

***INDIA — EXPORT RELATED MEASURES***

**(DS541)**

**COMMENTS OF THE UNITED STATES ON INDIA'S RESPONSES TO THE PANEL'S  
QUESTIONS (QQ. 18-90)**

**April 1, 2019**

**TABLE OF REPORTS**

<b>SHORT TITLE</b>	<b>FULL CITATION</b>
<i>Australia – Automotive Leather II (Panel)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126/R, adopted 16 June 1999
<i>Brazil – Taxation (AB)</i>	Appellate Body Report, <i>Brazil – Certain Measures Concerning Taxation and Charges</i> , WT/DS472/AB/R ; WT/DS497/AB/R and Add.1, adopted 11 January 2019
<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 4 August 2000
<i>Canada – Autos (AB)</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R / WT/DS142/AB/R, adopted 19 June 2000
<i>Canada – Renewable Energy / Feed-In Tariff Program (“Canada – FIT”) (AB)</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector, Canada – Measures Relating to the Feed-In Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
<i>EC – Tariff Preferences (AB)</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004
<i>EU – PET (Pakistan) (AB)</i>	Appellate Body Report, <i>European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan</i> , WT/DS486/AB/R and Add.1, adopted 28 May 2018
<i>US – Anti-Dumping and Countervailing Duties (China) (AB)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011

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<i>US – Large Civil Aircraft (2<sup>nd</sup> Complaint) (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint</i> , WT/DS353/AB/R, adopted 23 March 2012
<i>US – Softwood Lumber V (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Upland Cotton (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , 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**

<b>Ex. No.</b>	<b>Description</b>
US-70	Communication from the Chairman, (21 April 2011), TN/RL/W/254
US-71	Council for Leather Exports at <a href="http://leatherindia.org/welcome-to-council-for-leather-exports-india/">http://leatherindia.org/welcome-to-council-for-leather-exports-india/</a>
US-72	Council of Leather Exports (CLE) Comprehensive Guidelines for Implementation of Duty-Free Import Scheme (DFIS) for 2018-2019, available at <a href="http://leatherindia.org/wp-content/uploads/2018/03/DFIS-Circular-2018-19.doc">http://leatherindia.org/wp-content/uploads/2018/03/DFIS-Circular-2018-19.doc</a>
US-73	<i>Govt to increase duty incentives for exports of milk products</i> , The Times of India, September 21, 2018, available at <a href="https://timesofindia.indiatimes.com/business/india-business/govt-to-increase-duty-incentives-for-exports-of-milk-products/articleshow/65899679.cms">https://timesofindia.indiatimes.com/business/india-business/govt-to-increase-duty-incentives-for-exports-of-milk-products/articleshow/65899679.cms</a>

1. India's responses to the Panel's written questions to a large extent repeat arguments that the United States has addressed previously. Rather than also repeat prior U.S. arguments on these issues, the comments below contain additional points on India's arguments. The absence of a U.S. comment on an aspect of India's response to any particular question should not be understood as agreement with that response.

## ARTICLE 27 OF THE SCM AGREEMENT

*Q. 18. To India: Please explain how "a literal interpretation" of the text of Article 27.2(b) would run contrary to the object and purpose of the SCM Agreement, including special and differential treatment for developing countries.*

### Comments:

2. India argues that the "literal interpretation" of Article 27.2(b) runs contrary to what India asserts is the object and purpose of the SCM Agreement to provide "special and differential treatment."<sup>1</sup> To meet this supposed object and purpose, India believes that the treatment of Article 27.2(b) developing country Members and developing country Members listed in Annex VII(b) must be the "same."<sup>2</sup> According to India, an Annex VII(b) Member must receive an additional eight years after graduation to phase out its export subsidies to ensure the "same" treatment as Article 27.2(b) Members not listed in Annex VII(b).<sup>3</sup>

3. Each step of India's argument is flawed. For the reasons noted in the U.S. response to Panel Question 21, Article 27.2(b) must, as reflected in DSU Article 3.2, be interpreted using the ordinary meaning (what India appears to characterize as the "literal interpretation") of the terms, in context and in light of the object and purpose of the WTO Agreement.

4. In arguing against what India characterizes as the "literal reading" of Article 27.2(b), India appears to concede that the ordinary meaning of Article 27.2(b) is clear. "A period of eight years from the date of entry into force of the WTO Agreement [January 1, 1995]" is January 1, 2003. Article 27 of the SCM Agreement and Annex VII(b) show that India does *not* enjoy an additional eight-year phase out period of its challenged schemes after it graduated from Annex VII(b).

5. India appears to argue that its proposed "object and purpose" of the SCM Agreement calls for disregarding the plain meaning of Article 27.2(b) and revising it. India is wrong. Customary rules of interpretation call for interpreting the ordinary meaning of terms "in the light of" the treaty's object and purpose. Contrary to India's argument, those rules do not provide for the object and purpose of a treaty to override or disregard the ordinary meaning of terms. To adopt an interpretation, which runs counter to the clear meaning of the terms of an agreement, would not be to interpret but to revise the agreement.<sup>4</sup>

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<sup>1</sup> India response to Panel Question 18.

<sup>2</sup> India response to Panel Question 18.

<sup>3</sup> India response to Panel Question 18.

<sup>4</sup> *See, e.g.*, Yearbook of the International Law Commission, 1966, Vol. II, page 219, commenting on what would become Article 31 of the Vienna Convention.

6. Furthermore, India proposes an incorrect “object and purpose” of the SCM Agreement. India is wrong when it states that: “Article 27.1 of the SCM Agreement, read with other provisions of Article 27 and the Annexes, provides for the object and purpose of the SCM Agreement.” As an initial matter, the fact that the SCM Agreement does not contain a preamble or statement of its object and purpose calls for caution in ascribing an “object and purpose” to the SCM Agreement.<sup>5</sup> And the SCM Agreement is but one part of the WTO Agreement, annexed together with other agreements in one undertaking agreed by Members. It is revealing, and unsurprising, that when the Appellate Body has attempted to identify an object and purpose of the SCM Agreement, that view did not accord with India’s assertion that the “object and purpose” of the SCM Agreement is defined by Article 27.1. For instance, in *US – CVD (China)*, the Appellate Body stated that “the object and purpose of the SCM Agreement, ... is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions.”<sup>6</sup>

7. Moreover, India errs in arguing that the “literal interpretation” is contrary to the object and purpose of the SCM Agreement. Article 27.1 of the SCM Agreement highlights the “Special and Differential Treatment of Developing Country Members” and that “Members recognize that subsidies may play an important role in the economic development programmes of developing country Members.” The SCM Agreement therefore provides a period for developing country Members to phase out export subsidies.

8. Article 27 of the SCM Agreement provides for a mechanism for developing country Members to phase out their export subsidies as explained in the U.S. second written submission.<sup>7</sup> For developing country Members under Article 27.2(b), the prohibition of Article 3.1(a) shall not apply “for a period of eight years from the date of entry into force [January 1, 1995<sup>8</sup>] of the WTO Agreement, subject to compliance with the provisions of paragraph 4” of Article 27.<sup>9</sup> A developing country Member under Article 27.2(b) was obligated not to grant export subsidies as of January 1, 2003, unless it requested and was granted an extension, as provided for in Article 27.4.

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<sup>5</sup> See, e.g., *Canada – Aircraft (Brazil) (Panel)*, para. 9.119 (“we note that the SCM Agreement does not contain any express statement of its object and purpose. We therefore consider it unwise to attach undue importance to arguments concerning the object and purpose of the SCM Agreement.”),

<sup>6</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 573, quoting *US – Softwood Lumber IV (AB)*, para. 64.

<sup>7</sup> U.S. second written submission, paras. 56-58.

<sup>8</sup> “The WTO Agreement, which established the World Trade Organization, entered into force on 1 January 1995.” (Ex. US-50). Therefore, eight years following the date the WTO Agreement went into force would be January 1, 2003.

<sup>9</sup> *Brazil – Aircraft (AB)*, para. 139 (“The ordinary meaning of the text of Article 27.2(b) is clear. For a period of eight years after the date of entry into force of the WTO Agreement, the prohibition on export subsidies in paragraph 1(a) of Article 3 of the SCM Agreement does not apply to developing country Members”).

9. Annex VII(b) of the SCM Agreement lists other developing country Members who are subject to the provisions of Article 27.2(b) upon reaching a GNP of \$1,000 per capita.<sup>10</sup> Therefore, reading Annex VII(b) and Article 27.2(b) of the SCM Agreement together, an Annex VII(b) developing country Member that graduates from Annex VII(b) shall end its prohibited subsidies by the later of January 1, 2003, or the time it reaches \$1,000 GNP per capita.<sup>11</sup>

10. Under the “literal interpretation,” an Annex VII(b) Member who graduates before January 1, 2003 may provide export subsidies until January 1, 2003. Those Annex VII(b) Members that graduate after January 1, 2003, are not obligated to end their export subsidies until the date of their graduation.

11. Therefore, India is wrong to argue that the ordinary meaning of Article 27 calls for the “same” treatment for an Annex VII(b) Member and a non-Annex VII(b) developing country Member. Those Annex VII(b) Members that graduate after January 1, 2003, would have had a *longer* period to provide export subsidies than a non-Annex VII(b) developing country Member. Indeed, the period of time for an Annex VII(b) Member to provide export subsidies is indefinite, which is not at all the same as the period of time for those developing country Members not listed in Annex VII(b).

12. India believes that such a reading “prevents members graduating from Annex VII(b) post this date [1 January 2003] from benefiting from the treatment accorded to developing country members originally within the scope of Article 27.2(b).”<sup>12</sup> In fact, a Member graduating from Annex VII(b) after January 1, 2003, would receive *better* treatment (in the sense of a longer implementation period) than the Members originally within the scope of Article 27.2(b). And India’s proposed interpretation would grant Annex VII(b) Members who graduate after January 1, 2003, even better treatment compared to other developing country Members than was agreed under Annex VII(b).

***Q. 19. To India: At paragraphs 180-184 of your first written submission, you refer to certain disagreements between Members regarding the interpretation of Article 27.2(b). Do you consider that those disagreements are a means of interpretation identified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties? If so, which?***

<sup>10</sup> Annex VII(b) of the SCM states:

(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*<sup>10</sup>: 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).

<sup>11</sup> India response to Panel Question 18.

<sup>12</sup> India response to Panel Question 18.

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**Comments:**

13. India argues that certain alleged disagreements among Members as to the interpretation of Article 27.2(b) serve as supplementary means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties.<sup>13</sup>

14. The text of the Vienna Convention does not support India’s argument. Article 32 of the Vienna Convention permits recourse to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.” Supplementary means may be used to confirm the meaning from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. A resort to Article 32 of the Vienna Convention is unnecessary here.

15. Article 27 of the SCM Agreement, interpreted using the customary rules of interpretation reflected in Article 31 of the Vienna Convention, is clear. That meaning is not ambiguous or obscure, and does not lead to a manifestly absurd or unreasonable result.

16. Furthermore, India’s approach appears to be that the interpretation of an agreement can be changed by a party or parties disagreeing with the ordinary meaning of the terms after the agreement has been concluded. This is not what is meant by recourse to supplementary means of interpretation. It is also significant that India argues that events long after the conclusion of an agreement – in this case disagreements between Members – can be “supplementary means of interpretation.” India’s only basis for this argument is the Appellate Body report in *EC – Chicken Cuts*. But there the Appellate Body was careful to explain that when it was referring to supplementary means of interpretation, it was referring to the circumstances surrounding the conclusion of a treaty.<sup>14</sup>

17. Indeed, under India’s approach, the filings submitted by the parties to almost every WTO dispute settlement proceeding would be a “supplementary means of interpretation” since almost every WTO dispute involves disagreements regarding the interpretation of a covered agreement. India’s approach is not consistent with customary rules of interpretation and should be rejected.

18. For further discussion on the applicability of Article 32 of the Vienna Convention to the Panel’s analysis of Article 27, the United States refers the Panel to the U.S. response to Panel Question 23.

***Q. 20. To India: At paragraphs 184-186 of your first written submission, you refer to a joint proposal by a group of Members concerning the scope of Articles 27.2 and 27.4. Do you***

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<sup>13</sup> India response to Panel Question 19.

<sup>14</sup> See, e.g., *EC – Chicken Cuts (AB)*, para. 284 (referring to “the historical background against which the EC Schedule was negotiated” and the circumstances of the conclusion of a treaty, and citing to the reference by an author to “historical research into a period preceding that of the conclusion of the treaty.”).

*consider that the joint proposal is a means of interpretation identified in Articles 31 and 32 of the Vienna Convention? If so, which?*

**Comments:**

19. India argues that a joint proposal from certain Annex VII(b) countries, including India, serves as a supplementary means of interpretation under Article 32 of the Vienna Convention of Articles 27.2 and 27.4 of the SCM Agreement.<sup>15</sup>

20. As noted above in the U.S. comments on India's response to Panel Question 19, no resort to supplementary means of interpretation under Article 32 of the Vienna Convention is necessary because the meaning of Articles 27.2 and 27.4 is clear, and India's approach to supplementary means of interpretation – which seeks to re-write agreements long after they have been concluded – is fundamentally in error.

21. In any event, this joint proposal of the Annex VII(b) Members shows that the interpretation that India advocates was advanced to the Membership and was not adopted. In fact, the Chairman noted that the proposal provoked significant discussion and the observation that the decision in Doha already gave notice to Annex VII(b) countries when their right to grant export subsidies would end.<sup>16</sup> The Chairman noted “Annex VII countries now have forewarning because they only graduate” after three consecutive years of maintaining a \$1000 GNP per capita.<sup>17</sup> Thus, the Annex VII Members' ability to grant export subsidies would not end “overnight.”<sup>18</sup> The failed joint proposal further supports the argument that Article 27 of the SCM Agreement does not provide for an additional eight-year phase out period for India.

22. For further discussion on the applicability of Article 32 of the Vienna Convention to the Panel's analysis of Article 27, the United States refers the Panel to the U.S. response to Panel Question 23.

***Q. 21. To both parties: In its arguments, India relies on the fact that the first sentence of Article 27.4 refers to an eight-year period without qualifying this period to commence on the date of entry into force of the WTO Agreement. The third sentence of Article 27.4 also refers to "the 8-year period" and provides for the possibility of developing country Members to request an extension of this period by the SCM Committee for specific subsidy programs. Such requests must be notified "no later than one year before the expiry of this period". WTO Members put in place prior to 1 January 2003 a specific mechanism and procedures for Article 27.4 extensions which they administered over subsequent years.***

***Do you consider that WTO Members' practice concerning Article 27.4 extensions is a means of interpretation identified in Articles 31 and 32 of the Vienna Convention? If so, which?***

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<sup>15</sup> India response to Panel Question 19.

<sup>16</sup> Communication from the Chairman, (21 April 2011), TN/RL/W/254, para. 34 (Ex. US-70).

<sup>17</sup> Communication from the Chairman, (21 April 2011), TN/RL/W/254, para. 34. (Ex. US-70).

<sup>18</sup> Communication from the Chairman, (21 April 2011), TN/RL/W/254, para. 33. (Ex. US-70).

**Comments:**

23. India argues that “[t]he Extension Procedures are subsequent to the conclusion of the SCM Agreement, and in order to fall within the scope of general rules of interpretation in the VCLT, would have to satisfy the threshold specified in Article 31(3)(a) or (b) of the VCLT.”<sup>19</sup>

24. For the reasons noted in the U.S. response to Panel Question 21, the ordinary meaning controls the interpretation of Article 27.2(b). The meaning of Article 27.2(b) is clear. “A period of eight years from the date of entry into force of the WTO Agreement [January 1, 1995]” is January 1, 2003.” Article 27 of the SCM Agreement and Annex VII(b) show that India does not enjoy an additional eight-year phase out period of its challenged schemes after it graduated from Annex VII(b).

25. While the plain and ordinary meaning of Article 27 controls and additional inquiry is unnecessary, the subsequent practice of the Members regarding Article 27.4 extensions provides further support for the U.S. interpretation of Article 27.

26. It is also noteworthy that India’s position on the relevance of the date of the Extension Procedures and its argument, without explanation, that the Extension Procedures are not supplementary means of interpretation contradict India’s views in its responses to Panel Questions 19 and 20 with respect to later-in-time proposals and disagreements by Members.

***Q. 22. To both parties: To the extent they are relevant to the interpretation of Article 27.2(b), what, if anything, do the third sentence of Article 27.4 and WTO Members' practice under it tell us about the meaning of "for a period of eight years from the date of entry into force of the WTO Agreement" in Article 27.2(b)?***

**Comments:**

27. India argues that “the fact that such phrase [“from the date of entry into force of the WTO Agreement”] is absent from Article 27.4 indicates that it does not apply to countries that graduate from Annex VII(b),” and India is entitled to an additional eight-year phase out period after graduation from Annex VII(b).<sup>20</sup>

28. For the reasons discussed in the U.S. response to this question, the third sentence of Article 27.4 supports the U.S. interpretation of Article 27. Article 27.4’s references to “the eight-year period” refer back to “a period of eight years from the date of entry into force of the WTO Agreement” mentioned in Article 27.2(b) or January 1, 1995 until January 1, 2003.

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<sup>19</sup> India response to Panel Question 21. India’s argument with regard to the “Extension Procedures” is irrelevant. The fact that “extensions granted . . . shall not affect any other existing rights and obligations . . .” and “the criteria [for extensions] have no precedential value or relevance, direct or indirect, for any other purpose” does not alter the fact that Members agreed to act in a manner consistent with the proper interpretation under Article 32 of the Vienna Convention of Article 27 of the SCM Agreement.

<sup>20</sup> India response to Panel Question 22.

Nothing in Article 27.4 refers to an eight-year period beginning on the date a Member graduates from Annex VII(b).

29. India also argues “that the Extension Procedure and the practice of certain WTO members pursuant to such Procedures, do not fall within the scope of Article 31 and 32 of the VCLT.”<sup>21</sup>

30. As explained previously, Members’ practice under Article 27.4 further supports the interpretation that Article 27 of the SCM Agreement does not provide for an additional period of time for India.

***Q. 23. To both parties: In its arguments concerning the negotiating history, India refers to the draft text by the Chairman of the Negotiating Group for the SCM Agreement circulated on 6 November 1990.<sup>22</sup> The subsequent Draft Final Act of 20 December 1991 and the ultimately adopted text of the SCM Agreement and its Annex VII differ from the draft text of 6 November 1990 specifically with respect to the issue of the exemption mechanism for Members falling under Annex VII(b) and the transition period. Do you consider that the draft text of 6 November 1990 falls among the means of interpretation identified in Articles 31 and 32 of the Vienna Convention? If so, which?***

**Comments:**

31. India submits “that the Draft text of 6 November 1990 [“Draft Text”] falls within the scope of supplementary means of interpretation under Article 32” of the Vienna Convention.<sup>23</sup>

32. For the reasons discussed in the U.S. response to this question, resort to supplementary means of interpretation as described in Article 32 of the Vienna Convention is unnecessary because the meaning of Article 27 of the SCM Agreement resulting from the application of the customary rules of interpretation reflected in Article 31 of the Vienna Convention is clear. That meaning is not ambiguous or obscure, and does not lead to a manifestly absurd or unreasonable result.

33. Consideration of the Draft Text only demonstrates that Members considered an approach similar to that advocated by India and did not adopt it.

***Q. 24. To both parties: The Panel refers to Articles 4.1, 4.4, and 27.7.***

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<sup>21</sup> India response to Panel Question 22.

<sup>22</sup> Draft text on Subsidies and CVD, (Exhibit IND-4) (dated 7 November 1990); this document refers to MTN.GNG/NG10/W/38/Rev.3 of 6 November 1990.

<sup>23</sup> India response to Panel Question 23.

- a. How are Articles 4.1, 4.4, and 27.7 to be read together, having in mind cases where the defendant argues that, because of Article 27.7, Article 4 does not apply?***
- b. In particular, in such cases, at what stage in the proceedings is a panel to adjudicate upon the applicability of Article 4?***
- c. Further, in such cases, can a panel adjudicate upon the applicability of Article 4 without deciding whether the requirements in Article 27.7 are met?***

**Comments:**

34. The United States comments on India’s responses to subparts a through c of this question together.
35. India argues that “Article 4 procedures need to be determined at an early stage, and where this is not possible, such procedures should not apply.”<sup>24</sup>
36. The United States notes that nothing has prevented India from raising the defense of Article 27.7 of the SCM Agreement after the Panel was established and from seeking a determination on whether Article 27.7 precluded application of Article 4. In fact, India sought such a preliminary ruling in its first written submission.<sup>25</sup> After the parties briefed this legal question, India requested that the Panel delay resolving this issue.<sup>26</sup>
37. India also asserts “that where the parties disagree about applicability of Article 4 procedures, or where there is uncertainty regarding conformity with paragraphs 2 through 5 of Article 27 . . . Article 4 procedures should not apply.”<sup>27</sup> In other words, India’s view is that a complaining Member should be denied the rights afforded under Article 4 of the SCM Agreement whenever a responding Member claims Article 27 applies. This would reverse the plain text of Article 4.1, for example. Rather than Article 4 applying where the *complaining* Member “has reason to believe that a prohibited subsidy is being granted or maintained by another Member,” India’s approach would be that Article 4 does not apply whenever the *responding* Member “claims it has reason to believe that Article 4 does not apply.”
38. Nothing in Article 27 provides for the approach advocated by India. It is telling that the difference in the texts of Article 4 and Article 27 demonstrates that Members were capable of framing provisions in terms of “having reason to believe.” That they chose not to do so in the case of Article 27 should be respected, and the context offered by Article 4 should inform the interpretation of Article 27.

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<sup>24</sup> India response to Panel Question 24.

<sup>25</sup> India first written submission, para. 406(B).

<sup>26</sup> *India – Export Related Measures* (WT/DS541), Communication from the Panel, 22 January 2019, paras. 3.11-3.12.

<sup>27</sup> India response to Panel Question 24.

39. As the United States has highlighted in its answer to this question, Articles 4.1 and 4.4 both apply before there could be any finding as to whether a Member’s measure is a prohibited subsidy. The text of Article 4.1 is clear, for instance, that it applies whenever a Member “has reason to believe” that a prohibited subsidy is being granted or maintained by another Member. The text of Article 4.4 is also clear that where a Member has requested consultations under Article 4.1, then either party to those consultations (including the responding party) may refer the matter to the DSB. Some additional components of Article 4 also apply regardless of whether the measure is ultimately found to be a prohibited subsidy, including the expedited timeframes under Article 4.12.

40. India also mentions that the imposition of Article 4 expedited procedures infringes on its “due process” rights to “hear and respond” and “precludes India from defending itself from application of such procedure.”<sup>28</sup>

41. As the United States has described in its response to Panel Question 91 and comment on India’s response to Panel Question 92, India has had ample time and opportunity to “hear and respond” in this dispute,<sup>29</sup> and there has been no infringement of India’s “due process” rights. Moreover, as discussed above, nothing has precluded India from arguing that Article 4 does not apply to this dispute.

#### STATEMENT OF AVAILABLE EVIDENCE

*Q. 26. To India: You have argued that the statement of available evidence in the United States' request for consultations is insufficient because it "reproduces a verbatim list" of the legal instruments cited in the request for consultations.<sup>30</sup> Can you please detail how, concretely, the cited legal instruments, alone and in combination, fail to provide evidence of the existence and nature of the challenged subsidies?*

#### Comments:

42. India argues that presenting a list of the legal instruments representing the measures at issue fails to satisfy the standard of Article 4.2 of the SCM Agreement.<sup>31</sup>

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<sup>28</sup> India response to Panel Question 24.

<sup>29</sup> For example, the Panel scheduled over three months’ time between the date of India’s second written submission and the first day of the substantive meeting to allow the parties to prepare. The Panel also granted India’s request for over a month of time from the conclusion of the substantive meeting to submit the parties’ answers to the Panel’s questions. India has also had the opportunity to respond. India has submitted hundreds of pages of written submissions, delivered lengthy opening and closing statements, actively participated in two full days of questions and answers with the Panel, and is answering or commenting on up to 92 questions from the Panel. *See, e.g.*, U.S. first written submission, para. 50; U.S. Response to Panel Question 91, paras. 3-5; U.S. Comments on India’s Answers to Panel Questions 91 and 92, paras. 9-12.

<sup>30</sup> India first written submission, paras. 95 and 97.

<sup>31</sup> India response to Panel Question 26.

43. As discussed in the U.S. response to Panel Question 28, legal instruments that identify the measures (consistent with Article 4.4 of the DSU) may also serve as evidence of the existence and nature of the subsidy (consistent with Article 4.2 of the SCM Agreement).<sup>32</sup> This will often be true with a *de jure* prohibited export subsidy because a “subsidy is contingent ‘in law’ upon export performance when the existence of that condition can be demonstrated on the basis of *the very words of the relevant legislation, regulation or other legal instrument constituting the measure.*”<sup>33</sup>

44. The cited instruments – on their face – in the U.S. Statement of Available Evidence satisfy the standard of Article 4.2 of the SCM Agreement because they evidence both: (1) the existence and (2) nature of the subsidy in question as required.<sup>34</sup>

45. India also complains that “Instruments 1-6 [are] cited randomly with no reference to specific provisions within the legislation or the specific program being challenged.”<sup>35</sup> India is mistaken. First, there is no such requirement under Article 4.2 of the SCM Agreement. Moreover, even if there were such a requirement, the U.S. Request for Consultations identifies each program by the name that India calls each program and then lists the instruments applicable to each program.

***27. To India: What type of evidence do you consider the United States was required to refer to, or describe, in the statement of available evidence, for its statement to be sufficient?***

**Comments:**

46. India argues that “the statement of available evidence must have included specific provisions within the legislation that are relevant to the characterization of the measure as a prohibited subsidy.”<sup>36</sup>

47. As discussed above, Article 4.2 contains no such requirement. In any event, the U.S. Request for Consultations identifies each program by the name that India calls each program and then lists the instruments applicable to each program.

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<sup>32</sup> U.S. response to Panel Question 28, para. 20.

<sup>33</sup> U.S. response to Panel Question 28, para. 20 quoting *Canada – Autos (AB)*, para. 100 (emphasis added).

<sup>34</sup> U.S. response to Panel Question 26. India points to Instruments 1-6, 21-24, and the Income Tax Act (Instrument 26) to complain that the Statement of Available Evidence does not show the existence and nature of the subsidy in question. See India response to Panel Question 26. As shown in the U.S. Response to Panel Question 25, each of these cited instruments show, either alone or read in combination with other cited instruments, the existence and nature of the subsidy in question. See U.S. response to Panel Question 25, pages 38-46, 50-52.

<sup>35</sup> India response to Panel Question 26.

<sup>36</sup> India response to Panel Question 27.

48. In addition, India believes “the statement of available evidence could have also included summaries of the challenged measures, in order to demonstrate how they may be characterized as subsidies.”<sup>37</sup>

49. As discussed in the U.S. response to Panel Question 28, in arguing that the statement of available evidence must also contain an explanation as to why the evidence “demonstrate[s]” that the measure is a subsidy, India confuses evidence with argument. In order to satisfy Article 4.2 of the SCM Agreement, the complaining party must only bring forth available *evidence* as opposed to legal argument.<sup>38</sup>

50. India also notes that the level of detail the United States provided in the U.S. response to Panel Question 25 is not necessary to satisfy Article 4.2 but the detail in that response demonstrates the “necessary nuance” that must be included by the complainant while presenting the statement of available evidence.<sup>39</sup> While the United States agrees that the level of detail contained in the U.S. response to Question 25 is unneeded, we disagree that any “necessary nuance” – whatever that may mean – must be included in the statement of available evidence.

51. The U.S. response to Panel Question 25 merely confirms that the evidence included in the U.S. Statement of Available Evidence reflected the existence and nature of the subsidy in question “on the basis of *the very words of the relevant legislation, regulation or other legal instrument constituting the measure.*”<sup>40</sup> That is all that Article 4.2 requires.

***Q. 28. To both parties: Article 3.1(a) prohibits subsidies that are de jure contingent upon export performance. Article 3.1(b) prohibits subsidies that are de jure contingent upon the use of domestic over imported goods. In such cases, it may often be the case that the legal instruments that serve to identify the measures at issue also provide evidence of the existence of the subsidies and of their nature as subsidies.***

***At the same time, the requirements in Article 4.2, which have been specifically laid down for disputes under Article 3, are additional to the requirement, in Article 4.4 of the DSU, to identify the measures at issue.***

***What are the implications of these two propositions, combined, for the interpretation of Article 4.2? In particular, are there situations in which Article 4.2 may be satisfied by the mere listing of the same legal instruments that serve to identify the measure at issue in the request for consultations? If so, what are examples of such situations?***

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<sup>37</sup> India response to Panel Question 27.

<sup>38</sup> See *Australia – Automotive Leather II (Panel)*, para. 9.18 (“[t]he ordinary meaning of the phrase ‘include a statement of available evidence’ does not, on its face, require disclosure of arguments in the request for consultations.”).

<sup>39</sup> India response to Panel Question 27.

<sup>40</sup> *Canada – Autos (AB)*, para. 100 (emphasis added).

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**Comments:**

52. India argues that “a statement of available evidence must demonstrate the character of the measure as a subsidy and not merely the existence of the measure.”<sup>41</sup>

53. For the reasons explained in the U.S. comments on India’s response to Panel Question 27 and the U.S. response to this question, India confuses evidence with argument.

***Q. 29. To both parties: Do you consider that a reference to one or more legal instruments can serve both to identify the measures at issue for purposes of Article 6.2 of the DSU, and as evidence of the existence and nature of a subsidy for purposes of Article 4.2?***

54. India acknowledges that a reference to one or more legal instruments can serve to fulfill the requirements of both Article 6.2 of the DSU and Article 4.2 of the SCM Agreement.<sup>42</sup> India however argues that the present case is an exception, and bases its argument on the difference in procedures to which Article 6.2 of the DSU and Article 4.2 of the SCM Agreement apply, finding it significant that one applies at the consultations stage and the other at the panel stage.<sup>43</sup> For these reasons, India contends that a reference to one or more legal instruments may not always satisfy both the requirements of Article 6.2 of the DSU and Article 4.2 of the SCM Agreement in this dispute.<sup>44</sup>

55. India’s reliance on the difference in the relevant procedural stages is misplaced. As noted in the U.S. response to this question, in a *de jure* export subsidy case, as in this proceeding, reference in a panel request to one or more instruments that constitute the measures at issue will often satisfy the requirement in Article 6.2 of the DSU to “identify the specific measures at issue.” Listing the same legal instruments in a statement of available evidence included with a consultation request will often satisfy the requirements of Article 4.2 of the SCM Agreement with regard to the “existence and nature of the subsidy in question.”

56. India again argues that Article 4.2 of the SCM Agreement requires establishing the “character of the measure as a subsidy in the statement of available evidence.”<sup>45</sup>

57. For the reasons explained in the U.S. comments on India’s response to Panel Question 27 and the U.S. response to Panel Question 28, India’s approach confuses evidence with argument. The statement of available evidence only needs to put forth *evidence* under Article 4.2.

***Q. 30. To both parties: Does the adjective "available" in Article 4.2 mean that a complainant must state all evidence available to the complainant at the time of requesting consultations, or can the complainant limit its statement to the minimum of***

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<sup>41</sup> India response to Panel Question 28.

<sup>42</sup> India response to Panel Question 29.

<sup>43</sup> India response to Panel Question 29.

<sup>44</sup> India response to Panel Question 29.

<sup>45</sup> India response to Panel Question 29.

***evidence that is necessary "with regard to the existence and nature" of the alleged subsidy?***

58. India “is of the view that a statement of available evidence must necessarily consist of all such evidence that the complainant is in the possession of at the time it requests consultations.”<sup>46</sup> At the same time, India acknowledges that a Panel will have “difficulty in determining as a factual matter whether these materials were at the disposal of the complainant at the time it requested consultations.”<sup>47</sup> Accordingly, India appears to acknowledge that it could be to the detriment of the WTO dispute settlement system to encourage responding Members to raise procedural arguments over whether a statement of available evidence included every single piece of evidence that was available to the complaining Member at the time of the consultations request.

59. As described in the U.S. response to this question, “available evidence” means evidence necessary with regard to the existence and nature of a prohibited export subsidy at the disposal of the complaining Member at the time it requests consultations.

60. The United States disagrees with India’s assertion, with no foundation in the text of Article 4.2, that “the statement of available evidence be specific and nuanced.”<sup>48</sup> Instead, Article 4.2 only requires the inclusion of a statement of available evidence with regard to the existence and nature of those subsidies.

**FINANCIAL CONTRIBUTION: IN GENERAL**

***Q. 33. To India: The table in paragraph 6 of your first written submission does not provide figures for the Duty-Free Imports for Exporters Scheme. What is the amount of the duty exemptions or remissions granted in budget years 2016-2017 and 2017-2018, under the challenged Line Numbers of Customs Notification No. 50/2017, including any amendments or replacements?***

**Comments:**

61. India asserts that it does not expressly administer this scheme.<sup>49</sup> This is incorrect.

62. At least one Export Promotion Council, which is a non-profit “[f]unctioning under the aegis of the Ministry of Commerce and Industry,”<sup>50</sup> refers to benefits under No. 50/2017 to the

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<sup>46</sup> India response to Panel Question 30.

<sup>47</sup> India response to Panel Question 30.

<sup>48</sup> India response to Panel Question 30.

<sup>49</sup> See India response to Panel Question 33.

<sup>50</sup> See Council for Leather Exports at <http://leatherindia.org/welcome-to-council-for-leather-exports-india/> (last visited March 22, 2019) (Ex. US-71).

leather industry as “DFIS.”<sup>51</sup> Moreover, the scheme or elements of the scheme appear both in prior revisions of the Foreign Trade Policy (“FTP”) under Chapter 1B (“Special Focus Initiatives”) and were added via notification to the current revision of the FTP.<sup>52</sup>

63. India also characterizes the U.S. estimate for benefits under DFIES as “absurd and unclear.”<sup>53</sup> The United States has explained that “[t]he estimate of revenue forgone for the Duty Free Import Scheme is based on data from the websites of the India Export Promotion Councils participating in the scheme (Ex. US-02).”<sup>54</sup> The United States has provided the methodology for its estimate in the U.S. response to Panel Question 32.

64. India also declined to provide any of the requested information because it contends an accounting would be “extremely cumbersome.”<sup>55</sup> In light of India’s representation that it is impracticable to provide an accounting of revenue forgone under this scheme, it is implausible that India prevents excessive exemptions under this scheme. India cannot produce the amount of exemptions provided under this scheme, and India cannot identify the amount of duty liability borne by applicants.

***Q. 34. To both parties: Please explain whether and, if so, to what extent, a measure comprising both components that are consistent with footnote 1 and the Annexes and components that are not, can benefit from the shelter of footnote 1 for those components that are consistent with it.***

***For example, assume that a Member has a scheme exempting from import duties both (1) inputs that are consumed in the production of exported products, and (2) goods that cannot qualify as "inputs that are consumed in the production of the exported product" under Annex I(i), as illustrated below:***

Component 1	Component 2
Exemption from import duties on inputs consumed in the production of exported products	Exemption from import duties of goods of a type that cannot qualify as inputs consumed in the production of exported products

<sup>51</sup> See Council of Leather Exports (CLE) Comprehensive Guidelines for Implementation of Duty-Free Import Scheme (DFIS) for 2018-2019, available online at <http://leatherindia.org/wp-content/uploads/2018/03/DFIS-Circular-2018-19.doc> (Ex. US-72).

<sup>52</sup> See Notification 9/2015-2020, “Amendment in the Chapter-1 of FTP 2015-2020” (May 28, 2018) (Ex. US-43) (e.g., “iii. Leather and Footwear, a. Duty free import entitlement of specified items upto (sic) 3% of FOB value of exports of leather garments during preceding financial year.”).

<sup>53</sup> India response to Panel Question 33.

<sup>54</sup> U.S. first written submission, para. 3, n.1.

<sup>55</sup> India response to Panel Question 33.

***Assume that in every other respect, the scheme is compliant with footnote 1 and Annex I(i). In such a case, (a) does Component 1 benefit from the shelter of footnote 1, whereas Component 2 does not, or (b) does the entire scheme fall outside footnote 1?***

**Comments:**

65. The United States comments on India’s responses to subparts a through b of this question together.

66. India argues that “a measure comprising both components that are consistent with footnote 1 and the Annexes and components that are not, can benefit from the shelter of footnote 1 at minimum for those components that are consistent with it. In such a case, the entire scheme cannot fall outside footnote 1.” In support of this view, India contends “the distinction between Component 1 and 2 turns on a nuanced and holistic examination of the definition of ‘inputs.’”<sup>56</sup>

67. No “nuanced” or “holistic” examination of the definition of inputs is necessary because footnote 61 of the SCM Agreement provides the definition of “inputs consumed in the production process.”

68. India also argues that an examination of whether inputs are consumed in the production of the exported product must occur as part of a countervailing duty investigation.<sup>57</sup> India is incorrect. Nothing requires that a Member challenging a prohibited subsidy in WTO dispute settlement also initiate a countervailing duty determination. In fact, footnote 35 to the SCM Agreement, in stating that the “provisions of Part II or III may be invoked in parallel with the provisions of Part V” makes clear that there is no such requirement. The use of the term “may” means that the parallel procedures is a permissive option, not mandatory.

69. Annex II, item (II) deals with drawback schemes and, as the United States has demonstrated, the challenged schemes are not proper duty drawback schemes. Second, India again misunderstands the difference between a *de jure* export subsidy claim, as here, and a countervailing duty investigation.<sup>58</sup> Whether the scheme at issue meets the threshold requirement of Annex I, item (i) that the input is consumed in the production of the exported product can be determined first from the measure itself.

70. India also believes that the inclusion of Component 2 does not render the measure in breach.<sup>59</sup> However, panels and the Appellate Body have often found measures to be in breach if

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<sup>56</sup> India response to Panel Question 34.

<sup>57</sup> India response to Panel Question 34.

<sup>58</sup> See Annex II, item (II) (“as part of a *countervailing duty investigation* pursuant to this Agreement. . .”) (emphasis added); see also U.S. response to Panel Question 36, paras. 48-49; U.S. response to India Question 1, paras. 159-61.

<sup>59</sup> India response to Panel Question 34.

any aspect of the measure is inconsistent with the Member’s WTO obligations, even if other aspects are not.

71. As the U.S. described in response to this question, the consumption of the input in the production of the exported product is a pre-requisite condition that must be established before consideration of whether any remission or drawback has been “excessive.” Because that condition does not exist under Component 2, then the measure would not meet the criteria in footnote 1 and Annex I, item (i). The hypothetical “exported product” would receive improper exemptions for products not consumed in its production.

72. Finally, the upholding of the requirements of footnote 1 and Annex I, item (i), would not make it, as India contends, “impossible for any member to maintain a duty drawback scheme.”<sup>60</sup> Members need only to meet the requirements of a WTO-consistent duty drawback scheme.<sup>61</sup> The challenged schemes fail to meet these requirements.

***Q. 35. To both parties: When a challenged scheme exempts specified goods (or groups of goods, or all goods) from customs duties and other indirect taxes, while the same goods are subject to duties or taxes outside the challenged scheme, is there a requirement to conduct a "three-step test", including in particular an examination of the structure of the domestic tax system and its organizing principles<sup>62</sup>, in order to ascertain whether government revenue that is otherwise due has been foregone within the meaning of Article 1.1(a)(1)(ii)?***

**Comments:**

73. India argues that a three-step approach and an inquiry into the “structure” and “organizing principles” of its tax system are unnecessary in this dispute.<sup>63</sup>

74. India argues that, for measures falling under footnote 1, the Panel need only compare the “amount of remission of such duties or taxes and those which have accrued....”<sup>64</sup> For these reasons, the three-step approach and inquiry into the “structure” and “organizing principles” of India’s tax system is unnecessary.<sup>65</sup>

75. This “excess remissions principle,” on which India relies, is that “in the context of duty drawback schemes, the financial contribution element of the subsidy (i.e. government revenue

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<sup>60</sup> India response to Panel Question 34.

<sup>61</sup> See U.S. response to Panel Question 46.

<sup>62</sup> See, e.g., Appellate Body Reports, *Brazil - Taxation*, paras. 5.162 and 5.196; *US – Large Civil Aircraft (2nd complaint)*, paras. 812-14.

<sup>63</sup> India response to Panel Question 35.

<sup>64</sup> India response to Panel Question 35.

<sup>65</sup> India response to Panel Question 35.

forgone that is otherwise due) is limited to the excess remission or drawback of import charges on inputs. . . .”<sup>66</sup>

76. However, this comparison presumes that a scheme is a proper duty drawback scheme that attempts to relate remission of duties to those duties actually accrued. The challenged schemes do not even attempt to connect the amount of remission and the amount of duties or taxes actually accrued. Thus, the schemes fail to meet a fundamental requirement of a drawback scheme.

77. The challenged schemes also do not require exempted items to be consumed in production of the exported product, another fundamental requirement.

78. Therefore, the observations regarding duty drawback schemes found in *EU – PET (Pakistan)* are not applicable here because the challenged schemes are not proper duty drawback schemes to begin with.

79. An inquiry into the “structure” and “organizing principles” of India’s tax system is unnecessary. India provides: (1) a 100% exemption on duties or taxes under these schemes; (2) similarly-situated enterprises who do not participate in the schemes, all other things being equal, pay the duties or taxes from their income; and (3) the transparent reason for the challenged treatment is a reward for export performance. Under these facts, the “benchmark” treatment for comparison, the treatment of the income of a similarly situated non-scheme participant enterprise under Indian law, is readily identifiable.<sup>67</sup>

80. Finally, to the extent the Panel finds a three-step approach appropriate in this proceeding, in the U.S. written submissions and responses to the Panel’s questions, the United States has identified (i) the duty or tax treatment of the income that applies to the scheme participants and (ii) a benchmark for comparison.<sup>68</sup> The United States then compares (iii) the challenged tax treatment and the reasons for it with the benchmark duty or tax treatment.<sup>69</sup> This comparison shows that the challenged schemes result in India foregoing revenue and providing a financial contribution to scheme participants.

***Q. 36. To both parties: In EU – PET (Pakistan), the Appellate Body held:***

***With particular respect to duty drawback schemes as defined in Annex I(i), footnote 1 of the SCM Agreement highlights that the comparison to be made is between the tax treatment of the inputs imported under the duty drawback scheme that are consumed in the production of the goods destined for export, on the one***

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<sup>66</sup> *EU – PET (Pakistan)* (AB), para. 6.5.

<sup>67</sup> See U.S. responses to Panel Questions 48, 50, 67, 84.

<sup>68</sup> U.S. responses to Panel Questions 35, 48, 50, 67, 84.

<sup>69</sup> See, e.g., U.S. first written submission, paras. 110-17 (comparing treatment of income of SEZ participants with treatment of income of non-SEZ participants).

***hand, and the "duties or taxes borne by the like" imported input "when destined for domestic consumption", on the other hand.<sup>70</sup>***

***What, if anything, does this say about the extent to which the adjudicator must enquire into the "structure" and "organizing principles" of a Member's tax system<sup>71</sup>, in the context of duty exemptions or remissions?***

**Comments:**

81. India cites the appellate report in *EU – PET (Pakistan)* and argues that an inquiry into the “structure” and “organizing principles” of a Member’s tax system can be limited to the extent it needs to apply to the excess remission principle.<sup>72</sup>

82. As noted in the U.S. comment to India’s response to Panel Question 35 and the U.S. response to this question, *EU – PET (Pakistan)* is not particularly relevant here because none of the challenged schemes is a proper duty drawback or remission scheme *to begin with*. Therefore, an inquiry into the “structure” and “organizing principles” of India’s tax system, including comparing the treatment of a product under one system compared to the treatment of the identical product under another, is moot.

***Q. 37. To both parties: Under the Duty-Free Imports for Exporters Scheme, India caps the total value of import duty exemptions an importer can receive at a level corresponding to a certain percentage of the previous year's exports. India explains that, in this way, "the scheme merely aggregates the value of the duty exemption on the basis of past export values and volume".<sup>73</sup> Similarly, under the Merchandise Exports from India Scheme (MEIS), India provides scrips corresponding to a certain percentage of an exporter's past exports. India explains that "the value of MEIS Scrip is calculated using the FOB value of exports, which includes the indirect taxes already paid."<sup>74</sup>***

***Do you consider that, under footnote 1 and Annex I(i) or (h), a Member can determine the value of the duty or tax exemptions or remissions to which an exporter is entitled on the basis of aggregate (rather than transaction-specific) values, e.g. by providing for the remission of, or exemption from, duties or taxes representing a certain percentage of exports?***

**Comments:**

<sup>70</sup> *EU – PET (Pakistan)* (AB), para. 5.100.

<sup>71</sup> See, e.g., Appellate Body Reports, *Brazil - Taxation*, paras. 5.162 and 5.196; *US – Large Civil Aircraft (2nd complaint)*, paras. 812-814.

<sup>72</sup> India response to Panel Question 36.

<sup>73</sup> India second written submission, para. 197.

<sup>74</sup> India second written submission, para. 98 (fns. omitted).

83. India argues that neither footnote 1 nor Annex I, items (i) or (h) prevents a Member from determining the value of exemption or remission on an aggregate basis.<sup>75</sup>

84. As explained in the U.S. response to this question, the plain meaning of footnote 1 and Annex I, items (h) and (i) calls for an examination of actual transactions rather than an aggregate estimate.

85. India is also incorrect that “neither footnote 1 nor the related Annexes to the SCM Agreement offer guidelines with respect to how a Member must structure its schemes.”<sup>76</sup> In fact, the SCM Agreement provides guidelines that provide a basic standard that a scheme must meet to qualify as a drawback scheme. These standards are in the plain language of the SCM Agreement.<sup>77</sup>

86. For the reasons outlined above,<sup>78</sup> a CVD investigation is unnecessary for either a complaining Member to mount a *de jure* challenge to a Member's prohibited export subsidy schemes or for panel findings. In a *de jure* claim, the panel examines the measures themselves to determine if the schemes are inconsistent with the SCM Agreement. There is no requirement that a panel “inquire into the verification system of the exporting Member in the context of a countervailing investigation”<sup>79</sup> as India asserts nor is the excess remission principle applicable to an analysis of the challenged schemes because they are not proper duty drawback or remissions schemes.

***Q. 38. To India: The Appellate Body has clarified that whether a measure is inconsistent "as such" with WTO obligations does not turn on the mandatory/discretionary dichotomy.<sup>80</sup> Instead, the relevant enquiry is whether the complainant has "establish[ed] the WTO-consistency of the challenged municipal law".<sup>81</sup> In light of this, can you please explain your argument that the United States must prove that the challenged legislation "preclude[s] the possibility of imported inputs being consumed in the production of an exported product" or "explicitly prevent[s] the possibility of inputs being imported solely for the consumption of exported products"?<sup>82</sup>***

### **Comments:**

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<sup>75</sup> India response to Panel Question 37.

<sup>76</sup> India response to Panel Question 37.

<sup>77</sup> See U.S. response to Panel Question 46.

<sup>78</sup> See U.S. comment on India response to Panel Question 34.

<sup>79</sup> India response to Panel Question 37.

<sup>80</sup> See, e.g., *EU – Biodiesel (Argentina) (AB)*, paras. 6.226-6.230.

<sup>81</sup> *EU – Biodiesel (Argentina) (AB)*, para. 6.230.

<sup>82</sup> India second written submission, para. 46.

87. India mistakenly applies the mandatory/discretionary distinction, which is a useful analytical tool for determining whether a measure irrespective of its application can be found WTO-inconsistent, to argue that the United States must establish that “the legislation [is] worded in such a manner as to preclude the possibility of imported inputs being consumed in the production of an exported product[], or, alternatively, the legislation [] explicitly prevent[s] the possibility of inputs being imported solely for the consumption of exported products.”<sup>83</sup> India misconstrues what will suffice to show the challenged measures are inconsistent with the SCM Agreement.

88. As demonstrated in the U.S. written submissions, opening and closing statements, and responses to the Panel’s questions, the United States has established that the challenged schemes – from the text of the relevant measures – are export subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement. The United States has also shown that India’s defense that the challenged schemes are proper duty drawback or remission schemes is incorrect.

89. India erroneously contends that the United States must demonstrate how the “legislation [] explicitly prevent[s] or obstruct[s], either in i[t]s language or its operation, the fundamental aspects of a duty drawback program, in order for it to be held as inconsistent”<sup>84</sup> with the SCM Agreement. But there is no basis in the SCM Agreement to require a complaining party to show that a measure could *never* operate in a WTO-inconsistent manner for it to breach.

90. To the contrary, if a complaining party can demonstrate that a measure will, in a defined circumstance, necessarily produce a WTO-inconsistent result, the measure may be found WTO-inconsistent “as such.” That in other circumstances the measure may not necessarily produce a WTO-inconsistent result does not cure the inconsistency (for example, a measure that sets out a tariff in excess of a Member’s binding, but only on Monday and not Tuesday-Friday). Similarly, the fact that the measures do not mandate, for example, the explicit preclusion of imported inputs being consumed in the production of the exported product does not mean that the challenged schemes do not confer export subsidies when domestic inputs are being consumed in the production of exported products. That is, there is no relevant “discretion” under the measure under the mandatory / discretionary distinction (the discretion not to engage in WTO-inconsistent behavior).<sup>85</sup>

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<sup>83</sup> India second written submission, para. 46.

<sup>84</sup> India response to Panel Question 38.

<sup>85</sup> The United States does not agree with the analysis or logic of the Appellate Body in *EU – Biodiesel (Argentina)*, to the extent it may suggest that a measure may be found WTO-inconsistent even though it is “discretionary,” in the sense of affording a WTO Member the discretion to operate the measure in a WTO-consistent fashion. It is not necessary for the Panel to consider this issue, however, as India has merely asserted that the measure does not preclude *some* WTO-consistent action (or, conversely, does not preclude *any* WTO-consistent action). This is not the relevant analysis, as the United States must show the measure mandates WTO-inconsistent action or precludes the discretion to take WTO-consistent action – which we have done.

**EXPORT ORIENTED UNITS (EOU) AND SECTOR SPECIFIC SCHEMES**

***Q. 43. To India: The Panel notes your arguments at paragraphs 72 and 73 of your second written submission, regarding the phrase "approved activity". Please explain, by reference to record evidence, the meaning of "approved activity" in Section 6.01(d)(i) of the FTP.***

**Comments:**

91. India argues in its second written submission that “approved activity refers to manufacturing of exports, and that accordingly, the duty-free imports are inputs within the meaning of Footnote 1 and Annex I(i) of the SCM Agreement.”<sup>86</sup>
92. India’s response to the Panel’s question defines “approved activity” as “the manufacture of specified products for export by the Unit.”<sup>87</sup>
93. Neither India’s second written submission nor response to the Panel question addresses the fundamental flaws in this scheme that make it inconsistent with footnote 1 and Annex I, item (i).
94. First, neither definition allows for the illogical jump that because “approved activity refers to manufacturing exports,” or “the manufacture of specified products for export,” it follows that items imported duty free by an EOU unit necessarily qualify as “inputs” under footnote 61 of the SCM Agreement.
95. Second, India cannot show the scheme applies only to imported inputs that are consumed in the production of the exported product – a fundamental requirement under Annex I, item (i).<sup>88</sup> The United States highlighted how imported goods “utilized” for export production do not satisfy the requirement that inputs be “consumed in the production of the exported product.”<sup>89</sup>
96. Moreover, the scheme allows for the duty-free import of capital goods.<sup>90</sup> Capital goods do not qualify as “inputs” to satisfy the requirement of Annex I, item (i).<sup>91</sup>

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<sup>86</sup> India second written submission, para. 73.

<sup>87</sup> India response to Panel Question 43 citing India second written submission, para. 73.

<sup>88</sup> U.S. second written submission, paras. 82-86.

<sup>89</sup> U.S. response to Panel Question 40, paras. 55, 57.

<sup>90</sup> Foreign Trade Policy, 6.01(d) (i) (unit may import/procure from DTA or bonded warehouses . . . all types of goods, including capital goods, required for its activities) (Ex. US-03).

<sup>91</sup> U.S. second written submission, paras. 83-86.

97. Pursuant to Section 6.01(f) of the FTP, Units may also enjoy duty-free imports of “certain specified goods for creating a central facility.”<sup>92</sup> These specified goods need not be involved in the manufacturing process at all.

98. This scheme allows for units to import “[a]ny other items not mentioned above with approval of BOA.”<sup>93</sup> Thus, the list of permitted imports at Section 6.04 is not exhaustive, and units may import “any other items” for which they obtain approval, regardless of whether the items are inputs consumed in the production of the exported product.

99. The fact that “approved activity” relates to the export contingency of this scheme to have units “undertak[e] to export their entire production of goods and services,”<sup>94</sup> while helping to demonstrate that the scheme is a prohibited subsidy, is irrelevant to and does not overcome the scheme’s inconsistency with footnote 1 and Annex I, item (i).

***Q. 44. To India: What activities fall within the scope of the phrase "approved activity" in Section 6.01(d)(i) of the FTP?***

**Comments:**

100. The United States refers the Panel to the U.S. comments on India’s response to Panel Question 43.

***Q. 45. To India: Do activities other than production for export outside India fall within the scope of the phrase "approved activity" in Section 6.01(d)(i) of the FTP?***

**Comments:**

101. India argues that “[a]ctivities other than production for export outside India do not fall within the scope of ‘approved activity.’”<sup>95</sup>

102. This is not accurate. FTP 6.08 and 6.09, for example, allow for domestic sales within India under this scheme. Therefore, these sales would fall, by definition, within “*approved activities*.”<sup>96</sup>

103. In any event, the definition of “approved activities” does not affect this scheme’s fundamental inconsistency with footnote 1 and Annex I, item (i), as discussed above.

<sup>92</sup> Foreign Trade Policy 6.01(f) (Ex. US-03); see U.S. second written submission, para. 89.

<sup>93</sup> Handbook of Procedures at 6.04(f) (Ex. US-05).

<sup>94</sup> Foreign Trade Policy 6.00(a) (Ex. US-03).

<sup>95</sup> India response to Panel Question 45.

<sup>96</sup> India response to Panel Question 43 citing India second written submission, para. 73.

***Q. 46. To both parties: What are the mandatory elements that WTO law imposes in respect of remission or exemption schemes compliant with footnote 1, read together with Annexes I(g), I(h), and I(i), respectively?***

**Comments:**

104. India responds to this question by contending that the challenged schemes fall within footnote 1 because “the remission of such duties or taxes in amounts [are] not in excess of those which have accrued” under the excess remission principle.<sup>97</sup> For the reasons discussed in the U.S. comments on India’s responses to Panel Questions 35 and 36, this principle is inapplicable to the challenged schemes because the schemes are not proper duty drawback or remissions schemes.

105. The U.S. response to this question details the elements the Members agreed to for compliance with footnote 1 and Annex I, items (g), (h), and (i).

***Q. 47. To India: Please describe the elements of the "structure" and "organizing principles" of India's domestic tax regime<sup>98</sup> that you consider the Panel should take into account in assessing whether India provides a financial contribution under the EOU and sector-specific schemes. For each tenet of your description, please point to the precise portions of the evidence on the Panel's record that support it.***

**Comments:**

106. India argues that “the ‘structure’ and ‘organizing principles’ of India’s domestic tax regime are only relevant insofar as they [sic] required in the comparison test under the Excess Remission Principle.” India also contends that examining the “structure” and “organizing principles” for purposes of the “three-step approach” is unneeded in this dispute.

107. As explained in the U.S. comments on India’s response to Questions 35 and 36, the excess remission principle is inapplicable because the challenged schemes are not proper duty drawback or remissions schemes to begin with.

108. Moreover, as explained in the U.S. comments on India’s response to Questions 35, should the Panel engage in a “three-step” approach, an examination of the “structure” and “organizing principles” of India’s tax regime is unnecessary. Under these facts, the “benchmark” treatment for comparison is readily identifiable – it is the treatment of the income of a similarly situated non-scheme participant enterprise under Indian law.<sup>99</sup>

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<sup>97</sup> India response to Panel Question 46.

<sup>98</sup> See, e.g., *Brazil – Taxation (AB)*, paras. 5.162 and 5.196; *US – Large Civil Aircraft (2nd complaint) (AB)*, paras. 812-814.

<sup>99</sup> See U.S. responses to Panel Questions 48, 50, 67, 84.

**EXPORT PROMOTION CAPITAL GOODS SCHEME (EPCG)**

***Q. 49. To India: Please describe the elements of the "structure" and "organizing principles" of India's domestic tax regime<sup>100</sup> that you consider the Panel should take into account in assessing whether India provides a financial contribution under the EPCG Scheme. For each tenet of your description, please point to the precise portions of the evidence on the Panel's record that support it.***

**Comments:**

109. India argues that “the ‘structure’ and ‘organizing principles’ of India’s domestic tax regime are only relevant insofar as they [sic] required in the comparison test under the Excess Remission Principle.” India also contends that examining the “structure” and “organizing principles” for purposes of the “three-step approach” is unneeded in this dispute.

110. As explained in the U.S. comments on India’s responses to Questions 35 and 36, the excess remission principle is inapplicable because the challenged schemes are not proper duty drawback or remissions schemes to begin with.

111. Moreover, as explained in the U.S. comments on India’s response to Questions 35, should the Panel engage in a “three-step” approach, an examination of the “structure” and “organizing principles” of India’s tax regime is unnecessary. Under these facts, the “benchmark” treatment for comparison is readily identifiable – it is the treatment of the income of a similarly situated non-scheme participant enterprise under Indian law.<sup>101</sup>

***Q. 51. To India: The FTP, at Section 5.04(b) sets forth an obligation for exports to be "over and above[] the average level of exports achieved by the applicant in the preceding three licensing years for the same and similar products within the overall EO period". The Handbook of Procedures, at Section 5.12, further describes the "calculation of average export obligation". The United States describes this as an "annual 'average' export obligation".<sup>102</sup> Does the obligation relate to the "annual" level of exports, as described by the United States?***

**Comments:**

112. India first contends that the EPCG scheme falls within the context of Footnote 1 of the SCM Agreement and, therefore, it does not qualify as a subsidy.<sup>103</sup>

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<sup>100</sup> See, e.g., *Brazil – Taxation (AB)*, paras. 5.162 and 5.196; *US – Large Civil Aircraft (2nd complaint) (AB)*, paras. 812-814.

<sup>101</sup> See U.S. responses to Panel Questions 48, 50, 67, 84.

<sup>102</sup> U.S. first written submission, para. 66.

<sup>103</sup> India response to Panel Question 51.

113. Capital goods do not meet the definition of “inputs” described in footnote 61 of the SCM Agreement because they are not “physically incorporated” or “consumed” in the production of the exported product.<sup>104</sup> Moreover, Annex I, items (h) and (i)’s reference to “normal allowance for waste” does not contemplate or permit capital goods to be considered as “inputs.”<sup>105</sup>

114. FTP 5.04(b) requires that “EO [export obligation] shall be, over and above, the average level of exports achieved by the applicant in the preceding three licensing years for the same and similar products . . . [s]uch average would be the arithmetic mean of export performance in the preceding three licensing years for same and similar products.”

115. Moreover, FTP 5.01(c) states that “[i]mport under EPCG Scheme shall be subject to an export obligation equivalent to 6 times of duties, taxes and cess saved on capital goods, to be fulfilled in 6 years reckoned from date of issue of Authorisation.”

116. These provisions underscore the export contingency of this scheme. Not only must participants increase their exports above the amount of their previous export performance, they must also export more than the value of duty and cess exempted on the imported capital goods.

***Q. 52. To India: What is the meaning of "the three preceding licensing years" in Section 5.04(b) of the FTP?***

**Comments:**

117. India’s response regarding the meaning of “three preceding licensing years” is consistent with the U.S. understanding of that phrase.

***Q. 53. To India: Please provide a formula illustrating how compliance with this "average" export obligation is determined.***

**Comments:**

118. India’s response regarding the formula for determining “average” export obligation is consistent with the U.S. understanding.

119. The United States notes that even if, as India asserts, “the applicant enterprise has not exported same or similar products, [and] then the average export obligation is not considered,” that EPCG participant would still be required to fulfill an “export obligation equivalent to 6 times of duties, taxes and cess saved on capital goods.”<sup>106</sup>

<sup>104</sup> U.S. second written submission, paras. 84-86.

<sup>105</sup> U.S. second written submission, para. 85.

<sup>106</sup> Foreign Trade Policy 5.01(c) (Ex. US-03).

**MERCHANDISE EXPORTS FROM INDIA SCHEME (MEIS)**

***Q. 56. To India: At paragraph 75 of its opening statement, India indicated that "MEIS does not state that the scrip can be sold for cash". Section 3.02 of the FTP provides that "[s]crips ... shall be freely transferable". What is the meaning of "freely transferable" in Section 3.02 of the FTP?***

**Comments:**

120. India contends that the scrips are ultimately limited in their use to offset certain duties,<sup>107</sup> and no “provision of the FTP or Handbook of Procedure state[s] that the scrip can be sold for cash nor does it mandate that the scrip must be sold for cash.”<sup>108</sup>

121. As noted in FTP 3.02, duty credit scrips (scrips) are “freely transferable” without restriction. Therefore, an MEIS participant that receives scrips as a reward for export performance can sell the scrips for cash or other consideration with no restriction.<sup>109</sup>

122. India also argues that the scrips “corresponds to the value of the embedded indirect taxes of the exported products.”<sup>110</sup> This argument is a fiction. The United States points to the U.S. responses to Panel Questions 37<sup>111</sup> and 60, and to the U.S. written submissions<sup>112</sup> that explain how India’s award of scrips has no connection to the amount of indirect taxes or import duties MEIS participants accrue. Instead, the grant of scrips is a reward for export performance based on the value of export, export country, and product exported.

***Q. 57. To India: Please describe the elements of the "structure" and "organizing principles" of India's domestic tax regime<sup>113</sup> that you consider should be taken into account in assessing whether India provides a financial contribution under MEIS in the form of revenue foregone. For each tenet of your description, please point to the precise portions of the evidence on the Panel's record that support it.***

**Comments:**

123. India argues that “the ‘structure’ and ‘organizing principles’ of India’s domestic tax regime are only relevant insofar as they required in the comparison test under the Excess

<sup>107</sup> India response to Panel Question 56.

<sup>108</sup> India response to Panel Question 56.

<sup>109</sup> The United States has previously noted a number of marketplaces for MEIS scrips. See, e.g., <https://www.scripbazaar.com/>; <https://scrippadda.com/>; <http://www.eximscrip.com/>.

<sup>110</sup> India response to Panel Question 56.

<sup>111</sup> U.S. response to Panel Question 37, para. 47.

<sup>112</sup> U.S. first written submission, paras. 52-53; U.S. second written submission, para. 103.

<sup>113</sup> See, e.g., *Brazil – Taxation (AB)*, paras. 5.162 and 5.196; *US – Large Civil Aircraft (2nd complaint) (AB)*, paras. 812-814.

Remission Principle.” India also contends that examining the “structure” and “organizing principles” for purposes of the “three-step approach” is unneeded in this dispute.

124. MEIS scrips are best described as a direct transfer of funds under Article 1.1(a)(1)(i) of the SCM Agreement. As a direct transfer of funds, there is no examination of the “structure” and “organizing principles” of a domestic tax regime.

125. Because the scrips can be used to offset import duty liability, MEIS scrips could possibly also be characterized as revenue foregone under Article 1.1(a)(1)(ii) of the SCM Agreement.

126. To the extent the Panel finds the MEIS scrips are both a “direct transfer of funds” and “revenue foregone,” the United States refers the Panel to the U.S. comments on India’s responses to Panel Questions 35 and 36 to address the revenue foregone finding.

127. As explained in the U.S. comments on India’s response to Questions 35 and 36, the United States believes the excess remission principle is inapplicable because the challenged schemes are not proper duty drawback or remissions schemes to begin with.

128. Moreover, as explained in the U.S. comments on India’s response to Questions 35, should the Panel engage in a “three-step” approach, an examination of the “structure” and “organizing principles” of India’s tax regime is unnecessary. Under these facts, the “benchmark” treatment for comparison is readily identifiable – it is the treatment of the income of a similarly situated non-scheme participant enterprise under Indian law.<sup>114</sup>

***Q. 58. To India: At paragraph 230 of its first written submission, you have explained that India is "empowered to ask for original documents related to the MEIS application, at any time within three years from the date of issuance of the scrip". You have further explained that if "any discrepancy or over claim is found", the scrip recipient may be required to refund the value of the scrip, with interest. How does this affect scrips that have been transferred to a third party?***

**Comments:**

129. As noted by India, this procedure does not affect the third party who acquired the scrips from the original MEIS participant.<sup>115</sup> This fact further illustrates how “freely transferable” the scrips are and how the finding of a discrepancy or excess claim in the issues of the original scrips imposes no restriction or penalty on the third party purchaser of the scrips.

***Q. 59. To India: When the original recipient of a scrip transfers the scrip to a third party, is the third-party recipient required to use the scrip only to acquire inputs to be consumed in the production of an exported product?***

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<sup>114</sup> See U.S. responses to Panel Questions 48, 50, 67, 84.

<sup>115</sup> India response to Panel Question 58.

**Comments:**

130. As India states, a third-party recipient of the scrips may use the scrips for the specified uses outlined in FTP 3.02.<sup>116</sup> However, the third-party recipient can also choose to sell the scrips to another third party for cash or other consideration without restriction.

131. As described in the U.S. responses to Panel Questions 56 and 60, MEIS is not a proper remission of indirect taxes as India again argues.

***Q. 60. To India: You have appeared to indicate that the reward rates under MEIS are meant to correspond to, or approximate, the value of exemptions or remissions that the recipient exporter would have been entitled to on inputs consumed in the production of the products exported during a given year. Please indicate how you determined the different reward rates and provide the evidence supporting your answer.***

**Comments:**

132. India contends that the “rates under MEIS is based on an examination of the prior-stage cumulative indirect taxes on inputs consumed in the production of exported products, indirect taxes in relation to production and distribution of exported products, that are embedded in the cost of the final exported product.”<sup>117</sup>

133. First, the language of the MEIS scheme contradicts India’s contention. The MEIS’s objective is to reward export performance. Therefore, the criteria for the total scrips granted is the: (1) value of exports; (2) product of export; (3) country of export; and (4) corresponding MEIS Reward Rate.<sup>118</sup> There is no record evidence that India examines the prior-stage cumulative indirect taxes accrued, whether inputs are consumed in the production of an exported product, or the indirect taxes accrued in relation to production and distribution of exported products as part of the MEIS. Rather, there is a complete disconnect between the MEIS export reward objective,<sup>119</sup> as reflected in the scheme, and remitting or exempting any indirect taxes accrued.<sup>120</sup>

<sup>116</sup> India response to Panel Question 59.

<sup>117</sup> India response to Panel Question 60.

<sup>118</sup> See U.S. first written submission, paras. 52-53.

<sup>119</sup> The repeated increases in the MEIS reward rate for exports of dairy products to 10 percent, and then doubling to 20 percent of FOB value, highlight how the reward rate has nothing to do with the exemption or remission of indirect taxes. The reason for these increases was “to boost their [dairy products] overseas shipments” as an apparent concession during protests by dairy farmers in Maharashtra state during 2018. See *Govt to increase duty incentives for exports of milk products*, The Times of India, September 21, 2018, available at <https://timesofindia.indiatimes.com/business/india-business/govt-to-increase-duty-incentives-for-exports-of-milk-products/articleshow/65899679.cms> (Ex. US-73). See also Public Notice 41/2015-2020, dated September 27, 2018, available at <http://dgft.gov.in/sites/default/files/PN-41-270918.pdf> (Ex. US-44).

<sup>120</sup> U.S. response to Panel Question 37, para. 53.

134. Second, according to India, the “value of MEIS Scrips is calculated by multiplying the rate with the FOB value of export of the product, resulting in the approximate refund of such embedded indirect taxes already paid during the production and distribution of the exported product.”<sup>121</sup> India omits that the *product of export* and *export destination country* determine the rewards rate. There is no record evidence that the MEIS reward rate has anything to do with the remission or exemption of any indirect taxes accrued.

135. India gives no explanation why different destination countries for export change the MEIS reward rate determination. India can give no such explanation because the destination country for the exports has no effect on domestic indirect taxes accrued. Instead, the reward rate reflects the policy and objective to reward export of certain “notified goods”<sup>122</sup> to certain countries.

136. Third, India asserts that the rebates are merely a less “cumbersome” means to estimate the “embedded taxes in the exported product.”<sup>123</sup> The exemption or remission of indirect taxes must be based on indirect taxes actually accrued.<sup>124</sup> An examination of actual transactions rather than an aggregate estimate is required under Annex I, items (g), (h), and (i).<sup>125</sup>

137. Even aside from the fact that an estimate, rather than determining the actual indirect taxes accrued in actual transactions, is inconsistent with footnote 1 and Annex I, items (g) and (h), the MEIS fails even the lax standard of an estimate. The record evidence shows the MEIS rewards rate and the granting of scrips are completely determined by export performance, described above, and is not an attempt to estimate the indirect taxes accrued.

138. Finally, India provides one example of where the MEIS rewards rate happens to be lower than the indirect taxes accrued on a product. From this example, India contends “[t]o administratively ease the process, the Government refunds embedded taxes paid, which is lower than the actual taxes levied. This ensures that the quantum of MEIS Scrip received by the

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<sup>121</sup> India response to Panel Question 60.

<sup>122</sup> U.S. first written submission, para. 50 (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. 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.”) (citations omitted).

<sup>123</sup> India response to Panel Question 60.

<sup>124</sup> See, e.g., paragraph 2 of Annex II of the SCM Agreement (referring to “the amount of such taxes *actually* levied on inputs” and “remission or drawback of import charges in excess of those *actually* levied on inputs that are consumed in the production of the exported product.”) (emphasis added).

<sup>125</sup> U.S. response to Panel Question 37, paras. 51-52. Although this response did not address Annex I, item (g), Annex I, item (g) also requires an examination of the indirect taxes “in respect of the production and distribution of exported products . . .” accrued rather than an estimate.

exporter (3% of the FOB Value of the export) is less than the total [sic] the indirect taxes paid (6.10% of the FOB value of export) by the exporter.”<sup>126</sup>

139. The existence of one happenstance example does not show that India examines the tax subsumed for a product covered under MEIS, and India has provided no record evidence that India undertakes such an examination.

140. Instead, the MEIS rewards rate is determined by policy objectives regarding export performance including product of export and the destination country for that export. It has no connection to the amount of “embedded taxes” accrued.

***Q. 61. To India: What is the nature of the "shortfall in export obligation" that can be paid for using MEIS scrips?***

**Comments:**

141. India's view that MEIS scrips can be used to make up for the failure to meet the export contingency (i.e., the shortfall in export obligation) in the EPCG scheme is consistent with the U.S. understanding.

142. India asserts that “[t]he amount by which the MEIS Scrip is debited [to offset shortfall related customs duties] is equal to the amount of embedded indirect tax refund the exporter is receiving and utilizing.”<sup>127</sup> As described in the U.S. response to Panel Questions 56 and 60, MEIS is not a proper remission of indirect taxes as India argues.

***Q. 62. To both parties: To your knowledge, in domestic jurisdictions, are "tax credits" transferable to third parties for monetary value in arm's length transactions, or are they to be used by the original recipient to satisfy that recipient's tax liability?***

**Comments:**

143. As described in the U.S. responses to Panel Questions 56 and 60, MEIS is not a proper remission of indirect taxes as India again argues; the objective and purpose of MEIS is rewarding export performance.

**SPECIAL ECONOMIC ZONES SCHEME (SEZ)**

***Q. 64. To India. At paragraph 329 of its first written submission, you asked the Panel to exercise judicial economy on the question whether the challenged measures under the SEZ Scheme are subsidies within the meaning of Article 1, and to hold, instead, that they are not export contingent. India however "reserve[d] its right to prove that***

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<sup>126</sup> India response to Panel Question 60.

<sup>127</sup> India response to Panel Question 61.

***those measures are not subsidies under Article 1". What did you mean by "reserv[ing that] right"?***

**Comments:**

144. India “submits that it is not necessary for the resolution of the dispute to determine whether SEZ Schemes are ‘subsidies’ as per Article 1 of the SCM Agreement.”<sup>128</sup>

145. The United States notes that India has limited its argument on the SEZ scheme to the alleged absence of export contingency. The United States has demonstrated that the SEZ scheme is a subsidy (i.e., financial contribution that confers a benefit). Consequently, India does not challenge that the SEZ scheme is a subsidy or any other element of the U.S. *prima facie* case.

***Q. 65. To India: At paragraph 328 of your first written submission, you wrote that the SEZ Scheme "uses an objective criterion to determine which enterprises are consistent with the general objective of the SEZ Scheme." Can you please state precisely what that objective criterion is, as well as pointing to the evidence on the Panel's record that supports India's answer?***

**Comments:**

146. The United States disagrees with India's characterization of Rule 53 of the SEZ Rules as an “objective criterion” used “to determine which enterprises are consistent with [sic] overall objective of the SEZ scheme to increase economic activity and development.”<sup>129</sup> The Net Foreign Exchange (NFE) requirement specifically advances the objective of the SEZ scheme: “the establishment, development, and management of the Special Economic Zones for *the promotion of exports . . .*”<sup>130</sup> The SEZ scheme and NFE requirement incentivizes exports over domestic sales and are not general measures to increase overall economic activity.<sup>131</sup>

***Q. 66. To India: Please describe the elements of the "structure" and "organizing principles" of India's domestic tax regime<sup>132</sup> that you consider the Panel should take into account in assessing whether India provides a financial contribution under the SEZ Scheme. For each tenet of your description, please point to the precise portions of the evidence on the Panel's record that support it.***

**Comments:**

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<sup>128</sup> India response to Panel Question 64.

<sup>129</sup> See India response to Panel Question 65.

<sup>130</sup> Special Economic Zones Act of 2005, p.1 (emphasis added) (Ex. US-22).

<sup>131</sup> U.S. response to Panel Question 69, paras. 108, 111-13; U.S. response to Panel Question 77, paras. 122-23.

<sup>132</sup> See, e.g., *Brazil – Taxation (AB)*, paras. 5.162 and 5.196; *US – Large Civil Aircraft (2nd complaint) (AB)*, paras. 812-814.

147. India makes the conclusory assertion that the “elements of the ‘structure’ and ‘organizing principles’ of India’s domestic tax regime are to be taken into account when determining whether there has been government revenue foregone in the case of the SEZ Scheme, under Article 1 of the SCM Agreement.”<sup>133</sup> India does not explain this statement and later explains it does not challenge the financial contribution or benefit element under Article 1.1(a)(1) of the SCM Agreement for the SEZ scheme.<sup>134</sup>

148. As explained in the U.S. comments on India’s response to Questions 35, should the Panel engage in a “three-step” approach, an examination of the “structure” and “organizing principles” of India’s tax regime is unnecessary. Under these facts, the “benchmark” treatment for comparison is readily identifiable – it is the treatment of the income of a similarly situated non-scheme participant enterprise under Indian law.<sup>135</sup>

***Q. 68. To both parties: Exhibit USA-60 bears a revised version of Section 53 of the SEZ Rules. Please confirm whether Section 53 as set out in Exhibit USA-28 was the version in force until 18 September 2018, and Section 53 as set out in Exhibit USA-60 is the version in force since 19 September 2018.***

**Comments:**

149. India’s response regarding the version of Section 53 in effect before and after September 19, 2018, is consistent with the U.S. understanding.

***Q. 69. To both parties: Section 53 of the SEZ Rules, laying out the formula for calculating "Net Foreign Exchange", defines item "A" in that formula. Section 2(m) of the SEZ Act, relied upon at paragraph 145 of the United States' second written submission, defines "exports". What is the relationship between these two definitions?***

**Comments:**

150. India argues that “the definition provided in Section 2(m) of the SEZ Act is to be read into the item ‘A’ in the formula for calculating Net Foreign Exchange in Rule 53 of the SEZ Rules,” which “further expands the scope of items that fall within the scope of ‘A’ in calculating the Free-on-Board value of exports, in line with the understanding of ‘exports’ under the SEZ Scheme.”<sup>136</sup>

151. As explained in the U.S. response to this question, the availability of limited domestic exceptions as a secondary means for an SEZ unit to fulfill its NFE does not diminish the primary

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<sup>133</sup> India response to Panel Question 66.

<sup>134</sup> India response to Panel Question 66.

<sup>135</sup> See U.S. responses to Panel Questions 48, 50, 67, 84.

<sup>136</sup> India response to Panel Question 69.

means for an SEZ unit to fulfill its net foreign exchange requirement – foreign export.<sup>137</sup> India incentivizes export sales,<sup>138</sup> and India recognizes that the objective and reality of the SEZ scheme is to make physical exports to foreign countries.<sup>139</sup>

***Q. 70. To both parties: The Panel refers to Section 53 of the SEZ Rules as set out in Exhibit USA-28, and in particular to item "A" therein. Please indicate, for each of items (a) to (o) under item A, which consists of sales to the DTA and which does not.***

**Comments:**

152. India identifies that these category of sales consist of DTA sales for Panel Questions 70-73.<sup>140</sup>

153. The United States highlights that the categories described in Panel Questions 70-73 are the limited exceptions to the norm (*see* U.S. response to Panel Question 69). “Exports,” as the common understanding of that term is used, constitute the bulk of sales under “A” in Rule 53.

***Q. 71. To both parties: For those of items (a) to (o) that do not consist of sales to the DTA, please indicate whether you consider that they are exports (as the term is understood in the SCM Agreement) or not and, if not, what they are.***

**Comments:**

154. The United States refers the Panel to the U.S. comments on India’s response to Question 70.

***Q. 72. To both parties: The Panel refers to Section 53 of the SEZ Rules as set out in Exhibit USA-60, and in particular to item "A" therein. Please indicate, for each of items (a) to (k) under item A, which consists of sales to the DTA and which does not.***

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<sup>137</sup> U.S. response to Panel Question 69, para. 107.

<sup>138</sup> U.S. response to Panel Question 69, paras. 108-09.

<sup>139</sup> U.S. response to Panel Question 69, paras. 110-13. As discussed in the U.S. response to Panel Question 69, the Comptroller and Auditor General of India (CAG) made findings devastating to India’s argument. The CAG identified only one percent of SEZ units that were meeting the majority of their NFE obligation via DTA sales. The CAG reports that: “[a]n average 15 per cent of exports has been sold in DTA and gradually the sales not counting for positive NFE has overtaken the value of DTA sales counting for positive NFE.” Thus, at least 85 percent of SEZ sales were physical exports from India, the intended result of the NFE requirement.

The CAG report also notes a proposed requirement that at least 51 per cent of the production of goods and services by a unit in a SEZ be physically exported out of India. The CAG report concluded that “the basic objective of the scheme of earning foreign exchange from overseas by the units by resorting to deemed exports/ DTA sales but not effecting actual physical exports to foreign countries...” was an unintended loophole incompatible with the objective of the SEZ scheme.

<sup>140</sup> India response to Panel Question 70.

**Comments:**

155. The United States refers the Panel to the U.S. comments on India’s response to Question 70.

*Q. 73. To both parties: For those of items (a) to (k) that do not consist of sales to the DTA, please indicate whether you consider that they are exports (as the term is understood in the SCM Agreement) or not and, if not, what they are.*

**Comments:**

156. The United States refers the Panel to the U.S. comments on India’s response to Question 70.

**DUTY-FREE IMPORTS FOR EXPORTERS SCHEME (DFIES)**

*Q. 80. To both parties: Please indicate, among the items eligible under the challenged Line Numbers of Custom Notification No. 50/2017 for import duty exemption identified in the table in Exhibit USA-36 and in any relevant lists referred to in that table, which are capital goods.*

**Comments:**

157. India again makes the erroneous argument that capital goods are “inputs consumed in the production of an exported product . . .” as part of a proper duty drawback scheme.<sup>141</sup> Capital goods do not meet the definition of “inputs” described in footnote 61 of the SCM Agreement because they are not “physically incorporated” or “consumed” in the production of the exported product.<sup>142</sup> Moreover, the reference in Annex I, items (h) and (i) to “normal allowance for waste” does not contemplate or permit capital goods to be considered as “inputs.”<sup>143</sup>

158. The United States has identified the lists and items that qualify as capital goods in Appendix II to the U.S. responses to the Panel Questions. The U.S. challenge does not extend to capital goods imported for research and development purposes. The United States notes that Condition 60(ii) describes, “the goods are imported for use in the manufacture of commodities” and not for research and development purposes.

*Q. 82. To both parties: What does "an exported product" ("un produit exporté", "un producto exportado") in footnote 1 mean?<sup>144</sup> Does it mean a product "as a whole"?<sup>145</sup>*

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<sup>141</sup> India response to Panel Question 80.

<sup>142</sup> U.S. second written submission, paras. 84-86.

<sup>143</sup> U.S. second written submission, para. 85.

<sup>144</sup> Annexes I, items (h) and (i) refer to “the exported product.”

<sup>145</sup> See, e.g., *US – Softwood Lumber V (AB)*, para. 93.

***Consider, for example, a scheme that provides for duty exemptions on the importation of specified inputs consumed in the production of the exported product. Next, consider that these duty exemptions are only available until the value of such imports of inputs reaches a given ceiling. Does the existence of this ceiling mean that the scheme no longer falls under footnote 1, because the exemption is not provided for specified inputs into the production of the exported product "as a whole"?***

**Comments:**

159. India believes that “a ceiling imposed by the Member on the value of imported inputs that may avail of duty exemptions is not affected by the nature of the exported product as a whole or in part, and does not affect the scheme (which will continue to benefit from the ambit of footnote 1).”<sup>146</sup>

160. As explained in the U.S. response to this question, the fact that, under this hypothetical scheme, the Member decided to set a ceiling on the total exemption permitted based on the value of imported inputs, which will be consumed in the production of the exported product, would not necessarily disqualify this scheme from footnote 1. However, one would need additional facts about how the ceiling would affect the operation and design of the scheme and the exported product after the ceiling has been reached to see if it still complied with footnote 1.

161. The United States emphasizes that this hypothetical scheme contrasts with the DFIES’s reward for export performance where “the remission or drawback of import charges” is completely disconnected from “those [actually] levied on imported inputs that are consumed in the exported product.”

***Q. 83. To India: Please describe the elements of the "structure" and "organizing principles" of India's domestic tax regime<sup>147</sup> that you consider the Panel should take into account in assessing whether India provides a financial contribution under the challenged Line Numbers of Custom Notification No. 50/2017. For each tenet of your description, please point to the precise portions of the evidence on the Panel's record that support it.***

**Comments:**

162. India argues that “the ‘structure’ and ‘organizing principles’ of India’s domestic tax regime are only relevant insofar as they [sic] required in the comparison test under the Excess Remission Principle.”<sup>148</sup> India also contends that examining the “structure” and “organizing principles” for purposes of the “three-step approach” is unneeded in this dispute.<sup>149</sup>

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<sup>146</sup> India response to Panel Question 82.

<sup>147</sup> See, e.g., *Brazil – Taxation (AB)*, paras. 5.162 and 5.196; *US – Large Civil Aircraft (2nd complaint) (AB)*, paras. 812-814.

<sup>148</sup> India response to Panel Question 83.

<sup>149</sup> India response to Panel Question 83.

163. As explained in the U.S. comments on India’s responses to Questions 35 and 36, the United States believes the excess remission principle is inapplicable because the challenged schemes are not proper duty drawback or remissions schemes to begin with.

164. Moreover, as explained in the U.S. comments on India’s response to Questions 35, should the Panel engage in a “three-step approach,” an examination of the “structure” and “organizing principles” of India’s tax regime is unnecessary. Under these facts, the “benchmark” treatment for comparison is readily identifiable – it is the treatment of the income of a similarly situated non-scheme participant enterprise under Indian law.<sup>150</sup>

#### **EXCEPTIONS, DEROGATIONS, AND BURDENS**

***Q. 87. To both parties: If you consider that derogations are not themselves exceptions: does footnote 1 to the SCM Agreement provide for an "exception", or a "derogation"?***

#### **Comments:**

165. India’s view is that footnote 1 is neither an exception nor a derogation.<sup>151</sup>

166. The U.S. view is that footnote 1 is part of a definition. In this sense, because it is not part of an obligation, it would be neither a derogation nor an exception. Article 1 of the SCM Agreement sets out the definition of a subsidy; footnote 1 then clarifies that measures that fall within the scope of the footnote are also not within the definition of a subsidy.

***Q. 88. To both parties: The Panel refers to the statements of the Appellate Body in EC – Tariff Preferences and Canada – Renewable Energy / Canada – Feed-in Tariff Program.<sup>152</sup> Do you consider that the burden of proof does, or does not, depend on the characterization of a provision as a "derogation" or an "exception"?***

#### **Comments:**

167. India’s view is that “the burden of proof rests on the party seeking to assert a fact. However, in the case of a derogation it is unclear as to which party bears the burden of proof. Further, the case of footnote 1 of the SCM Agreement . . . is distinct since there exists a two – tiered process – one of raising/invoking footnote 1 and the other of proving it.”<sup>153</sup>

168. As noted in the U.S. response to this question, the burden of proof is not as simple as the characterization of a provision as a “derogation” or “exception.” Instead, as one panel noted, the “usual rule regarding burden of proof in WTO proceedings, unless the text of the covered agreement indicates otherwise . . . [is] the initial burden of proof rests upon the party, whether

<sup>150</sup> See U.S. responses to Panel Questions 48, 50, 67, 84.

<sup>151</sup> India response to Panel Question 87.

<sup>152</sup> *EC – Tariff Preferences (AB)*, para. 88 (footnote omitted); *Canada – Renewable Energy/ Canada – Feed-in Tariff Program (AB)*, para. 5.56.

<sup>153</sup> India response to Panel Question 88.

complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what it asserts is correct, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut that presumption.”<sup>154</sup>

***Q. 89. To both parties: In a dispute resting on an allegation of a subsidy under Article I, which party bears the burden of proving that a measure does / does not meet the requirements in footnote 1 (including the relevant portions of Annexes I to III)?***

**Comments:**

169. India contends that having to raise and then establish the defense of footnote 1 is “unfair and absurd,” because the “respondent [] bear[s] the additional burden of providing data and quantitative analysis while simply raising footnote 1.”<sup>155</sup> Instead, India appears to argue that it can raise the defense of footnote 1 and then the burden of proof is on the United States to disprove the defense India raises.<sup>156</sup> This contention is incorrect and confuses the principles of the allocation of the burden of proof and the difference between a *de jure* export subsidy claim and a CVD investigation.

170. First, the burden of proof rests with the party raising a claim or defense. As cited in the U.S. response, panels and the Appellate Body have recognized this principle repeatedly, and this principle serves as the starting point for considering the allocation of the burden of proof.

171. India invokes footnote 1 and Annexes I-III as a defense to the U.S. claims, and so India bears the burden of proving that its measures meet the conditions of footnote 1 and justifying them under the Annexes.

172. Second, India conflates the difference between a *de jure* export subsidy claim and a CVD investigation.<sup>157</sup> In a *de jure* export subsidy dispute, as here, the responding party need not provide “data and quantitative analysis” to either raise or establish a defense under footnote 1 and the Annexes.<sup>158</sup> Instead, the responding party can rely on the measures themselves to show their consistency with a raised defense. While India has raised footnote 1 and the Annexes as a defense in this dispute, it has not and cannot establish that the measures are consistent with footnote 1 and the Annexes – because they are not.

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<sup>154</sup> *US – Upland Cotton (Panel)*, para. 7.270.

<sup>155</sup> India response to Panel Question 89.

<sup>156</sup> India response to Panel Question 89.

<sup>157</sup> India again ignores the plain language of Annex II, item II that the guidelines apply to a countervailing duty investigation. *See* Annex II(II) (“as part of a *countervailing duty investigation* pursuant to this Agreement. . .”) (emphasis added); *see also* U.S. response to Panel Question 36, paras. 48-49; U.S. response to India Question 1, paras. 159-61.

<sup>158</sup> India response to Panel Question 89.

173. In any event, the United States has demonstrated the many ways the challenged schemes do not meet the conditions in footnote 1.

***Q. 90. To both parties: In a dispute resting on an allegation of a subsidy under Article I, does one of the parties bear the burden of raising footnote 1 and, if so, which party?***

**Comments:**

174. India accepts that it has the burden to raise footnote 1 but then contends that it does not have the burden to establish the defense “where the complainant alleges that a challenged measure is inconsistent with footnote 1 and related Annexes, particularly because inputs have not been consumed.”<sup>159</sup> This assertion is wrong.

175. Here, India is invoking footnote 1 as a defense to the U.S. claims. Therefore, the burden is on India to establish that its measures meet the conditions in footnote 1.

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<sup>159</sup> India responses to Panel Questions 89 and 90.