it to achieve a positive NFE. Furthermore, the Development Commissioner, having jurisdiction over the unit's activities under the guidelines issued by the Ministry of Commerce, will monitor the unit's performance and the enterprise will incur liability for failure to fulfill such an NFE obligation.[40]

33. For export enterprises to enjoy any of the benefits of participation as units, they must agree to maintain a positive NFE.[41] A positive NFE is calculated from this formula: Positive NFE = A-B >0. "A" is the FOB value of exports by the export enterprise, and "B" is the sum total of CIF value of all imported inputs, imported capital goods, and value of all payments made in foreign exchange by the export enterprise for such things as commissions, royalties, fees, dividends, and interest on external borrowing.[42] "Inputs" mean raw materials, intermediates, components, consumables, parts and packing materials.[43] The NFE is calculated in blocks of five years starting from commencement of production.[44] Failure to maintain a positive NFE or to abide by the terms and conditions of the LoP/LoI may bring penal liability or cancellation of the LoP/LoI.[45] In addition, upon exit from the EOU scheme, if an EOU unit has not met its NFE and other obligations, it will be subject to penalty after receiving a show cause notice.[46]

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[36] Handbook of Procedures 6.01(b)(ii) (Ex. US-05).

[37] *(Appendices and Aayat Niryat Forms) of FTP 2015-2020, 1st April, 2015-31st March, 2020* (Ministry of Commerce and Industry, Department of Commerce, undated) ("Appendices and Aayat Niryat Forms") ANF-6A (Ex. US-06).

[38] Handbook of Procedures 6.01(f) (Ex. US-05).

[39] Appendices and Aayat Niryat Forms Appx.-6D para. (ii) (Ex. US-06).

[40] Appendices and Aayat Niryat Forms Appx.-6E p.1 (Ex. US-06).

[41] Foreign Trade Policy 6.04. (Ex. US-03).

[42] Handbook of Procedures 6.10 (Ex. US-05).

[43] Handbook of Procedures 6.10. (Ex. US-05).

[44] Foreign Trade Policy 6.04 (Ex. US-03).

[45] Foreign Trade Policy 6.05(c) (Ex. US-03).

[46] Foreign Trade Policy 6.18(b) (Ex. US-03). *See also* Appendices and Aayat Niryat Forms Appx.-6F para. 4(i) (Ex. US-06).

34. *Monitoring*: The UAC Committee monitors the EOU units and focuses on whether the unit meets its NFE requirement.[47] The Guidelines for Monitoring Performance include the following:

> Criteria for Annual Monitoring
>
> The criteria for keeping the unit under watch or initiating penal action in respect of EOU units would be as follows:
>
> i) Watch-If there is shortfall in achieving the NFE as per norms in EOU Scheme at the end of 1st and IInd [sic] year;
>
> ii) For failure to achieve positive NFE, after completion of one year from the date of commencement of production, a cautionary letter may be issued; at the end of 3rd or subsequent year, Show cause notice will be issued if positive NFE is not achieved; after completion of block periods as per para 6.04 of FTP, Development Commissioner would initiate penal action . . . . Final decision may be taken as far as possible within six months and positively within one year.
>
> iii) no action to be initiated if the Development Commissioner, on the receipt of reply from the unit, is satisfied that the shortfall has been on account of genuine reasons.[48]

35. Similarly, the Department of Electronics and Information Technology monitors the NFE performance of EHTP units, and the Department of Bio-Technology monitors the NFE performance of BTP units.[49]

36. A review of the EOU/EHTP/BTP schemes approval and monitoring process shows that India's overwhelming interest centers on the unit maintaining a positive NFE; by definition, an enterprise must export in order to achieve positive NFE.[50] By doing so, that unit keeps its eligibility for the relevant EOU, EHTP, or BTP schemes and enjoys several advantages.

b. Advantages Provided to EOU/EHTP/BTP Units

37. *Advantages*: Units may: (i) import duty free or (ii) procure products duty free from Domestic Tariff Areas[51] (DTA) or bonded warehouses in DTA/international exhibitions held in

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[47] Foreign Trade Policy 6.20 (Ex. US-03). *See also*, Handbook of Procedures 6.32(b)(iii), (v) (Ex. US-05).

[48] Appendices and Aayat Niryat Forms Appx.-6F para. 3 (Ex. US-06).

[49] Handbook of Procedures 6.12 (Ex. US-05).

[50] Handbook of Procedures 6.10 (Ex. US-05).

[51] Domestic Tariff Areas are areas outside the Special Economic Zone or EOU/EHTP/BTP areas.

India.[52] These imports can include all types of goods, including raw materials and capital goods.[53] EOU/EHTP/BTP units do not pay customs duty, compensation cess[54] or excise duty – a a type of tax charged on goods produced within India.[55] India treats units more favorably than non-units.

2. India's Export Oriented Units Scheme and Sector Specific Schemes Are Inconsistent with India's Obligations Under Articles 3.1(a) and 3.2 of the SCM Agreement

a. Financial Contribution

38. The EOU/EHTP/BTP schemes focus on export promotion and production.[56] The companies that agree to participate in these schemes promise to export their entire production in exchange for receiving government-funded rewards that are dependent on export performance. The exemption provided by these schemes from customs and excise duty[57] 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.[58]

39. In some instances, the analysis may permit a straightforward application of a "but for" test. This test may be appropriate in certain situations where the government would collect certain income "but for" the challenged measure.[59] For example, the test may be applied "where the measure at issue is an 'exception' to a 'general' rule of taxation."[60] A financial contribution exists where the government would have collected revenue under the general rules of taxation in the absence of the measure.

40. A participating enterprise in the EOU/EHTP/BTP schemes receives an exemption from the payment of customs duties that would otherwise be due in the absence of the measure.[61] Comparably situated enterprises in India, on the other hand, must pay customs duties according

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[52] Foreign Trade Policy 6.01(d)(i) (Ex. US-03).

[53] Handbook of Procedures 6.04 (Ex. US-05).

[54] Compensation cess is a levy placed on certain notified goods to compensate states in India for the loss of revenue that occurred after implementing the Goods and Services Tax.

[55] Foreign Trade Policy 6.01(d)(ii-iii) (Ex. US-03).

[56] Foreign Trade Policy 6.00(b) & 6.08 (Ex. US-03).

[57] Foreign Trade Policy 6.01(d)(ii)-(iii) (Ex. US-03).

[58] *US – FSC (AB)*, para. 90.

[59] *US – FSC (AB)*, para. 91; *US – Large Civil Aircraft (2nd complaint) (Panel)*, paras. 7.133, 7.329, 7.709; *US – FSC (Panel)*, para. 7.45.

[60] *US – FSC (Article 21.5 – EC) (AB)*, para. 91.

[61] Foreign Trade Policy 6.01(d)(ii) (Ex. US-03).

to India's national tariff schedule. The First Schedule to the Customs Tariff Act, 1975 lists the rate of duty for listed products,[62] as required by the Customs Act, 1962. The Customs Act, 1962, states that "[e]xcept as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975], or any other law for the time being in force, on goods imported into, or exported from, India."[63]

41. 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. Enterprises that do not participate in the EOU/EHTP/BTP schemes must generally pay these duties. These schemes provide the type of exception to the general rule that constitute a financial contribution by the foregoing of revenue that is otherwise due within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.[64]

b. Benefit

42. The financial contribution confers a benefit on EOU/EHTP/BTP participants. A benefit analysis under Article 1.1(b) of the SCM Agreement requires a panel to consider whether the recipient is in an advantageous position because of the contribution.[65] In other words, a panel assesses "whether the financial contribution has made the recipient 'better off' than it would otherwise have been, absent that contribution."[66]

43. Where the benefit analysis follows an affirmative finding of financial contribution under the second category of Article 1.1(a)(1)(ii) – revenue foregone that is otherwise due – the analysis is straightforward: the reduced liability represents a direct benefit to the recipient. Indeed, as recently recognized by the panel in *Brazil – Taxation*, "[s]everal panels have concluded that, whenever there is revenue foregone by the government, a benefit is conferred."[67] These panels have appropriately recognized that, where the government foregoes revenue, the recipient "is better off than it would have been absent the contribution."[68] One panel remarked

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[62] Customs Tariff Act, 1975, as amended (Ex. US-07).

[63] Customs Act, 1962, Section 12 (Ex. US-08).

[64] *US – FSC (Article 21.5 – EC) (AB)*, para. 91.

[65] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

[66] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

[67] *Brazil – Taxation (Panel)*, para. 7.491; *US – Large Civil Aircraft (2nd complaint) (Panel)*, paras. 7.169-7.171 ("In those cases where a financial contribution has been found to exist in the form of the foregoing of revenue otherwise due, the conclusion that a benefit exists has been made with little difficulty."). *See also Canada – Renewable Energy / Canada – Feed-in Tariff Program (Panel)*, fn 509 ("We note that to date, the 'marketplace' has not been explicitly used as a benchmark to determine whether financial contributions taking the form of the measures described in Article 1.1(a)(ii)…confer a benefit."); *US – FSC (Panel)*, para. 7.103; *US – FSC (AB)*, para. 140 ("The tax exemptions provided by the FSC measure…confer upon the recipient the obvious benefit of reduced tax liability and, therefore, reduced tax payments.).

[68] *US – FSC (Article 21.5 – EC) (Panel)*, para. 8.46.

that "the relevant tax break is essentially a gift from the government, or a waiver of obligations due, and it is clear that the market does not give such gifts."[69]

44. 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. The financial contribution confers a benefit to the EOU/EHTP/BTP participant.

c. Export Contingency

45. 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.[70] In some instances, the link is clear. In *Canada – Autos*, the Appellate Body stated that "as the import duty exemption is simply not available to a manufacturer unless it exports motor vehicles, the import duty exemption is clearly conditional, or dependent upon, exportation and, therefore, is contrary to Article 3.1(a)."[71] The measure in this case is similarly export contingent based on the "words of the relevant legislation, regulation or other legal instrument."[72]

46. This exemption from duties is *de jure* contingent on the export performance of the EOU/EHTP/BTP units. 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.[73] Units must meet the NFE requirement or face cancellation of EOU/EHTP/BTP eligibility and penal consequences if they fail to maintain a positive NFE.[74] As described above, because NFE boils down to subtracting the imports and costs of an enterprise from its exports, export performance determines if a participant will obtain positive NFE.

d. Conclusion

47. For the reasons discussed above, through the EOU/EHTP/BTP schemes, India grants and maintains subsidies within the meaning of Article 1.1(a) of the SCM Agreement that are contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement. Therefore, these subsidies are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

B. Merchandise Exports from India Scheme

48. 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

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[69] *US – Large Civil Aircraft (2nd complaint) (Panel)*, para. 7.170.

[70] SCM Agreement, Article 3.1(a) (internal footnotes omitted).

[71] *Canada – Autos (AB)*, para. 104. *See also Canada – Autos (AB)*, para. 100.

[72] *Canada-Aircraft (AB)*, para. 167.

[73] *Canada – Autos (AB)*, paras. 100 and 104.

[74] Foreign Trade Policy 6.05(c) (Ex. US-03).

and export of notified goods/products."[75] The Indian government, 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. Scrips are paper authorizations that allow the holder to import inputs and machinery – without paying duty equivalent to the value of the scrips – for use in manufacturing export products and provide other advantages discussed below. 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. Based on the product, and destination market for the product, eligible companies receive scrips. We provide below (1) factual background of the MEIS program and (2) the prohibited export subsidy analysis.

1. Factual Background

49. Chapter 3 of the Foreign Trade Policy[76] and Chapter 3 of the Handbook of Procedures[77] outline the procedure for applying for and accruing scrips under the MEIS. An examination of the MEIS structure shows how India's reward of scrips to an export enterprise hinges on the amount of exports and – as set in rates that India determines – the exported good and the destination market for the export.

50. India introduced the MEIS through the Foreign Trade Policy 2015-20 on April 1, 2015.[78] The MEIS merged into one program five different schemes for rewarding merchandise exports with different kinds of scrips with varying conditions attached to their use.[79] MEIS seeks to promote export of "notified" goods (these are goods India designates eligible for MEIS) produced in India and is a major export promotion scheme the Ministry of Commerce and Industry (MCI) implemented.[80] According to the MCI, "[t]he reward/incentives provided by the Government makes the exporters competitive in the international market including Europe, [t]he United States of America and Africa. These three markets are covered under the scheme for all notified 5012 tariff lines."[81] The MEIS now covers approximately 8,000 tariff lines.[82]

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[75] Foreign Trade Policy 3.00 & 3.03 (Ex. US-03).

[76] Foreign Trade Policy Chapter 3 (Ex. US-03).

[77] Handbook of Procedures Chapter 3 (Ex. US-05).

[78] Press Release, "Merchandise Export from India Scheme," Press Information Bureau, Government of India, Ministry of Commerce and Industry. August 8, 2016. (Ex. US-09).

[79] Press Release, "Merchandise Export from India Scheme," Press Information Bureau, Government of India, Ministry of Commerce and Industry. August 8, 2016. (Ex. US-09).

[80] Press Release, "Merchandise Export from India Scheme," Press Information Bureau, Government of India, Ministry of Commerce and Industry. August 8, 2016. (Ex. US-09).

[81] Press Release, "Merchandise Export from India Scheme," Press Information Bureau, Government of India, Ministry of Commerce and Industry. August 8, 2016. (Ex. US-09).

[82] Government of India, Ministry of Commerce and Industry, Lok Sabha Unstarred Question No.3941, to be Answered on 27th March, 2017 and Answer. (Ex. US-10).

a. MEIS Duty Credit Scrips Benefit

51. Under the MEIS, India grants freely transferable[83] scrips as benefits for export performance. 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.[84] On the last point, an export enterprise could use scrips to cover the deficit between a promised export obligation and the actual export performance for that year. The exported product and the destination market for that product determine the rate reward (the percentage of the total amount of exports of that product that will earn scrips) of earning scrips.[85]

b. Granting Scrips

52. *Scrips Rewards*: The application process for scrips demonstrates the tie between accruing scrips and export performance. An online application starts the process for seeking scrips from Regional Authorities (RA).[86] RAs consider, verify, and grant the applications for the scrips.[87] The application form outlines the calculation of the reward. The destination and product of export determine the reward rate. India divides the products by ITC (HS) code and labels each export market as A, B, or C.[88] For example, Austria is in the "A" class of markets, and exporting

[83] Foreign Trade Policy 3.02 (Ex. US-03).

[84] Foreign Trade Policy 3.02 & 3.18 (Ex. US-03).

[85] Foreign Trade Policy 3.04 (Ex. US-03). *See Public Notice 2/2015-2020, Subject: Merchandise Exports from India Scheme (MEIS) – Schedule of country group, ITC (HS) code wise list of products with reward rates under Appendix 3B notified* (Ministry of Commerce and Industry, Department of Commerce, April 1, 2015) (Ex. US-11), as amended by *Public Notice 27/2015-2020, Subject: Merchandise Exports from India Scheme (MEIS) – Additions/amendments in Table 1 (containing list of country groups) and Table 2 [containing ITC (HS) code wise list of products with reward rates] of Appendix 3B* (Ministry of Commerce and Industry, Department of Commerce, July 14, 2015) (Ex. US-12); *Harmonised and Consolidated Table 2 of Appendix 3B as per Public Notice No. 61/2015-20* (Ministry of Commerce and Industry, Department of Commerce, March 7, 2017) (Ex. US-13); *Public Notice 1/2015-2020 Subject: Amendments in Product Description in MEIS Schedule Table 2 of Appendix 3B* (Ministry of Commerce and Industry, Department of Commerce, April 13, 2017) (Ex. US-14); *Public Notice 17/2015-2020 Subject: Harmonizing MEIS Schedule in the Appendix 3B (Table 2) with ITC (HS), 2017* (Ministry of Commerce and Industry, Department of Commerce, August 22, 2017) (Ex. US-15); *Public Notice 22/2015-2020 Subject: Corrections/Amendments in Table 2 of Appendix 3B Foreign Trade Policy 2015-20* (Ministry of Commerce and Industry, Department of Commerce , August 31, 2017) (Ex. US-16); *Public Notice 42/2015-2020 Subject: Amendment in Appendix 3B of the Foreign Trade Policy 2015-20* (Ministry of Commerce and Industry, Department of Commerce, November 24, 2017) (Ex. US-17); *Public Notice 44/2015-2020 Subject: Amendments to Appendix 3B Foreign Trade Policy 2015-20* (Ministry of Commerce and Industry, Department of Commerce, December 5, 2017) (Ex. US-18); *Public Notice 60/2015-2020 Subject: Amendments/Corrections in Table 2 of Appendix 3B Foreign Trade Policy 2015-20* (Ministry of Commerce and Industry, Department of Commerce, February 15, 2018) (Ex. US-19) (collectively, "Appendix 3B").

[86] Handbook of Procedures 3.01(b) (Ex. US-05).

[87] Handbook of Procedures 3.01(f), (h) (Ex. US-05).

[88] Appendix 3B (Ex. US-11).

medicated soaps to an "A" class market yields a 3% reward rate.[89] The MEIS chart shows this line for medicated soap:

				MEIS Reward Rate (in%)		
S.No	HS Code	ITC(HS) Code	Description of Goods	Country Group Code A	Country Group Code B	Country Group Code C
1589		34011110	Medicated Soaps	3	3	0

53. In this example, an enterprise that exported medicated soap to Austria would earn a 3% rate reward in MEIS scrips.[90] The participating enterprise's value of exports times the rate of reward determines the total scrips awarded.[91] For every ITC (HS) Code product listed in India's MEIS Schedule, the chart assigns a non-zero reward rate for at least one country group.[92]

54. *Monitoring Award of Scrips*: India closely monitors the scrips rewards and the enterprise's export performance. India controls how the product exported and the destination market for that product determine the rate of receiving scrips, the right to change the rate of scrips accrued, the debiting of scrips for importing goods, the capping of value of a product for scrips accrual purposes, and the power to limit the total reward for an exporter.[93] For example, in December 2017, India raised the MEIS incentives for two sub-sectors of textiles, Ready Made Garments and Made Ups, from 2% to 4%.[94]

2. India's Merchandise Exports from India Scheme Is Inconsistent with India's Obligations Under Articles 3.1(a) and 3.2 of the SCM Agreement

55. The MEIS program explicitly grants subsidies to exporters based on the value, product, and country to which they export. The MEIS participants receive freely transferable scrips based upon export performance.

[89] Appendix 3B (Ex. US-11).

[90] Appendix 3B (Ex. US-11).

[91] Appendices and Aayat Niryat Forms ANF-3a pp. 1-2 (Ex. US-06); Foreign Trade Policy 3.04 (Ex. US-03).

[92] Appendix 3B (Ex. US-11).

[93] Foreign Trade Policy 3.13 (Ex. US-03).

[94] Highlights of the Foreign Trade Policy Review, 2015-2020, Mid Term Review (December 2017), p. 4 (Ex. US-20).

a. Financial Contribution

56. India awards scrips as a "direct transfer" of funds under Article 1.1(a)(1)(i) of the SCM Agreement.[95] When considering a financial contribution through a direct transfer of funds, a panel examines "conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient."[96] The meaning of funds "includes not only money, but also financial resources and other financial claims more generally."[97] As the Appellate Body in *Japan – DRAMs* stated, financial contributions go beyond "an incremental flow of funds to the recipient that enhances the net worth of the recipient."[98] The list of examples of direct transfers in Article 1.1(a)(1)(i) such as "grants, loans, and equity infusion" is not exhaustive, and includes actions similar to these examples, including debt forgiveness, extension of a loan maturity, and interest rate reduction.[99] A panel has noted that user marketing payments to domestic users and exporters, marketing loan program payments, crop insurance payments, and payments for seed (to grow a crop) are financial contributions in the form of grants.[100]

57. Here, the MEIS scheme meets Article 1.1(a)(1)(i)'s definition of a government financial contribution. The government 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.[101] It is also freely transferable[102] and has cash value. India presents a financial contribution to the exporter through a direct transfer of scrips in exchange for export performance.

b. Benefit

58. 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 financial position because of the financial contribution.[103] In other words, it requires assessing "whether the financial contribution has made the recipient 'better off' than it would otherwise have been, absent that contribution."[104]

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[95] Foreign Trade Policy 3.04 (Ex. US-03).

[96] *US – Large Civil Aircraft* (*2nd complaint*) (*AB)*, para. 614.

[97] *US – Large Civil Aircraft* (*2nd complaint*) (*AB*), para. 614.

[98] *Japan – DRAMs (AB)*, para. 250.

[99] *Japan – DRAMs (AB)*, para. 251.

[100] *US – Upland Cotton (Panel)*, paras. 7.1114-7.1115.

[101] Foreign Trade Policy 3.02 & 3.18 (Ex. US-03).

[102] Foreign Trade Policy 3.02 (Ex. US-03).

[103] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

[104] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

59. 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, customs fees, and can be used to offset a shortfall in export obligation.[105] These scrips are freely transferable, and can be sold on the open market for cash. The recipient of the scrips transfer does not have export promises to fulfill as the original MEIS earner did. There is no market equivalent, and MEIS participants do not provide anything of equal value in exchange for the scrips. Given the non-zero reward rate for every ITC (HS) Code product to at least one country group, discussed above, the MEIS scheme confers a benefit for exporters of those products.

c. Export Contingency

60. 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.[106] In some instances, the link is clear; the import duty exemption is clearly conditional, or dependent upon, export performance.[107] The "words of the relevant legislation, regulation or other legal instrument"[108] demonstrate a clear link between the granting of the scrips benefits and export performance.

61. An MEIS program participant receives scrips conditioned and tied to the value it exports, where the exports are sold, and of what product.[109] Export performance determines the rate of scrips accrual. India closely monitors the grant of these scrips, and the enterprise's export performance. Through an intensive monitoring process, India ensures that the value, place, and product of export, i.e., export performance, determine the MEIS reward.[110] From approval to award to monitoring, the amount of scrips hinges on export performance.

d. Conclusion

62. For the reasons discussed above, through the MEIS scheme, India grants and maintains a subsidy within the meaning of Article 1.1(a) of the SCM Agreement that is contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement. Therefore, the subsidy is inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

C. Export Promotion Capital Goods Scheme

63. 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

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[105] Foreign Trade Policy 3.02 & 3.18 (Ex. US-03).

[106] SCM Agreement, Article 3.1(a) (internal footnotes omitted).

[107] *Canada – Autos (AB)*, para. 104. *See also Canada – Autos (AB)*, para. 100.

[108] *Canada – Aircraft (AB)*, para. 167.

[109] Foreign Trade Policy 3.04 (Ex. US-03). *See* Appendix 3B (detailing rates categories and rates of reward based on country and exported product) (Ex. US-11).

[110] Foreign Trade Policy 3.19(b) (Ex. US-03).

competitiveness."[111] "The EPCG scheme covers manufacturer exporters with or without supporting manufacturers, merchant exporters tied to supporting manufacturers, and service providers."[112] We provide below (1) factual background of India's EPCG program and (2) the prohibited export subsidy analysis.

1. Factual Background

64. Chapter 5 of the Foreign Trade Policy and Chapter 5 of the Handbook of Procedures outline the application, monitoring, and benefits of the EPCG scheme.[113] EPCG applicants promise to fulfill 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. It can also be transferred to others.

a. Approval and Export Obligation of EPCG Scheme

65. *Approval*: An exporter applies to the RA for EPCG authorization. An authorization remains valid for eighteen months,[114] but within six months of the import of the capital good, the authorization holder must produce a certificate from the jurisdictional customs authority or engineer confirming installation of the imported capital good.[115] On this certificate, the engineer describes and certifies the "nexus" between the imported capital good and the exported product: "I hereby certify that the Capital Good(s) proposed to be imported under EPCG Scheme by M/s.__ having IEC number__ and PAN number ___ is/are required for use at the pre-production/production/post-production stage for manufacture of the export product(s)/rendering service(s)."[116] In addition, the enterprise seeking EPCG authorization must provide financial records connected to its export of goods and financial information such as the FOB value for the preceding three years of the same or similar products that the participant plans to export for which the imported capital goods are sought.[117]

66. *Export Obligations*: By participating in the EPCG scheme, enterprises agree to meet an annual "average" export obligation. This export obligation requires that the exporter's performance for a year must be above the exporter's average level of export performance for the past three years for same or similar products.[118]

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[111] Foreign Trade Policy 5.00 (Ex. US-03).

[112] Foreign Trade Policy 5.02(a) (Ex. US-03).

[113] Foreign Trade Policy Ch. 5 (Ex. US-03) and Handbook of Procedure Ch. 5 (Ex. US-05).

[114] Foreign Trade Policy 5.01(d) (Ex. US-03).

[115] Handbook of Procedures 5.04(a) (Ex. US-05).

[116] Appendices and Aayat Niryat Forms Appx. 5A (Ex. US-06).

[117] Appendices and Aayat Niryat Forms Appx. 5B & 5C (Ex. US-06).

[118] Foreign Trade Policy 5.04(b) (Ex. US-03).

67. Along with maintaining the average export obligation, the exporter also needs to fulfill a specific export obligation to be fulfilled within six years of the date of issuance of authorization, (approval of EPCG scheme participation by the RA), of six times the duties, taxes, and cess[119] saved on capital goods used for production of goods for export.[120] The exporter must also follow this schedule:[121]

Period from the date of issuance of authorization	Minimum export obligation ("EO") to be fulfilled
1st to 4th year	50%
5th to 6th year	Balance of EO

68. With a view toward accelerating exports, India also rewards export performance by incentivizing the early fulfillment of the export obligations. An EPCG authorization holder who fulfills 100% of average annual export obligation and 75% of its specific export obligation in half or less time than the period allowed for fulfilling both export obligations will have the remainder of its export obligation extinguished.[122] In contrast, the failure to fulfill the export obligations will result in imposition of a fee and payment of customs duty proportionate to the duty saved on the portion of the unfulfilled EO.[123]

b. Advantages of EPCG Participation

69. EPCG participants enjoy key advantages. They may import capital goods used for pre-production, production, and post-production of their export without paying import duties.[124] Alternatively, the EPCG scheme provides that if exporters pay for duties, taxes, and cess on import of capital goods upfront in cash,[125] then India will remit to the participant the basic customs duty, paid as freely transferable scrips, similar to the scrips in the MEIS program (described above); these post-export EPCG scrips can be used in a similar way to the MEIS scrips.[126]

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[119] A name for a tax in India to raise funds for a specific purpose such as education.

[120] Foreign Trade Policy 5.01(c) (Ex. US-03).

[121] Handbook of Procedures 5.14(a) (Ex. US-05).

[122] Foreign Trade Policy 5.09 (Ex. US-03).

[123] Handbook of Procedures 5,14(c) (Ex. US-05).

[124] Foreign Trade Policy 5.01(a) (Ex. US-03).

[125] Foreign Trade Policy at 5.12(a) (Ex. US-03).

[126] Foreign Trade Policy 5.12(b), (e) (Ex. US-03). *See also* Handbook of Procedures 5.28(d)-(e) (Ex. US-05).

2. India's Export Promotion Capital Goods Scheme Is Inconsistent with India's Obligations Under Articles 3.1(a) and 3.2 of the SCM Agreement

a. Financial Contribution

70. 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.[127]

71. In some instances, a "but for" standard may be appropriate where the government would collect certain income "but for" the contested measure.[128] For example, a panel may apply this test "where the measure at issue might be described as an 'exception' to a 'general' rule of taxation."[129] The question is whether the government would have collected revenue under the general rules of taxation in the absence of the measure.

72. 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.[130]

73. Thus, in the absence of the challenged measure, participating exporters would be required to pay customs duties that are equal to the amounts reflected in India's generally applied national tariff schedule.[131] The EPCG scheme provides the type of exception to the general rule that constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.[132] India foregoes revenue that is otherwise due as defined under Article 1.1(a)(1)(ii) of the SCM Agreement.

b. Benefit

74. EPCG participants receive numerous benefits under the program. A benefit analysis under Article 1.1(b) of the SCM Agreements requires consideration of whether the recipient is in

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[127] *US – FSC (AB)*, para. 90.

[128] *US – FSC (AB)*, para. 91; *US – Large Civil Aircraft (2nd complaint) (Panel)*, paras. 7.133, 7.329, 7.709; *US – FSC (Panel)*, para. 7.45.

[129] *US – FSC (Article 21.5 – EC) (AB)*, para. 91.

[130] Customs Tariff Act, 1975, as amended (Ex. US-07). *See* India Customs Tariff (as of February 2, 2018), available at http://www.cbic.gov.in/htdocs-cbec/customs/cst1718-020218/cst1718-0202-idx; Customs Act, 1962, Section 12 (Ex. US-08). *See also* India's applied tariffs, available at https://www.wto.org/english/thewto_e/countries_e/india_e.htm.

[131] Customs Act, 1962, Section 12 (Ex. US-08). *See US – FSC (Article 21.5 – EC) (AB)*, para. 91.

[132] *US – FSC (Article 21.5 – EC) (AB)*, para. 91.

a more advantageous position because of the contribution.[133] In other words, the question is whether the financial contribution has made "the recipient 'better off' than it would otherwise have been, absent that contribution."[134]

75. Where the benefit analysis follows an affirmative finding of financial contribution under Article 1.1(a)(1)(ii) – revenue foregone that is otherwise due – the analysis is straightforward: the reduced liability represents a direct benefit to the recipient.[135] Where the government foregoes revenue, the recipient "is better off than it would have been absent the contribution."[136]

76. 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.

c. Export Contingency

77. 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.[137] In this case the import duty exemption is clearly conditional, or dependent upon, export performance. [138]

78. Here, a unit receives EPCG benefits conditioned and dependent on its fulfillment 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.[139] In addition, the enterprise must meet an average annual obligation where the exporter's performance for a given year must be above the exporter's average level of export performance for the past three years for same or similar products.[140] Failure to fulfill these export obligations will result in imposition of fees and a payment due of customs duty saved on the unfulfilled portion of the EO.[141] The EPCG facially ties the granting of benefits on the export performance of the EPCG participant.

d. Conclusion

79. For the reasons discussed above, through the EPCG program, India grants a subsidy within the meaning of Article 1.1(a) of the SCM Agreement that is contingent upon export

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[133] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

[134] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

[135] *Brazil – Taxation (Panel)*, para. 7.491.

[136] *US – FSC (Article 21.5 – EC) (Panel)*, para. 8.46.

[137] SCM Agreement, Article 3.1(a) (internal footnotes omitted).

[138] *Canada – Autos (AB)*, para. 104. *See also Canada – Autos (AB)*, para. 100.

[139] Foreign Trade Policy 5.01(c) (Ex. US-03).

[140] Foreign Trade Policy 5.04(b) (Ex. US-03).

[141] Handbook of Procedures 5,14(c) (Ex. US-05).

performance within the meaning of Article 3.1(a) of the SCM Agreement. Therefore, the subsidy is inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

D. Special Economic Zones Scheme

80. Special Economic Zones are geographic areas that contain multiple exporting units (SEZ Units). An SEZ is an area approved by India's Board of Approval that has been developed by a government or non-government entity, including through the improvement of the geographic area and the construction of infrastructure, with the intention of attracting foreign investment and promoting exports.[142] A developer seeking to establish an SEZ must submit an application to the government and meet the prescribed requirements. India's Board of Approval can approve the application[143] and, once approved, a Development Commissioner is appointed to promote exports from the SEZ and to monitor SEZ and SEZ Unit performance, including export volume.[144]

81. An enterprise can seek to be approved as an SEZ Unit located in an approved SEZ. The central government creates an Approval Committee to review SEZ Unit applications for each SEZ. During the review process, the Approval Committee modifies, rejects, or approves a proposal to establish a unit in the SEZ.

82. This dispute concerns tax reductions and customs duty exemptions provided by India to SEZ Units.

83. India established the SEZ scheme for the express purpose of promoting exports by SEZ Units.[145] The Special Economic Zones Act, 2005 makes this clear; the preamble states: "An Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto."[146] India has long acknowledged that the "Special Economic Zones (SEZ) scheme has been a key instrument for promoting exports from India."[147] To promote an SEZ Unit's exports, India grants numerous tax reductions and customs duty exemptions to SEZ Units.

84. India developed these specific benefits with the intention of incentivizing exports. In 2014, India's Minister of Industry and Commerce highlighted the focus on exports, stating:

> SEZ Act and Rules provide a very competitive package for setting up export oriented manufacturing and services units in the country. The units in SEZ are eligible for a number of benefits such as duty

[142] Special Economic Zones Act of 2005, section 3 (Ex. US-22).

[143] Special Economic Zones Act of 2005, section 9 (Ex. US-22).

[144] Special Economic Zones Act of 2005, section 12 (Ex. US-22).

[145] Special Economic Zones Act of 2005, section 5 (Ex. US-22).

[146] Special Economic Zones Act of 2005, p. 1 (Ex. US-22).

[147] Address by Shri Anand Sharma Minister of Commerce, Industry and Textiles at the Release of Annual Supplement 2013-14 to the Foreign Trade Policy 2009-14 18th April, 2013 (Ex. US-23).

> free import / domestic procurement of goods for development, operation and maintenance, 100% income tax exemption on export income for SEZ Unis [sic] for first five years, 50% for next five years and 50% of the plough back export profits for next five years, exemption from CST, service tax, single window clearance for central approvals, external commercial borrowings upto [sic] US $ 500 million in a year without any maturity route (except prohibited sectors).[148]

85. India developed the package of benefits available to SEZ Units to encourage "export oriented manufacturing" in India. These benefits – tax reductions and customs duty exemptions – are financial contributions by India that are contingent on SEZ Units achieving foreign exchange earnings through exports.

86. SEZs have had the intended effect: continued growth in Indian exports. India's Minister of Commerce and Industry recently observed that "the EOU and SEZ Schemes are important components of our export promotion efforts contributing about one-third of our national exports."[149] India has reported that 221 SEZs were operational as of September 2017, which taken together host 4,765 businesses with exports that total approximately $81.2 billion.[150] A recent publication by India's Ministry of Commerce and Industry reviewing export performance in SEZs showed sustained growth in exports over twelve years;[151] the incentives are having their intended effect of boosting exports.

87. This growth has come at the cost of distorting markets through the use of prohibited export subsidies. We provide below (1) factual background of India's SEZ program and (2) the prohibited export subsidy analysis.

1. Factual Background

88. The Special Economic Zones Act, 2005, created the current framework for SEZs in India, and in 2006, India issued the SEZ Rules.[152] Together, the SEZ Act and SEZ Rules, as amended, form the basis of the current SEZ scheme in India. Below, we describe the approval and monitoring process for SEZ Units, and the benefits available to SEZ Units.

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[148] Nirmala Sitharaman, SEZ scheme of India is quite comprehensive, Daily News and Analysis, December 20, 2014 (Ex. US-24).

[149] Export Champions, Economic Times, February 12, 2018 (Ex. US-04).

[150] "Fact Sheet on Special Economic Zones," Ministry of Commerce and Industry, Department of Commerce (Ex. US-25).

[151] "Export Performances," Ministry of Commerce and Industry, Department of Commerce (March 5, 2018) (Ex. US-26).

[152] India periodically amends the SEZ Rules. Certain amendments have altered the benefits available to SEZ Units. *See Notification 15/2017-Integrated Tax (Rate)* (Ministry of Finance, Department of Revenue, June 30, 2017) (Ex. US-27). In general, however, amendments to the SEZ Rules make certain operational changes to the SEZ program, and do not alter the eligibility requirements and benefits relevant to this dispute.

a. Approval and Monitoring of SEZ Units

89. The fundamental objective of the Special Economic Zones scheme – to promote exports – is reflected through the approval and regulation of the SEZ Units that are located within Special Economic Zones. During the application phase, an enterprise seeking approval as an SEZ Unit must commit to export; once operational, export performance is regularly monitored to ensure continued exports. The rules governing each stage of the approval and monitoring process ensure that SEZ Units fulfill the key objective of promoting exports. In exchange, by virtue of being an SEZ Unit, the enterprise receives substantial tax reductions and customs duty exemptions.

90. *Application*: An enterprise seeking to become an SEZ Unit must submit an application to the Development Commissioner of the SEZ where it seeks to be located.[153] The SEZ Rules require that the application include SEZ Rule Form F, which requests information regarding the planned manufacturing activity, the level of investment, and the capital goods and raw materials the enterprise will import.[154] The enterprise must also provide a foreign exchange balance sheet, to include the anticipated FOB value of exports for the first five years of operation. After receiving the application, the Development Commissioner transmits it to the Approval Committee.[155]

91. *Review*: As part of its review, the Approval Committee must determine if the enterprise made a commitment to export. The SEZ Rules provide:

> The Approval Committee shall approve the proposal if it fulfills the following requirements, namely:
>
> (i) *the proposal meets the positive net foreign exchange earning requirement as provided in rule 53*;
>
> (ii) availability of space and other infrastructure support applied for, is confirmed by the Developer in writing, by way of a provisional offer of space.[156]

92. The Approval Committee thus must make a threshold determination of whether the proposal meets the "positive net foreign exchange" (NFE) requirements of the SEZ Rules.

93. The SEZ Rules define positive NFE. As set forth in Chapter VI of the SEZ Rules, positive NFE is achieved where $A - B > 0$.[157] "A" is defined as FOB value of exports by the SEZ Unit and the value of the supply of the SEZ Unit's production in certain limited,

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[153] Special Economic Zones Rules, section 17 (Ex. US-28).

[154] Special Economic Zones Rules, Form F (Ex. US-28).

[155] Special Economic Zones Rules, section 17 (Ex. US-28).

[156] Special Economic Zones Rules, section 18(2) (Ex. US-28) (emphasis added).

[157] Special Economic Zones Rules, section 53 (Ex. US-28).

enumerated circumstances (i.e., supply to projects funded by the United Nations or supply of capital goods to EPCG license holders).[158] The SEZ Rules define "B" to include the CIF Value of certain of the SEZ Unit's imports, such as inputs (i.e., raw materials) and capital equipment.[159] To achieve a positive balance, the "export" value must exceed the import values.

94. The Approval Committee must ("shall") approve the proposal if the applicant satisfies the positive NFE requirements.[160]

95. *Approval*: If approved, the Approval Committee issues a Letter of Approval to the enterprise. The Letter of Approval sets forth the conditions of the approval. In particular, condition (iii) of the standard Letter of Approval states the following:

> You shall achieve positive Net Foreign Exchange (NFE) as prescribed in the Special Economic Zone Rules, 2006, for the period you operate as a Unit in the Special Economic Zone from the commencement of production, failing which you shall be liable for penal action under the Foreign Trade (Development and Regulation) Act, 1992.[161]

96. The Letter of Approval mandates that the approval is contingent upon the enterprise achieving and maintaining a positive NFE.

97. Upon receiving the Letter of Approval, the enterprise completes a bond-cum-legal undertaking for the SEZ Unit; Form H of the SEZ Rules contains the standard format for this contract.[162] Executed by the enterprise, the undertaking lists the conditions that must be met to remain in good standing as an SEZ Unit.[163]

98. Condition 8 of the undertaking corresponds to condition (iii) of the Letter of Approval, which is quoted above. Condition 8 states:

> We, the obligors shall achieve positive Net Foreign Exchange Earning and shall fulfill other conditions stipulated in the Letter of Approval and in case of failure to achieve the said Net Foreign Exchange Earnings, except when the fulfillment of such conditions is prevented or delayed because of any law and order, proclamation or regulation or ordinance of the Government, we

[158] Special Economic Zones Rules, section 53 (Ex. US-28).

[159] Special Economic Zones Rules, section 53 (Ex. US-28).

[160] Special Economic Zones Rules, section 18(2) (Ex. US-28).

[161] Special Economic Zones Rules, Form G, Condition iii (Ex. US-28).

[162] Special Economic Zones Rules, section 22 and Form H (Ex. US-28).

[163] Special Economic Zones Rules, section 22 (Ex. US-28).

> shall be liable for penal action under the provisions of the Foreign Trade (Development and Regulation) Act, 1992.[164]

99. The undertaking represents the enterprise's acceptance of the terms and conditions of operating as an SEZ Unit. The undertaking becomes void if the enterprise fails to meet the terms.[165]

100. *Monitoring*: The Development Commissioner and the Approval Committee are charged with ensuring that an SEZ Unit has achieved NFE through sufficient value of exports.[166] Each SEZ Unit must submit an Annual Performance Report, which is Form I of the SEZ Rules.[167]

101. 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.[168] 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.[169] If the resulting number is positive, the unit has satisfied the NFE condition.[170] The equation is remarkably simple: export value must exceed import value.[171]

102. If the Development Commissioner or the Approval Committee determines that the SEZ Unit has failed to meet the conditions of the undertaking, including maintaining a positive NFE, the undertaking may be voided[172] and the SEZ Unit may be subject to penal action.[173]

b. Subsidies Provided to SEZ Units

103. 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);[174]

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[164] Special Economic Zones Rules, Form H, Condition 8 (Ex. US-28).

[165] Special Economic Zones Rules, Form H, para. following condition 18 (Ex. US-28).

[166] Special Economic Zones Rules, section 22(3) (Ex. US-28).

[167] Special Economic Zones Rules, section 22(3) (Ex. US-28).

[168] Special Economic Zones Rules, Form I (Ex. US-28).

[169] Special Economic Zones Rules, Form I (Ex. US-28).

[170] Special Economic Zones Rules, section 53 (Ex. US-28).

[171] *See* Special Economic Zones Rules, Form I (Ex. US-28).

[172] Special Economic Zones Rules, Form H, para. following condition 18 (Ex. US-28).

[173] Special Economic Zones Rules, section 25 (Ex. US-28).

[174] Special Economic Zones Act of 2005, section 27 and the Second Schedule (Ex. US-28); Income Tax Act, 1961, as amended, section 10A and section 10AA (Ex. US-29).

2. Exemption from customs duty on goods imported into the SEZ;[175]

3. Exemption from export duties;[176] and

4. Exemption from India's Integrated Goods and Services Tax.[177]

104. The SEZ Act and SEZ Rules entitle an SEZ Unit to these reductions and exemptions where the operating conditions are met, including the condition to maintain positive NFE.

2. India's Special Economic Zones Scheme Is Inconsistent with India's Obligations Under Articles 3.1(a) and 3.2 of the SCM Agreement

105. For each of the tax reductions or customs duty exemptions provided to SEZ Units, the United States first demonstrates that they are subsidies within the meaning of Article 1.1 of the SCM Agreement. We then show that the subsidies are contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement. The analysis demonstrates that these subsidies granted or maintained for SEZ Units are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

a. Financial Contribution

106. 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 (and analyzed in more detail below) represent a decision by India to "[give] up an entitlement to raise revenue that it could 'otherwise' have raised."[178] As reflected in India's annual budget report, the SEZ Scheme cost the government of India over $1.5 billion in revenue foregone in 2016.[179]

107. As explained above in section III.B,[180] a determination of whether the government would have otherwise raised revenue in the absence of the measure may require a comparison. Under this analysis, a benchmark standard can be used to determine the revenue that would have been raised from the enterprise if the challenged measure were not in place. Previous panel and Appellate Body reports have reasoned that "[t]here must . . . be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the

[175] Special Economic Zones Act of 2005, section 26(1)(a) (Ex. US-22).

[176] Special Economic Zones Act of 2005, section 26(1)(a) (Ex. US-22).

[177] Notification 15/2017-Integrated Tax (Rate) (Ministry of Finance, Department of Revenue, June 30, 2017) (Ex. US-27).

[178] *US – FSC (AB)*, para. 90.

[179] "Statement of Revenue Impact under the Central Tax System," Receipts Budget 2018-2019, p. 44 (Ex. US-01).

[180] *See*, para. 16.

revenue that would have been raised 'otherwise.'"[181] The primary basis of comparison must be the rules applied by the responding Member in the absence of the reduction or exemption.[182]

108. In some instances, the facts allow for a straightforward application of a "but for" test – that is, where the government would collect certain income "but for" the contested measure.[183] A financial contribution exists where the government would have collected revenue under the general taxation rules in the absence of the measure.[184]

109. To demonstrate that India has foregone or not collected revenue that is otherwise due for each reduction or exemption, we identify below (1) the treatment provided to SEZ Units and (2) the treatment of comparably situated enterprises in India.[185] 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.

1. *Corporate income tax deduction of export earnings*

110. Through the challenged measures, the government of India has foregone the collection of corporate income tax from SEZ Units that would otherwise be due.[186]

- Treatment provided to SEZ Units: SEZ Units are entitled to deduct from income tax liability 100% of profits from exports during the first five years; SEZ Units are then entitled to deduct from income tax liability 50% of profits from exports during each of the subsequent five years.[187]

- Treatment of comparably situated enterprises in India: India's Income Tax Act, 1961, as amended, does not permit enterprises, as a general rule, to deduct profits.[188]

111. In the absence of the challenged measures, SEZ Units would not be entitled to an income tax deduction for profits. The result would be increased income tax liability for SEZ Units, and

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[181] *US – FSC (AB)*, para. 90; *US – FSC (Article 21.5 – EC) (AB)*, para. 89.

[182] *US – FSC (AB)*, para. 90 (referred to as "the prevailing domestic standard of the Member in question"); *US – FSC (Article 21.5 – EC) (AB)*, para. 89.

[183] *US – FSC (AB)*, para. 91; *US – Large Civil Aircraft (2nd complaint) (Panel)*, paras. 7.133, 7.329, 7.709; *US – FSC (Panel)*, para. 7.45.

[184] For example, this analytical tool may be appropriate "where the measure at issue is an 'exception' to a 'general' rule of taxation." *US – FSC (Article 21.5 – EC) (AB)*, para. 91.

[185] *US – Large Civil Aircraft (2nd complaint) (AB)*, paras. 812-815. *See Brazil – Taxation (Panel)*, paras. 7.394-7.395.

[186] *See US – FSC (AB)*, para. 91.

[187] Special Economic Zones Act of 2005, section 27 and the Second Schedule (Ex. US-22); Income Tax Act, 1961, as amended, section 10A and section 10AA (Ex. US-29).

[188] *See* Income Tax Act, 1961, section 80A ("Deductions to be made in computing total income: in computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of this Chapter, the deductions specified in section 80C to [80U].") (Ex. US-30).

increased revenue for India. Accordingly, with respect to the corporate income tax deductions granted to SEZ Units, India makes a financial contribution to SEZ Units in the form of revenue foregone that is otherwise due, as defined in Article 1.1(a)(1)(ii) of the SCM Agreement.[189]

2. *Exemption from customs duty on imported goods*

112. Through the challenged measures, India has foregone the collection of customs duties from SEZ Units that would otherwise be due.[190]

- Treatment provided to SEZ Units: India "exempt[s] from any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or services provided in, a Special Economic Zone or a Unit, to carry on the authorized operations by the Developer or entrepreneur."[191] SEZ Units are exempt from the generally applicable customs duties applied to imports in India.[192]

- Treatment of comparably situated enterprises in India: Products of enterprises other than SEZ Units are subject to import duties. The First Schedule to the Customs Tariff Act, 1975 lists the rate of duty for listed products,[193] as required by the Customs Act, 1962. The Customs Act, 1962, states that "[e]xcept as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975], or any other law for the time being in force, on goods imported into, or exported from, India."[194] India's national tariff schedule indicates the generally applicable customs duties for all enterprises in India, apart from those entitled to certain customs duty reductions or exemptions.[195] As reflected in India's national tariff schedule, imported goods are subject to substantial customs duties: India's import duties average 13.8%.[196]

113. In the absence of the challenged measures, SEZ Units would be required to pay the customs duties reflected in India's generally applied national tariff schedule. With the exemption, India foregoes revenue it would otherwise collect. Accordingly, with respect to the

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[189] Special Economic Zones Act of 2005, section 27 and the Second Schedule (Ex. US-22); Income Tax Act, 1961, as amended, section 10A and section 10AA (Ex. US-29).

[190] *See US – FSC (AB)*, para. 91.

[191] Special Economic Zones Act of 2005, section 26(1)(a) (Ex. US-22).

[192] Special Economic Zones Act of 2005, section 26(1)(a) (Ex. US-22).

[193] Customs Tariff Act, 1975, as amended (Ex. US-07).

[194] Customs Act, 1962, Section 12 (Ex. US-08).

[195] Customs Tariff Act, 1975, as amended (Ex. US-07). *See* India Customs Tariff (as of February 2, 2018), available at http://www.cbic.gov.in/htdocs-cbec/customs/cst1718-020218/cst1718-0202-idx; Customs Act, 1962, Section 12 (Ex. US-08). *See also* India's applied tariffs, available at https://www.wto.org/english/thewto_e/countries_e/india_e.htm.

[196] http://stat.wto.org/TariffProfiles/IN_e.htm

customs import duty exemptions granted to SEZ Units, India makes a financial contribution to SEZ Units in the form of revenue foregone that is otherwise due, as defined in Article 1.1(a)(1)(ii) of the SCM Agreement.

3. *Exemption from export duties*

114. Through the challenged measures, India has foregone the collection of export duties from SEZ Units that would otherwise be due.[197]

- Treatment provided to SEZ Units: India "exempt[s] from any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force, on goods exported from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India."[198] SEZ Units are exempt from India's generally applicable export tariffs.

- Treatment of comparably situated enterprises in India: Products of enterprises other than SEZ Units are subject to export duties. The Second Schedule to the Customs Tariff Act, 1975 lists the rate of duty for listed products,[199] as required by the Customs Act, 1962. The Customs Act, 1962, states that "[e]xcept as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975], or any other law for the time being in force, on goods imported into, or exported from, India."[200] The provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975, are generally applicable, apart from where an enterprise is entitled to an exemption under law.

115. In the absence of the challenged measures, SEZ Units would be required to pay the export duties reflected in the Second Schedule to the Customs Tariff Act of 1975, pursuant to Customs Act, 1962. With the exemption from duty, India foregoes revenue it would otherwise collect. Accordingly, with respect to the export duty exemptions granted to SEZ Units, India makes a financial contribution to SEZ Units in the form of revenue foregone that is otherwise due, as defined in Article 1.1(a)(1)(ii) of the SCM Agreement.[201]

4. *Exemption from Integrated Goods and Services Tax*

116. Through the challenged measures, India has foregone the collection of Integrated Goods and Services Tax from SEZ Units that would otherwise be due.[202]

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[197] *See US – FSC (AB)*, para. 91.

[198] Special Economic Zones Act of 2005, section 26(1)(b) (Ex. US-22).

[199] Customs Tariff Act, 1975, Second Schedule (Ex. US-31).

[200] Customs Act, 1962, Section 12 (Ex. US-08).

[201] Special Economic Zones Act of 2005, section 26(1)(b) (Ex. US-22).

[202] *See US – FSC (AB)*, para. 91.

- Treatment provided to SEZ Units: SEZ Units are exempt from the payment of India's 2017 Integrated Goods and Services Tax.[203] The tax is a multi-stage value added tax. In relevant part, India levies the tax on goods imported into India, and does so at the same point at which India levies customs duties.[204] The tax rate ranges from 0.25 percent to 28 percent.[205] India, however, "exempts all goods or services or both imported by a unit…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 for authorized operations."[206] Accordingly, SEZ Units do not pay the Integrated Goods and Services Tax on imported goods.

- Treatment of comparably situated enterprises in India: India's Integrated Goods and Services Tax, 2017 imposes on all enterprises an integrated tax on goods imported into India, apart from where an explicit exception applies.[207]

117. In the absence of the challenged measures, SEZ Units would be required to pay the Integrated Goods and Services Tax on imported goods. With the exemption, India foregoes revenue it would otherwise collect. Accordingly, with respect to the exemption from the Integrated Goods and Services Tax, India makes a financial contribution to SEZ Units in the form of revenue foregone that is otherwise due, as defined in Article 1.1(a)(1)(ii) of the SCM Agreement.[208]

b. Benefit

118. In the case of each of the reductions or exemptions described above, India confers benefits to SEZ Units. As explained above in section III.B, a benefit analysis under Article 1.1(b) of the SCM Agreement requires consideration of whether the recipient is in a more advantageous position because of the financial contribution.[209] The question is "whether the financial contribution has made the recipient 'better off' than it would otherwise have been, absent that contribution."[210]

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[203] Notification 15/2017-Integrated Tax (Rate) (Ministry of Finance, Department of Revenue, June 30, 2017) (Ex. US-27).

[204] The Integrated Goods and Services Tax Act, 2017, section 5(1) (Ex. US-32).

[205] *See* Notification No. 01/2017- Integrated Tax (Rate), of the Integrated Goods and Services Act, 2017 (Ex. US-41).

[206] Notification 15/2017-Integrated Tax (Rate) (Ministry of Finance, Department of Revenue, June 30, 2017) (Ex. US-27).

[207] The Integrated Goods and Services Tax Act, 2017, section 5(1) (Ex. US-32). *See* Notification No. 01/2017- Integrated Tax (Rate) (Ex. US-41).

[208] Special Economic Zones Act of 2005, section 26(1)(a) (Ex. US-22).

[209] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

[210] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

119. As described above,[211] where the benefit analysis follows an affirmative finding of financial contribution under Article 1.1(a)(1)(ii) – revenue foregone that is otherwise due – the analysis is straightforward: the reduction or exemption represents a direct benefit to the recipient. Indeed, as recently recognized by the panel in *Brazil – Taxation*, "[s]everal panels have concluded that, whenever there is revenue foregone by the government, a benefit is conferred."[212] Where the government foregoes revenue, the recipient "is better off than it would have been absent the contribution."[213]

120. 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. As discussed above, SEZ Units are entitled to reductions or exemptions from the generally applied tax and customs duty obligations. An SEZ Unit is "better off" because of the financial contributions to the extent it is not required to pay the otherwise applicable tax or customs duty obligation.[214]

c. Export Contingency

121. 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.[215] As explained above in section III.B, the term "contingent" means "conditional; dependent on, upon; [d]ependent for its existence on something else,"[216] and past reports have reasoned that "the grant of a subsidy must be 'tied to' export performance."[217] The reductions and exemptions India provides through the SEZ scheme are contingent in law. For completeness, the United States also demonstrates that these subsidies are contingent in fact on export performance.

i. Export contingent in law

122. The subsidies under the SEZ Scheme are contingent on export performance, as is clear from the measures concerning the application, approval, and monitoring stages of the SEZ Unit's operation.

123. During the application stage, an enterprise seeking to become an SEZ Unit must provide a foreign exchange balance sheet that includes the anticipated FOB value of exports for the first five years of operation.[218] India then approves an enterprise only if the proposal meets the NFE

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[211] *See* para. 17.

[212] *Brazil – Taxation (Panel)*, para. 7.491.

[213] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

[214] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

[215] SCM Agreement, Article 3.1(a) (internal footnotes omitted).

[216] *New Shorter Oxford English Dictionary*, Volume 1, p. 494 (Ex. US-42).

[217] *US – FSC (Article 21.5 – EC) (AB)*, para. 111; *see Canada – Aircraft (Panel)*, para. 9.331.

[218] Special Economic Zones Rules, Form F (Ex. US-28).

requirements of the SEZ Rules; with limited exceptions, an enterprise must export to meet these requirements.[219]

124. 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 export and the NFE earning for the first five years of operation.[220] The Letter of Approval also states that the SEZ Unit "shall export the goods manufactured…as per provisions of the Special Economic Zones Act, 2005 and Rules made thereunder. . . ."

125. 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.[221] India grants the subsidy with the condition of making future exports and achieving an overall "positive" NFE (which requires exportation).

126. The monitoring data collected from SEZ Units further demonstrates this condition. In the Annual Performance Report, SEZ Units are required to report export value – defined in the Annual Performance Report as FOB value of exports for the most recent year – and the import value of inputs and capital goods. Using this data, the Annual Performance Report requires the SEZ Unit to calculate the NFE earning for the year: "FOB value of exports for the year" minus total value of imports during the year.[222] A positive number – indicating greater exports than imports – indicates that the unit has satisfied the NFE condition.[223] The equation requires exports to satisfy the condition: export value must exceed import value.[224]

127. India grants or maintains these subsidies on the condition of export performance by the recipient.[225] Accordingly, subsidies granted or maintained under the SEZ Scheme to SEZ Units are contingent in law upon export performance within the meaning of Article 3.1(a) of the SCM Agreement.

ii. Export contingent in fact

128. 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.

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[219] Special Economic Zones Rules, section 53 (Ex. US-28).

[220] Special Economic Zones Rules, section 19 (Ex. US-28).

[221] Special Economic Zones Rules, section 53 (Ex. US-28).

[222] Special Economic Zones Rules, Form I (Ex. US-28).

[223] Special Economic Zones Rules, section 53 (Ex. US-28).

[224] *See* Special Economic Zones Rules, Form I (Ex. US-28).

[225] *US – FSC (Article 21.5 – EC) (AB)*, para. 111.

129. Footnote 4 to Article 3.1(a) elaborates upon the legal standard for determining whether a subsidy is contingent "in fact" upon export performance. Specifically:

> This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, *is in fact tied to actual or anticipated exportation or export earnings*. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.[226]

130. Footnote 4 clarifies that a subsidy contingent "in fact" is one for which "the granting" of the subsidy is "tied to actual or anticipated exportation or export earnings." The ordinary meaning of the term "anticipated" is "expected." Therefore, the text states that the proper analysis is whether "the granting" of the subsidy is "tied to" actual or expected exportation. A subsidy granted by a Member with the expectation of exportation meets the standard of contingent "in fact." Whether the granting is so tied, and whether exports were expected, depends on the evidence.[227]

131. The facts reveal that India's granting of subsidies to SEZ Units is tied to their actual or expected export performance.[228] India introduced the SEZ Unit scheme for the stated purpose of promoting exports in India. The preamble of the implementing measure, the SEZ Act of 2005, makes this intention clear:

> An Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto.[229]

132. The SEZ Act delineates the functions of each entity charged with implementing the SEZ Scheme. In each instance, these government entities are charged with identifying further policies to promote future exports:

- "The [Approval] Board may, in order to promote exports or to protect the interest of Units or in the public interest, issue such directions or formulate

[226] SCM Agreement, footnote 4 (emphasis added).

[227] *Canada – Aircraft (AB)*, para. 172 ("[w]hether exports were anticipated or 'expected' is to be gleaned from an examination of objective evidence").

[228] Special Economic Zones Rules, section 53 (Ex. US-28). The facts reviewed above also amply satisfy the articulation in *EC – Large Civil Aircraft (AB)* because India grants the subsidies "to induce the promotion of future export performance."

[229] Special Economic Zones Act, p. 1 (Ex. US-22).

such scheme as it may consider necessary for operation of the Special Economic Zone."[230]

- "Every Development Commission shall take all steps in order to discharge his functions under this Act to ensure speedy development of the Special Economic Zone and promotion of exports therefrom."[231]

- "Subject to the provisions of this Act, it shall be the duty of each [Special Economic Zone] Authority to undertake such measures as it thinks fit for the development, operation and management of the Special Economic Zone for which it was constituted," and "the measures referred to therein may provide for promoting exports from the Special Economic Zone."[232]

133. Since establishing the SEZ Scheme, India has aggressively promoted the subsidies to SEZs as a critical policy tool used to induce exports:

- India's Ministry of Commerce, "Special Economic Zones in India" webpage states that the "promotion of exports of goods and services" is a "main objective of the SEZ Act."[233]

- India's Export Promotion Council for EOUs and SEZs has explained that "EOUs and SEZs play a stellar role in the growth of exports from the country."[234]

- India's Ministry of Electronics and Information Technology recognizes the Special Economic Zones Scheme as an "export promotion scheme."[235]

134. India has successfully achieved this policy objective, with the SEZ Scheme resulting in increased exports from India. Most recently, India's Minister of Commerce and Industry hailed the scheme as a key aspect of India's export promotion strategy, saying that "the EOU and SEZ Schemes are important components of our export promotion efforts contributing about one-third of our national exports."[236]

[230] Special Economic Zones Act, section 10(10) (Ex. US-22).

[231] Special Economic Zones Act, section 12(1) (Ex. US-22).

[232] Special Economic Zones Act, section 34 (Ex. US-22).

[233] Special Economic Zones in India, http://sezindia.nic.in/cms/introduction.php (Ex. US-33).

[234] Export Promotion Council for EOUs and SEZs, https://epces.in/view_section.php?lang=0&id=0,1,20 (Ex. US-34).

[235] Export Promotion Schemes, http://meity.gov.in/content/export-promotion-schemes (Ex. US-35).

[236] Export Champions, Economic Times, February 12, 2018 (Ex. US-04).

135. With this stated objective to use the SEZ Scheme to promote exports, the granting of subsidies under the SEZ Scheme is tied to actual or expected exports by SEZ Units.[237] This is evident from the application, approval, and monitoring stage of the SEZ Unit's operation:

- An enterprise's application to be an SEZ Unit must include anticipated FOB value of exports for the first five years of operation; [238] and

- If an enterprise is approved as an SEZ Unit, it must meet certain annual export and NFE earning targets for the first five years of operation.[239]

136. Furthermore, the requirement to achieve a positive NFE incentivizes an SEZ Unit to make export-market sales rather than domestic-market sales.[240] Maintaining positive NFE is the critical requirement of an SEZ Unit.[241] 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.[242] 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.

137. The SEZ Scheme has also structured the tax reduction benefit to induce exports by SEZ Units. As described above, 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.[243] 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. This approach is consistent with the SEZ Scheme's overall objective of promoting and inducing exports.

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[237] The subsidies under the SEZ Scheme are therefore designed, or geared, to induce exports by SEZ Units.

[238] Special Economic Zones Rules, Form F (Ex. US-28).

[239] Special Economic Zones Rules, section 19 (Ex. US-28).

[240] Special Economic Zones Rules, section 53 (Ex. US-28).

[241] Special Economic Zones Rules, section 18(2) (Ex. US-28); Special Economic Zones Rules, Form G, Condition iii (Ex. US-28); Special Economic Zones Rules, Form H, Condition 8 (Ex. US-28); Special Economic Zones Rules, Form H, para. following condition 18 (Ex. US-28).

[242] Special Economic Zones Rules, section 53 (Ex. US-28).

[243] Special Economic Zones Act of 2005, section 27 and the Second Schedule (Ex. US-22); Income Tax Act, 1961, as amended, section 10A and section 10AA (Ex. US-29).

138. These facts demonstrate that India grants these subsidies on the condition of export performance by the recipient.[244] Accordingly, and in the alternative to the demonstration of contingency in law, the subsidies granted and maintained under the SEZ Scheme to SEZ Units are contingent in fact upon export performance within the meaning of Article 3.1(a) of the SCM Agreement.

d. Conclusion

139. For these reasons, through the SEZ Scheme, India confers subsidies within the meaning of Article 1.1(a) of the SCM Agreement. These subsidies are contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement and, therefore, are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

E. Duty Free Imports for Exporters Scheme

140. The duty-free imports for exporters scheme exempts eligible exporters from customs import duties based on past export performance. The extent of the customs duty exemption in the current year is proportional to the value of exports from the *previous* year.

141. We provide below (1) factual background of India's duty free imports for exporters scheme and (2) the prohibited export subsidy analysis.

1. Factual Background

142. India grants exemptions under the program pursuant to Customs Notification 50/2017.[245] The notification identifies the goods eligible for import duty exemptions and, for each exemption, prescribes the "Condition" to qualify.[246] To qualify, *during the previous year*, an enterprise must have exported a product listed in the Condition.[247] Past export performance entitles the enterprise to an import duty exemption. That is, in the current year, the enterprise knows that it must export in order to qualify for an import duty exemption the following year.

143. The extent of the import duty exemption is contingent upon the FOB value of exports of a given product during the previous year. In Customs Notification 50/2017, goods permitted to be imported duty-free under the program list an applicable "Condition;" under the corresponding Condition, the notification identifies (1) the product that must have been exported during the previous year and (2) a percentage that ranges from zero to twenty-five percent. The enterprise's duty-free entitlement value is equal to (1) the FOB value of exports of that product during the

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[244] *EC – Large Civil Aircraft (AB)*, para. 1044 ("we consider that the factual equivalent of such conditionality can be established by recourse to the following test: is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?").

[245] Notification 50/2017-Customs (Ministry of Finance, Department of Revenue, June 30, 2017) ("Customs Notification 50/2017") (Ex. US-36). Previously, India provided subsidies under this program pursuant to Notification 12/2012-Customs (Ministry of Finance, Department of Revenue, March 17, 2012) (Ex. US-37).

[246] *See* Conditions 10, 21, 28, 32, 33, 36, 60, 61, 101, Customs Notification 50/2017 (Ex. US-36).

[247] *See* Conditions 10, 21, 28, 32, 33, 36, 60, 61, 101, Customs Notification 50/2017 (Ex. US-36).

previous year, multiplied by (2) the applicable percentage. The program entitles the enterprise to import the corresponding listed products duty free until the value of those imports is equal to the enterprise's duty-free entitlement value.[248]

144. For example, for textile or leather garments, the total value of goods imported duty free cannot exceed between 3 and 5 percent of the FOB value of textile or leather garments exported during the previous year.[249] Condition 28 of Customs Notification 50/2017 sets forth the condition for this duty-free entitlement. In relevant part, for an enterprise to import listed products duty free, Condition 28 requires:

> If, -
>
> (a) the goods are imported,
>
> (i) by a manufacturer of textile garments or leather garments; or
>
> (ii) by a merchant exporter tied up with supporting manufacturer of textile garments or leather garments
>
> for use in manufacture of textile garments or leather garments for export by that manufacturer directly or through a merchant exporter, as the case may be, and that the said manufacturer or merchant-exporter is registered with the Apparel Export Promotion Council or Indian Silk Promotion Council . . . .
>
> (b) the total value of goods imported shall not exceed 5 percent of the FOB value of textile garments (other than handloom garments) or 3 percent of the FOB value of textile garments (other than handloom garments) or leather garments, as the case may be, or 5 percent of the FOB value of handloom garments exported during the preceding financial year. . .[250]

145. Under this Condition, an enterprise that exports $1,000,000 in textile garments would receive a duty-free entitlement value of $50,000 ($1,000,000 * .05). In the following year, the enterprise would then be entitled to import up to $50,000 in value of certain goods duty free, as provided in Customs Notification 50/2017 (*i.e.*, fasteners, buttons).

146. Additional conditions with identical relevant language – in which the duty-free import entitlement is contingent upon past export performance – appear throughout Customs Notification 50/2017. Below are the relevant lines of Customs Notification 50/2017 and the corresponding Condition number:

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[248] Conditions 10, 21, 28, 32, 33, 36, 60, 61, 101, Customs Notification 50/2017 (Ex. US-36).

[249] Condition 28, Customs Notification 50/2017 (Ex. US-36).

[250] Condition 28, Customs Notification 50/2017 (Ex. US-36).

Line number	Condition number
104	10
229	21
288	28
312	32
313	33
327	36
430	60
431	61
612	101

147. Exhibit US-38 is a chart that excerpts the relevant line of the notification and the full text of the corresponding Condition.

148. Industry export councils play a coordinating role in the administration of the program. An exporter submits an application to obtain an Export Performance Certificate. The application details the enterprise's FOB export value of the listed products from the previous year.[251] The industry export council then issues an Export Performance Certificate that reflects the export value from the previous year.[252]

149. Upon receipt of an Export Performance Certificate, an enterprise may import eligible goods duty free. At the time of import, an enterprise applies to the industry council for an Import Certificate, including information about the Export Performance Certificate's duty-free entitlement value and a description and value of the goods to be imported. The industry council issues the Import Certificate and deducts the value of the imported goods from the duty free

[251] *See Council for Leather Exporters: Duty Free Import Scheme – an introduction* (Ex. US-39) (in the "Declaration of Export Realization" document, requiring the applicant to "declare that we have realized a sum of Rupees…as Export realization calculated on FOB Basis"); *Apparel Export Promotion Council: Export Performance Certificate 2017-2018* (Ex. US-40) (requiring applicant to declare "we wish to state that we have exported readymade garments and have realized the sale proceeds amount to [Rupees]").

[252] *See Council for Leather Exporters: Duty Free Import Scheme – an introduction* (Ex. US-39); *Apparel Export Promotion Council: Export Performance Certificate 2017-2018* (Ex. US-40).

import allowance displayed on the Export Performance Certificate. The industry council and the enterprise can then maintain the balance of the duty-free import allowance.[253]

150. The enterprise provides the Import Certificate to customs authorities to allow for duty-free clearance of the imported good. The enterprise may continue to import eligible products duty free during that year until it has exhausted the duty-free entitlement value.[254]

2. India's Duty Free Imports for Exporters Scheme Is Inconsistent with India's Obligations Under Articles 3.1(a) and 3.2 of the SCM Agreement

151. Through this program, India provides export subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement. We demonstrate below that India grants or maintains a subsidy within the meaning of Article 1.1 of the SCM Agreement, and that the subsidy is contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement.

a. Financial Contribution

152. 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). As explained in section III.B above, 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.

153. As explained above, in some instances, the facts allow for a straightforward application of a "but for" test – that is, where the government would collect certain income "but for" the contested measure.[255] A financial contribution exists where the government would have collected revenue under the general taxation rules in the absence of the measure.[256]

154. As a result of the duty exemption for participating exporters, the India has foregone revenue that it would otherwise be due within the meaning of a financial contribution under Article 1.1(a)(1)(ii) of the SCM Agreement. A participating enterprise receives a duty free import entitlement based on export value from the previous year,[257] and is then entitled to import

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[253] *See Council for Leather Exporters: Duty Free Import Scheme – an introduction* (Ex. US-39); *Apparel Export Promotion Council: Export Performance Certificate 2017-2018* (Ex. US-40).

[254] *See Council for Leather Exporters: Duty Free Import Scheme – an introduction* (Ex. US-39); *Apparel Export Promotion Council: Export Performance Certificate 2017-2018* (Ex. US-40).

[255] *US – FSC (AB)*, para. 91; *US – Large Civil Aircraft (2nd complaint) (Panel)*, paras. 7.133, 7.329, 7.709; *US – FSC (Panel)*, para. 7.45.

[256] For example, this analytical tool may be appropriate "where the measure at issue is an 'exception' to a 'general' rule of taxation." *US – FSC (Article 21.5 – EC) (AB)*, para. 91.

[257] Conditions 10, 21, 28, 32, 33, 36, 60, 61, 101, Customs Notification 50/2017 (Ex. US-36). *See Council for Leather Exporters: Duty Free Import Scheme – an introduction* (Ex. US-39); *Apparel Export Promotion Council: Export Performance Certificate 2017-2018* (Ex. US-40).

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.

155. A comparably situated enterprise in India must pay customs duties according to India's national tariff schedule. The First Schedule to the Customs Tariff Act, 1975 lists the rate of duty for listed products,[258] as required by the Customs Act, 1962. India's national tariff schedule indicates the generally applicable customs duties for all enterprises in India, except those entitled to certain customs duty reductions or exemptions.[259]

156. Thus, the duty free imports for exporters scheme presents an exception to the general rule of taxation. That exception constitutes a financial contribution.[260] Accordingly, with respect to this program, India foregoes revenue that is otherwise due within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.[261]

b. Benefit

157. India confers benefits to participating exporters through the exemption of customs duties normally due to the government to the extent of those exemptions. As explained in section III.B above, a benefit analysis under Article 1.1(b) of the SCM Agreements calls for considering whether the recipient is in a more advantageous position because of the financial contribution.[262] The question is "whether the financial contribution has made the recipient 'better off' than it would otherwise have been, absent that contribution."[263]

158. Where the benefit analysis follows an affirmative finding of financial contribution under Article 1.1(a)(1)(ii) – revenue foregone that is otherwise due – the analysis is straightforward: the reduced liability represents a direct benefit to the recipient. The panel in *Brazil – Taxation* agreed that "whenever there is revenue foregone by the government, a benefit is conferred."[264] Another panel concluded that, where the government foregoes revenue, the recipient "is better off than it would have been absent the contribution."[265]

159. 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. As discussed above, a

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[258] Customs Tariff Act, 1975, as amended (Ex. US-07).

[259] Customs Tariff Act, 1975, as amended (Ex. US-07). *See* India Customs Tariff (as of February 2, 2018), available at http://www.cbic.gov.in/htdocs-cbec/customs/cst1718-020218/cst1718-0202-idx; Customs Act, 1962, Section 12 (Ex. US-08). *See also* India's applied tariffs, available at https://www.wto.org/english/thewto_e/countries_e/india_e.htm.

[260] *US – FSC (Article 21.5 – EC) (AB)*, para. 91.

[261] Customs Act, 1962, Section 12 (Ex. US-08). *See US – FSC (Article 21.5 – EC) (AB)*, para. 91.

[262] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

[263] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

[264] *Brazil – Taxation (Panel)*, para. 7.491.

[265] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 635. *See Canada – Aircraft (AB)*, para. 157.

participating enterprise receives exemptions from the generally applied customs duty obligations. Thus, a participating enterprise is "better off" because of the financial contribution to the extent it is not required to apply the otherwise applicable customs duty obligation. Accordingly, with respect to the customs duty exemptions granted under this program, recipients receive a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

c. Export Contingency

160. 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.[266] As explained above in section III.B, the term "contingent" means "conditional; dependent on, upon; [d]ependent for its existence on something else,"[267] and past reports have reasoned that "the grant of a subsidy must be 'tied to' export performance."[268] In this case, the import duty exemption is clearly conditional, or dependent upon, export performance.[269]

161. India's provision of the import duty exemption is contingent in law (*de jure*) on the export performance of the benefiting enterprise.[270] To receive the import duty exemption, an enterprise must have made exports in the past year.[271] That is, in a given year, the enterprise must export in order to qualify for receipt of the subsidy in the subsequent year. 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. The program is export contingent because the subsidy (indeed, the amount of the benefit) is tied to the value of the exports from the previous year. Accordingly, the subsidy is contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement.

d. Conclusion

162. For these reasons, through the duty free imports for exporters scheme, India grants or maintains subsidies within the meaning of Article 1.1(a) of the SCM Agreement. These subsidies are contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement and, therefore, are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

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[266] SCM Agreement, Article 3.1(a) (internal footnotes omitted).

[267] *New Shorter Oxford English Dictionary,* Volume 1, p. 494 (Ex. US-42).

[268] *US – FSC (Article 21.5 – EC) (AB),* para. 111; *see Canada – Aircraft (Panel),* para. 9.331.

[269] *Canada – Autos (AB),* para. 104. *See also Canada – Autos (AB),* para. 100.

[270] Conditions 10, 21, 28, 32, 33, 36, 60, 61, 101, Customs Notification 50/2017 (Ex. US-36).

[271] *See Canada – Autos (AB),* para. 104. *See also Canada – Autos (AB),* para. 100.

V. CONCLUSION

163. For the foregoing reasons, the United States respectfully requests that the Panel find that the measures at issue – the (1) Export Oriented Units Scheme and sector specific schemes, including Electronics Hardware Technology Parks Scheme and Bio-Technology Parks Scheme; (2) the Merchandise Exports from India Scheme; (3) the Export Promotion Capital Goods Scheme; (4) Special Economic Zones; and (5) the Duty Free Imports for Exporters Scheme – are export subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

164. Pursuant to Article 4.7 of the SCM Agreement: "If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay."[272] Moreover, under Article 4.7 of the SCM Agreement, "[i]n this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn." The United States respectfully requests that the Panel specify, pursuant to Article 4.7, that the time period for withdrawal be 90 days after the DSB adopts its recommendations in this dispute.[273]

[272] Article 4.7 of the SCM Agreement, which is a "special or additional rule" listed in Appendix 2 to the DSU, is similar to Article 19.1 of the DSU: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."

[273] *Argentina – Hides and Leather*, para. 10.7; *Brazil – Aircraft (Panel)*, para. 8.5; *Canada – Aircraft (Panel)*, para. 10.4; *US – Tax Incentives (Panel)*, para. 8.6; *Canada – Autos (Panel)*, para. 11.7; *Brazil – Taxation (Panel)*, paras. 8.10-8.11 and 8.21-8.22.