WORLD TRADE ORGANIZATION

WT/DS541/R

31 October 2019

(19-7313)

INDIA – EXPORT RELATED MEASURES

REPORT OF THE PANEL

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Australia – Automotive Leather II	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, adopted 16 June 1999, DSR 1999:III, p. 951
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, p. 1221
Brazil – Taxation	Appellate Body Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/AB/R and Add.1 / WT/DS497/AB/R and Add.1, adopted 11 January 2019
Brazil – Taxation	Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, p. 1443
Canada – Aircraft (Article 21.5 – Brazil)	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW, adopted 4 August 2000, as modified by Appellate Body Report WT/DS70/AB/RW, DSR 2000:IX, p. 4315
Canada – Aircraft Credits and Guarantees	Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III, p. 849
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
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EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7

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EU – PET (Pakistan)	Panel Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/R, Add.1 and Corr.1, adopted 28 May 2018, as modified by Appellate Body Report WT/DS486/AB/R
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, p. 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3

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US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union*, WT/DS353/RW and Add.1, adopted 11 April 2019, as modified by Appellate Body Report WT/DS353/AB/RW
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Tax Incentives	Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R and Add.1, adopted 22 September 2017, DSR 2017:V, p. 2199
US – Tax Incentives	Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R, DSR 2017:V, p. 2305
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

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IND-7		WTO, Negotiating group on Rules, Amendment to Articles 27.2 and 27.4 of the ASCM in relation to developing countries covered under Annex VII, Communication from the Plurinational State of Bolivia, Egypt, Honduras, India, and Sri Lanka, TN/RL/GEN/177/Rev.1 (9 March 2011)
IND-9	General Council decision WT/L/384	WTO, General Council Decision on Implementation-Related Issues and Concerns of 15 December 2000, and the report thereon of the Chairman of the Committee on Subsidies and Countervailing Measures of 3 August 2001, WT/L/384
IND-10	SCM Committee decision G/SCM/34	WTO, Committee on Subsidies and Countervailing Measures, "Chairman's Report on the Implementation-Related Issues referred to the Committee on Subsidies and Countervailing Measures in the 15 December 2000 Decision of the General Council", G/SCM/34 (3 August 2001)
IND-11	Council for Leather Exporters Guidelines	"Council for Leather Exporters: Duty Free Import Scheme - An Introduction", CLE-HO/POL/DFIS/2018-19 (22 March 2018)
IND-14		The Integrated Goods and Services Tax Act, 2017
IND-21		Letter dated 16 March 2017 from the GOI to an enterprise to be set up as EOU
IND-22	2019 Amendment to the SEZ Rules	Indian Ministry of Commerce and Industry, Department of Commerce, Special Economic Zones (amendment) Rules (7 March 2019)
IND-23		Income Tax Act (1961) as amended
USA-3	Foreign Trade Policy	Indian Ministry of Commerce and Industry, Department of Commerce, Foreign Trade Policy, Notification No. 01/2015-2020 (1 April 2015); Mid-Term Review, Notification No. 41/2015-2020 (5 December 2017)
USA-4		"Export Champions", *The Economic Times*, (12 February 2018)
USA-5	Handbook of Procedures	Indian Ministry of Commerce and Industry, Department of Commerce, Handbook of Procedures, Public Notice No. 01/2015-2020, (1 April 2015); updated by Public Notice No. 43/2015-2020 (5 December 2017)
USA-6	Appendices and Aayat Niryat forms	Indian Ministry of Commerce and Industry, Department of Commerce, Appendices and Aayat Niryat Forms of FTP 2015-2020 (1 April 2015 -31 March 2020)
USA-7		Excerpt from Customs Tariff Act (1975) as amended
USA-8		Customs Act (1962) as amended, Section 12 to Section 15
USA-11	Public Notice 2/2015-2020	Indian Ministry of Commerce and Industry, Department of Commerce, Public Notice No. 2/2015-2020, MEIS, schedule of country group, ITC (HS) code wise list of products with reward rates under Appendix 3B (1 April 2015)
USA-20		Excerpt from highlights of the Foreign Trade Policy Review, 2015-2020, mid-term review (December 2017)
USA-22	SEZ Act	Ministry of Law and Justice, Special Economic Zones Act, 2005 No. 28 of 2005, Gazette of India, Extraordinary Part II Section I (23 June 2005)
USA-23	Annual Supplement 2013-2014 to the Foreign Trade Policy 2009-2014	Address by Shri Anand Sharma, Minister of Commerce, Industry and Textiles at the Release of Annual Supplement 2013-2014 to the Foreign Trade Policy 2009-2014 (18 April 2013)
USA-24		Nirmala Sitharaman, "SEZ Scheme of India is Quite Comprehensive", *Daily News and Analysis* (20 December 2014)
USA-27	Notification No. 15/2017	Indian Ministry of Finance, Department of Revenue, Notification No. 15/2017, integrated tax (rate) (30 June 2017)
USA-28	SEZ Rules	Indian Ministry of Commerce and Industry, Special Economic Zones Rules, incorporating amendments up to July 2010 (10 February 2006)

Exhibit	Short Title (if any)	Description
USA-29	Income Tax Act, 1961, Sections 10A and 10AA	Excerpt from Income Tax Act (1961) as amended, Sections 10A and 10AA
USA-30	Income Tax Act, 1961, Section 80A	Excerpt from Income Tax Act (1961) as amended, Section 80A
USA-31	Customs Tariff Act	Excerpt from Customs Tariff Act (1975) as amended, Second Schedule
USA-32	Integrated Goods and Services Tax Act	Indian Ministry of Law and Justice, Integrated Goods and Services Tax Act, Gazette of India, part II, section 1 (12 April 2017)
USA-35	Export Promotion Schemes	Indian Ministry of Electronics and Information Technologies, website information about Export Promotion Schemes (accessed 7 December 2018)
USA-36	Notification No. 50/2017	Indian Ministry of Finance, Department of Revenue, Notification No. 50/2017-Customs (30 June 2017)
USA-38		Excerpts from Notification No. 50/2017
USA-55	MIS Report on Export Promotion Schemes	Excerpt from Indian Ministry of Commerce and Industry, Department of Commerce, MIS Report on Export Promotion Schemes 2017 (31 May 2017)
USA-56	Ministry of Commerce and Industry Department of Commerce, Annual Report, 2017-2018	Excerpt from Indian Ministry of Commerce and Industry Department of Commerce, Annual Report, 2017-2018
USA-57		Scripbazaar website (accessed 9 October 2018)
USA-60	2018 Amendment to the SEZ Rules	Indian Ministry of Commerce and Industry, Department of Commerce, Notification No. G.S.R. 909(E) Special Economic Zones (amendment) Rules (19 September 2018)
USA-62		Excerpt from Central Excise Tariff Act of 1985, as amended
USA-63		Excerpt from Central Excise Tariff Act, 1985, First Schedule (Central Excise Tariff 2016-2017), updated 2 February 2017, and subsequent notifications and rate changes
USA-65		Indian Ministry of Finance, Department of Revenue website, Rates of Goods and Services Tax (accessed 14 March 2019)
USA-84		Income Tax Act (1961) as amended
USA-85		Highlights of the Foreign Trade Policy Review, 2015-2020, mid-term review (December 2017)
USA-87		Customs Tariff Act (1975) as amended
USA-88		Central Excise Act (1944) as amended
USA-89		Excerpt from Customs Tariff Act (1975) as amended, First Schedule
USA-90		Food Shark Marfa website, at https://www.foodsharkmarfa.com/best-meat-tenderizers/ (last visited 18 July 2019)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
BTP	Bio-Technology Parks
CIF	cost insurance freight
DFIS	Duty-Free Imports for Exporters Scheme
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DTA	domestic tariff area
EHTP	Electronics Hardware Technology Park
EOU	Export Oriented Units
EPCG	Export Promotion Capital Goods
FOB	free on board
FTP	Foreign Trade Policy
GATT 1994	General Agreement on Tariffs and Trade 1994
GNP	gross national product
HBP	Handbook of procedures
Highlights	Highlights of the Foreign Trade Policy 2015 2020 Mid Term Review (5 December 2017)
IGST	Integrated Goods and Services Tax
ITC	Indian Tariff Code
MEIS	Merchandise Exports from India Scheme
MSME	micro, small & medium enterprises
Press Release	Release of the Mid Term Review of Foreign Trade Policy 2015-2020 – Annual Incentives Increased by 2% amounting to over Rs 8,000 crore for Labour Intensive/MSME sectors (5 December 2017)
NFE	net foreign exchange
SAE	statement of available evidence
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SCM Committee	Committee on Subsidies and Countervailing Measures
SEZ	Special Economic Zones
SEZ Act	Special Economic Zones Act
SEZ Rules	Special Economic Zones Rules
STP	Software Technology Park
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the United States

1.1. On 14 March 2018, the United States requested consultations with India pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Articles 4 and 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with regard to certain alleged export subsidy measures of India.[1]

1.2. Consultations were held on 11 April 2018 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 17 May 2018, the United States requested the establishment of a panel pursuant to Article 6 of the DSU and Article 4.4 of the SCM Agreement with standard terms of reference in document WT/DS541/4.[2] At its meeting on 28 May 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the United States, in accordance with Article 6 of the DSU and Article 4.4 of the SCM Agreement.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS541/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 16 July 2018, the United States requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU and Article 4.12 of the SCM Agreement. On 23 July 2018, the Director-General accordingly composed the Panel as follows[5]:

Chairperson:	Mr Jose Antonio S. Buencamino
Members:	Ms Leora Blumberg Mr Serge Pannatier

1.6. Brazil, Canada, China, Egypt, the European Union, Japan, Kazakhstan, the Republic of Korea, the Russian Federation, Sri Lanka, Chinese Taipei, and Thailand notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[6] and timetable on 22 August 2018.

1.8. The United States and India submitted their first written submissions on 23 August and 20 September 2018, respectively, and their second written submissions on 11 October and 1 November 2018, respectively. The Panel held a substantive meeting with the parties on 12 and 13 February 2019. A session with the third parties took place on 13 February 2019. On 14 May 2019, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report

[1] Request for consultations by the United States, WT/DS541/1-G/SCM/D119/1 (United States' request for consultations).
[2] Request for the establishment of a panel by the United States, WT/DS541/4 (United States' panel request).
[3] Dispute Settlement Body, Minutes of Meeting held on 28 May 2018, WT/DSB/M/413, para. 7.7.
[4] Constitution note of the Panel, WT/DS541/5.
[5] Constitution note of the Panel, WT/DS541/5.
[6] See the Panel's Working Procedures in Annex A-1.

to the parties on 28 August 2019. The Panel held an interim review meeting with the parties on 16 September 2019 and issued its Final Report to the parties on 30 September 2019.

1.3.2 Single substantive meeting of the Panel with the parties

1.9. On 3 August 2018, the Chairperson of the Panel, on behalf of the Panel, held a meeting with the parties to obtain their views in preparation of the Panel's draft Working Procedures and timetable. He stressed the need to reconcile different considerations, namely, the provision for accelerated procedures in Article 4 of the SCM Agreement, the obligation to provide special and differential treatment to developing country Members, and resource constraints in the Secretariat. At that meeting, the United States proposed that the Panel hold a single meeting with the parties in this case, a proposal which India opposed.

1.10. As a means to balance the competing obligations and constraints in the particular circumstances of this case, in its draft Working Procedures and timetable sent to the parties on 8 August 2018, the Panel proposed holding a single meeting with the parties, after the filing of both parties' first and second written submissions[7], and reserved the right to schedule further meetings with the parties as required.[8] On 22 August 2018, the Panel adopted its draft Working Procedures and timetable. In response to communications from India to the Chairperson[9], on 9 and 19 October 2018 the Panel confirmed that it would proceed with the adopted Working Procedures and timetable, while reserving the right to schedule additional meetings as necessary.[10] On 19 October 2018, the Panel indicated that it would communicate the reasons supporting its decision in due course.[11]

1.11. India objected to the Panel's approach in its comments on the draft Working Procedures and timetable[12], comments on the United States' comments[13], first written submission[14], and in communications dated 5 October and 16 October 2018[15], and sought a preliminary ruling from the Panel that an additional substantive meeting with the parties should be held before the filing of the second written submissions.[16]

1.12. In its own communications, the United States took the view that the Panel could hold a single substantive meeting with the parties, or even decide the case entirely on the basis of the parties' written submissions, without holding any substantive meeting with the parties.[17] The United States set out its arguments on the matter in its comments on the draft Working Procedures and timetable[18], comments on India's comments[19], and second written submission.[20]

1.13. Brazil commented on this matter in its third-party submission. In Brazil's view, a panel's decision to deviate from the working procedures set out in Appendix 3 to the DSU and hold

[7] Draft Working Procedures (8 August 2018), paras. 3, 5, and 15-16; Draft timetable (8 August 2018).
[8] Draft timetable (8 August 2018), fn 1.
[9] Communication dated 5 October 2018 from India to the Chairperson of the Panel; Communication dated 16 October 2018 from India to the Chairperson of the Panel.
[10] Communication dated 9 October 2018 from the Panel to the parties and third parties; Communication dated 19 October 2018 from the Panel to the parties and third parties.
[11] Communication dated 19 October 2018 from the Panel to the parties and third parties.
[12] Communication dated 14 August 2018 from India to the Chairperson of the Panel, paras. 1-2 and 5-7.
[13] Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 1-15.
[14] India's first written submission, paras. 16-18 and 105-116.
[15] Communication dated 5 October 2018 from India to the Chairperson of the Panel; Communication dated 16 October 2018 from India to the Chairperson of the Panel.
[16] India's first written submission, paras. 18 and 105-115; Communication dated 5 October 2018 from India to the Chairperson of the Panel, pp. 1-4. See also Communication dated 16 October 2018 from India to the Chairperson of the Panel, p. 2.
[17] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 4-7; Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, para. 1.
[18] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, paras. 1-7.
[19] Communication dated 17 August 2018 from the United States to the Chairperson of the Panel, paras. 1-8.
[20] United States' second written submission, paras. 45-52.

a single substantive meeting with the parties should only happen with the agreement of both parties to the dispute.[21]

1.14. On 22 January 2019, the Panel, as it had anticipated, communicated the reasons for its earlier decision to proceed with the adopted Working Procedures and timetable, while reserving the right to schedule additional meetings, as necessary (see Annex D-1).

1.15. During the substantive meeting with the parties and subsequently in writing, the Panel asked the parties whether they considered a second substantive meeting necessary.[22] On both occasions, it also asked India whether and how concretely the fact of holding a single substantive meeting affected India's ability to defend itself.[23] The parties responded to these questions on 4 March 2019 and commented on each other's responses on 18 March 2019. Having studied the parties' responses and comments[24], and in light of the proceedings thus far, the Panel did not consider that there was a need to depart from the structure of the proceedings as originally envisaged in this dispute by adding a second substantive meeting with the parties; the Panel communicated its decision to the parties on 16 April 2019.[25]

1.3.3 Partially open meeting

1.16. On 8 August 2018, the Panel transmitted the draft Working Procedures to the parties, pursuant to which the Panel would "meet in closed session".[26] On 14 August 2018, the United States requested the Panel to open the meeting(s) with the parties to the public, either in whole or in part.[27] On 17 August 2018, India "completely oppose[d]" the United States' request.[28]

1.17. In the Working Procedures adopted on 22 August 2018, the Panel indicated that it would "revert to this issue in due course before the date of [its] meeting" with the parties.[29]

1.18. On 3 January 2019, the Panel invited the third parties to express their views on holding a partially open meeting. Canada, China, the European Union, and Japan considered panels to have discretion to hold a partially open meeting. China and Thailand expressed concern about granting a request for a partially open meeting without the consent of both parties to the dispute. In the event that the Panel held a partially open meeting, Brazil, Canada, the European Union, and Japan agreed to open their statements to the public.[30] China, Egypt, the Russian Federation, and Sri Lanka indicated their intention to keep their respective statements confidential.[31]

1.19. By communication dated 22 January 2019[32], the Panel declined the United States' request for a partially open meeting.

[21] Brazil's third-party submission, paras. 27-32.
[22] Panel question No. 91.
[23] Panel question No. 92(a)-(c).
[24] Including the parties' responses and comments to all other questions the Panel had asked during and after the hearing, which India had indicated would themselves require an additional substantive meeting with the parties.
[25] Communication dated 16 April 2019 from the Panel to the parties concerning the Panel's Working Procedures and Timetable, (Annex D-3).
[26] Draft Working Procedures (8 August 2018), para. 10.
[27] Communication dated 14 August 2018 from the United States to the Chairperson of the Panel, para. 18. See also, ibid. paras. 11-17.
[28] Communication dated 17 August 2018 from India to the Chairperson of the Panel, para. 21. See also, ibid. paras. 22-26.
[29] Working Procedures (22 August 2018), para. 10.
[30] Communication dated 11 January 2019 from Brazil to the Panel; Communication dated 11 January 2019 from Canada to the Panel; Communication dated 11 January 2019 from the European Union to the Panel; and Communication dated 11 January 2019 from Japan to the Panel.
[31] Communication dated 11 January 2019 from China to the Panel; Communication dated 11 January 2019 from Egypt to the Panel; Communication dated 11 January 2019 from the Russian Federation to the Panel; and Communication dated 11 January 2019 from Sri Lanka to the Panel.
[32] Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting (Annex D-1), paras. 3.1-3.16.

1.3.4 The Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence

1.20. In its first written submission, India requested the Panel to issue a preliminary ruling to the effect that (a) the United States' panel request does not meet the requirements of Article 6.2 of the DSU with respect to both the identification of the specific measures at issue and the summary of the legal basis of the United States' complaint; (b) the provisions of Article 4 of the SCM Agreement could not, at that stage of the proceedings, apply to the dispute before the Panel; and (c) the statement of available evidence in the United States' request for consultations does not meet the requirements of Article 4.2 of the SCM Agreement.[33]

1.21. In its second written submission, the United States disagreed with India's request on all counts.[34]

1.22. In a communication of 22 January 2019, the Panel ruled that the United States' panel request meets the requirements of Article 6.2 of the DSU.[35] It however declined to rule, at that stage, on the applicability of Article 4 of the SCM Agreement[36] and the conformity of the statement of available evidence with Article 4.2 of the SCM Agreement.[37] The Panel rules on these matters in this Report.

2 FACTUAL ASPECTS

2.1. This dispute concerns the United States' challenge of the following schemes maintained by India:

a. the Export Oriented Units (EOU) Scheme and Sector-Specific Schemes, including the Electronics Hardware Technology Parks (EHTP) Scheme and the Bio-Technology Parks (BTP) Scheme (the EOU/EHTP/BTP Schemes);

b. the Merchandise Exports from India Scheme (MEIS);

c. the Export Promotion Capital Goods (EPCG) Scheme;

d. the Special Economic Zones (SEZ) Scheme; and

e. the Duty-Free Imports for Exporters Scheme (DFIS).

2.2. These measures provide for certain exemptions from, or reductions of, customs duties or taxes, or for the granting by the government of freely transferable "scrips" to be used to satisfy certain liabilities *vis-à-vis* the government.

2.3. Section 7.5 below outlines key characteristics of the five schemes at issue.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that each of the challenged measures is a prohibited export subsidy inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement. The United States further requests, pursuant to Article 4.7 of the SCM Agreement, that the Panel recommend that India withdraw the subsidies within 90 days from the date the DSB adopts its recommendations.

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[33] India's first written submission, paras. 19-70.

[34] United States' second written submission, paras. 11-52.

[35] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), paras. 2.1-2.126.

[36] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), paras. 3.1-3.13.

[37] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), paras. 4.1-4.8.

3.2. India requests the Panel to find that Article 3 of the SCM Agreement does not apply to India by virtue of Article 27.2(b) granting India an eight-year exemption period from India's Annex VII(b) graduation. India also requests that the Panel find that, in any event, the challenged schemes are not export subsidies and are not inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement. Moreover, India requests the Panel to find that the dispute could not be subject to Article 4 of the SCM Agreement or, in the alternative, to dismiss the dispute due to the insufficiency of the statement of available evidence under Article 4.2 of the SCM Agreement.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, Egypt, the European Union, Japan, Sri Lanka, and Thailand are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1 to C-7). China, Kazakhstan, the Republic of Korea, the Russian Federation, and Chinese Taipei did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 28 August 2019, the Panel issued its Interim Report to the parties. On 9 September 2019, the parties submitted their written requests for review. In addition to its written requests, India also requested that the Panel hold an interim review meeting with the parties. The parties submitted written comments on each other's written requests for review on 16 September 2019. On the same day, the Panel held an interim review meeting with the parties. After the meeting, the Panel put written questions to India, to which India responded on 18 September 2019. The United States provided written comments on India's responses on 20 September 2019. The requests made at the interim review stage as well as the Panel's discussion and disposition of those request are set out in Annex A-2.

7 FINDINGS

7.1. Our findings, below, are structured as follows. We begin by outlining the burden of proof, burden of raising certain provisions (section 7.1), and standard of proof (section 7.2), as they are relevant to this dispute. Next, we ascertain whether Article 27 of the SCM Agreement still excludes India from the scope of application of Articles 3 and 4 of the SCM Agreement, and we find that it does not (section 7.3). We then assess whether the statement of available evidence provided by the United States as part of its request for consultations meets the standard of Article 4.2 of the SCM Agreement, and we find that it does meet that standard (section 7.4).

7.2. We therefore proceed to assess the United States' claims that certain measures under the EOU/EHTP/BTP Schemes, EPCG Scheme, SEZ Scheme, DFIS, and MEIS, are export contingent subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

7.3. We begin by providing a brief factual outline of the measures at issue (section 7.5). We then examine whether the measures at issue under the EOU/EHTP/BTP Schemes, EPCG Scheme, DFIS, and MEIS meet the conditions of footnote 1 of the SCM Agreement (section 7.6). Next, we assess whether the challenged measures constitute a financial contribution by the government (in the form of revenue foregone, in section 7.7, and in the form of a direct transfer of funds, in section 7.8), through which a benefit is conferred (section 7.9) and, therefore, a subsidy. Finally, we examine whether the subsidies that we have found to exist are export contingent and therefore inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement (section 7.10).

7.4. Before concluding, we explain how we have taken into account the special and differential provisions raised by India (section 7.11). We then set out our conclusions (section 8) and our recommendations, including the time period within which the measures we have found to be inconsistent with Articles 3.1(a) and 3.2 must be withdrawn (section 9).

7.1 Burden of proof

7.5. The DSU does not set forth express rules concerning burden of proof.[38] It has long been held, however, that WTO dispute settlement follows the "generally accepted canon of evidence in … most jurisdictions, that the burden of proof rests upon the party … who asserts the affirmative of a particular claim or defence".[39]

7.6. Applying this rule assumes an understanding of which party "asserts the affirmative of a particular claim or defence". In many instances, this is obvious. For example, a respondent invoking an exception under Article XX of the GATT 1994 is "assert[ing] the affirmative of a particular … defence", and therefore bears the burden of proving that the conditions of Article XX are met. Sometimes, however, the dividing line is less clear, as in cases involving provisions which, while potentially disqualifying a claim, are not considered to be exceptions / affirmative defences.[40] We now turn to this subject, which is relevant to two provisions at issue in this case, namely, footnote 1 and Article 27 of the SCM Agreement.[41]

7.1.1 Exceptions and excluding provisions

7.1.1.1 The distinction between exceptions and excluding provisions

7.7. WTO adjudicators have drawn a distinction between provisions that afford a "justification" for "measures that are found to be inconsistent with other provisions of" the WTO Agreements[42] (which we refer to as exceptions) and provisions that "limit[] the scope" of other provisions[43], without there being a violation in the first place (which we refer to as excluding provisions).[44]

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[38] The burden of proof identifies the party who bears the negative consequences of a situation where the factual foundation of a claim or defence has not been established to the necessary standard: "[w]hen the evidence is in equipoise, the party on whom the burden of proof rests loses". (L. P. Loren, "Fair Use: An Affirmative Defense" (2015) Vol. 90:685, *Washington Law Review*, p. 706). This is also referred to as the burden of persuasion (e.g. J. Pauwelyn, "Defenses and the Burden of Proof in International Law" (3 November 2016), version 11 July 2017, https://ssrn.com/abstract=2863962 (accessed 21 March 2019), p. 3), the ultimate burden of proof (B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, 1953), p. 334), and the legal burden (J. MacLennan, "Evidence, Standard and Burden of Proof and the Use of Experts in Procedure before the Luxembourg Courts", in F. Weiss, (ed.), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals*, p. 266).

The allocation of the ultimate burden of proof is different from "the rule that the party who asserts a fact … is responsible for providing proof thereof", which is referred to e.g. as the procedural burden of proof (B. Cheng, op. cit., p. 334) and the evidential burden (MacLennan, op. cit., p. 266). See also Appellate Body Report, *Japan – Apples*, para. 157 (describing the two as "distinct").

[39] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR: 1997:I, p. 335.

[40] We use the term "exceptions" as interchangeable with the phrase "affirmative defences". WTO adjudicators in the past have done the same. (See e.g. Appellate Body Report, *US – Wool Shirts and Blouses*, DSR: 1997:I, p. 337). The phrasing "affirmative defence" is used in common law jurisdictions. (See e.g. A. St. Eve and M. Zuckerman, "The Forgotten Pleading", (2013), Vol. 7, Issue 1, *The Federal Courts Law Review*, p. 160). ("A negative defense … asserts 'defects in the plaintiff's case' and the defendant has no burden to prove it. … Unlike a negative defense, an affirmative defense is one that admits the allegations in the complaint, but seeks to avoid liability, in whole or in part, by new allegations of excuse, justification, or other negating matter".)

[41] Footnote 1 of the SCM Agreement excludes certain measures from the scope of the definition of a "subsidy" for purposes of the SCM Agreement. Article 27.2 of the SCM Agreement provides that the prohibition of Article 3(1)(a) of the SCM Agreement shall not apply to certain Members, subject to compliance with certain conditions. Article 27.4 of the SCM Agreement provides that the provisions of Article 4 of the SCM Agreement shall not apply to export subsidies that are in conformity with Articles 27.2-27.5.

[42] E.g. Appellate Body Reports, *Brazil – Taxation*, para. 5.83.

[43] E.g. Appellate Body Reports, *Brazil – Taxation*, para. 5.84.

[44] The phrase "excluding provisions" is used by Grando, e.g. in M. Grando, "Allocating the Burden of Proof in WTO Disputes: A Critical Analysis" (2016), Vol. 9, No. 3, *Journal of International Economic Law*, p. 619. WTO adjudicators have used several terms to refer to these provisions, including "derogations", "exemptions", and "autonomous rights". (See, e.g. Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56, and *EC – Hormones*, para. 104). "Autonomous rights" appear to constitute a subcategory of excluding provisions, with the peculiar trait that they can give rise to an independent claim.

7.8. In other words, although the outcome of upholding an exception or an excluding provision is the same (i.e. the complaint fails), an exception presupposes a valid claim, to which it responds, whereas if an excluding provision applies, there is no valid claim under the provision that is excluded.

7.1.1.2 Burden of proof under excluding provisions

7.9. WTO adjudicators have often placed on complainants the burden of proof under excluding provisions.[45] Since excluding provisions do not presuppose a valid claim, but rather relate to the question of whether a valid claim has been established (necessarily by the complainant), we will do the same.

7.1.1.3 Burden of raising excluding provisions

7.10. A different[46] question from that of which party bears the burden of proof under an excluding provision is the question of which party bears the burden of raising an excluding provision.

7.11. In our view, it makes little sense to require complainants to anticipate all possible excluding provisions that might apply and then explain why, in fact, they do not apply.[47] A responding Member is best placed to know whether its measures fall under a particular excluding provision.

7.12. Therefore, we consider that the respondent bears the burden of raising excluding provisions.[48] As set out in the previous section, once the respondent has properly raised an excluding provision, the complainant will bear the burden of proof under the excluding provision, i.e. the burden of proving that the excluding provision does not apply.

7.2 Standard of proof

7.13. The standard of proof is the degree of proof that must be provided to satisfy one's burden of proof.

7.14. In WTO dispute settlement, a complainant must "establish a *prima facie* case of inconsistency with [the] provision [invoked] before the burden of showing consistency with that provision is taken on by the defending party". In this context, a "*prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[49]

7.3 Whether Article 27 of the SCM Agreement excludes India from the scope of application of Articles 3 and 4 of the SCM Agreement

7.15. The United States claims that the challenged measures are prohibited export subsidies in violation of Articles 3.1(a) and 3.2 of the SCM Agreement. Accordingly, it has sought the establishment of a panel under Article 4.4 of the SCM Agreement. India, however, submits that following its graduation from Article 27.2(a) and Annex VII(b), the prohibition in Article 3.1(a) still does not apply to its subsidy schemes, as a result of Article 27.2(b). India submits that, as a result, Article 27.7 renders the provisions of Article 4 of the SCM Agreement inapplicable to this dispute.

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[45] E.g. Appellate Body Report, *Brazil – Aircraft*, para. 141. Often, but not always: see Appellate Body Report, *EC – Tariff Preferences*, para. 113-118. The Appellate Body has made somewhat conflicting statements on whether the nature of a provision as an exception or excluding provision determines the allocation of the burden of proof. (Compare Appellate Body Reports, *EC – Tariff Preferences*, para. 88 and *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56).

[46] We discuss this question under a subheading of a section on "burden of proof" only for practical convenience.

[47] Of course, if the excluding provision also provides an autonomous basis for a claim (as is the case e.g. of Article 3.3 of the SPS Agreement), and the complainant wants to bring a *claim* on that basis, altogether different considerations apply.

[48] This is without prejudice to the possibility – indeed, the need – for a panel to examine an excluding provision on its own motion, when a failure to do so would result in a failure to conduct an objective assessment of the applicability of the relevant covered agreements, contrary to Article 11 of the DSU.

[49] Appellate Body Report, *EC – Hormones*, para. 104.

7.16. India asked the Panel to issue a preliminary ruling that the dispute could not be subject to Article 4 of the SCM Agreement unless the United States demonstrated, or the Panel otherwise found, that Article 27 of the SCM Agreement did not apply to the challenged measures.[50] At the same time, India and the United States had opposing interpretations of Article 27 of the SCM Agreement, and India argued that this disagreement went to the essence of the dispute and could only be decided by the Panel as part of the full panel proceedings.[51] In a communication dated 22 January 2019, the Panel explained that, in the circumstances of this dispute, a ruling on the applicability of Article 4 of the SCM Agreement would require a ruling on the parties' interpretive disagreement over Article 27 of the SCM Agreement.[52]

7.17. Below, we first recall the relevant provisions of Article 27.2 and Annex VII of the SCM Agreement.[53] We then summarize the parties' main arguments, before analysing the merits of the disagreement between the parties over the proper interpretation of Article 27.2(b). We then draw the consequences of our conclusion under Article 27.2(b) for the applicability of Articles 3.1(a) and 4 of the SCM Agreement.

7.18. We conclude that India does not fall under Articles 27.2 and 27.7 any longer, because it has graduated from Annex VII(b) and Article 27.2(a) of the SCM Agreement[54], and because Article 27.2(b) expired on 1 January 2003. Therefore, we find that Articles 3 and 4 of the SCM Agreement apply in the present dispute.

7.3.1 Relevant provisions

7.19. Article 27 of the SCM Agreement sets out provisions on "Special and Differential Treatment of Developing Country Members". Articles 27.2 and 27.4-27.7 concern special and differential treatment in respect of prohibited export subsidies.

7.20. Article 27.2 of the SCM Agreement provides:

> The prohibition of paragraph 1(a) of Article 3 shall not apply to:
>
> (a) developing country Members referred to in Annex VII.
>
> (b) other developing country Members for *a period of eight years from the date of entry into force of the WTO Agreement*, subject to compliance with the provisions in paragraph 4.[55]

7.21. Annex VII of the SCM Agreement, titled "Developing country Members referred to in paragraph 2(a) of Article 27", provides:

> The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:
>
> (a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

[50] India's first written submission, paras. 74-90.
[51] India's first written submission, para. 79; Communication dated 17 August 2018 from India to the Chairperson of the Panel, paras. 5-6.
[52] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 3.1-3.13.
[53] According to India, the burden of raising Article 27 and the burden of proof under this provision fall on the United States. Article 27.2 "entitle[s]" certain developing countries "to the non-application of Article 3.1(a)" as long as they comply with the relevant provisions of Article 27 (Appellate Body Report, *Brazil – Aircraft*, paras. 139-141), i.e. Article 27.2 is an excluding provision. As set out in paras. 7.10-7.12 above, we consider that, under excluding provisions, the burden of raising rests on the respondent but the burden of proof is on the complainant. As regards raising, we note that, in any event, the United States did raise this provision. As regards proof, we place the burden on the United States.
[54] A point that is undisputed between the parties.
[55] Emphasis added.

> (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 [gross national product] per capita has reached $1,000 per annum: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.[56]

7.22. The WTO Secretariat annually publishes the gross national product (GNP) per capita of the Annex VII(b) developing country Members (Annex VII(b) Members) using the three most recent years for which data are available.[57] In 2017 and in 2018, the WTO Secretariat released the calculations for the three most recent years for which data are available. According to these Notes by the Secretariat, India's GNP per capita exceeded USD 1,000 per year for the periods 2013-2015 and 2014-2016.[58]

7.3.2 Main arguments of the parties and third parties

7.23. The parties agree that India has graduated from Annex VII(b) of the SCM Agreement.[59] It is also not in dispute that Article 27.2(a) no longer excludes India from the application of the prohibition of export subsidies set forth in Article 3.1(a). The parties, however, differ on the interpretation of Article 27.2(b), that is, the meaning of the phrase "eight years from the date of entry into force of the WTO Agreement".

7.24. India argues that the eight-year period set out in Article 27.2(b) did not start, for India, on the date of entry into force of the WTO Agreement. Rather, it commenced on the date of India's graduation from Annex VII(b), thus starting in 2017 and ending in 2025.[60] India argues that a mere literal interpretation of Article 27.2(b) would render Article VII(b) ineffective or inutile, and would run contrary to the object and purpose of the SCM Agreement. India argues that Annex VII(b) and Article 27.1 are integral to the overall object and purpose of the SCM Agreement. Further, India submits that the purpose of providing special and differential treatment through Article 27 of the SCM Agreement must not be undermined and that an interpretation of Article 27.2(b) based on the ordinary meaning of its text would result in inconsistencies with Annex VII(b), Article 27.4, and Article 27.5.[61] To avoid any contradictions with these provisions, Article 27.2(b) must be interpreted so that the eight-year period starts upon Annex VII(b) graduation. Moreover, India contends that a textual interpretation of Article 27.2(b) leaves the meaning of its terms ambiguous and obscure and would lead to absurd and unreasonable results.[62] According to India, this provision must therefore be interpreted by recourse to supplementary means of interpretation according to Article 32 of the Vienna Convention and in particular the negotiating history of Annex VII(b).[63] India argues that considering the negotiating history, Article 27.2(b) grants graduating Annex VII(b) Members an additional eight-year transition period.[64]

7.25. According to the United States, the eight-year period under Article 27.2(b) ended on 1 January 2003, when eight years had passed since the entry into force of the WTO Agreement on 1 January 1995. In the United States' view, India is therefore now subject to the prohibition of export subsidies pursuant to Article 3.1(a).[65] The United States argues that the ordinary meaning of the phrase "a period of eight years from the date of entry into force of the WTO Agreement" in

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[56] Fn omitted.

[57] In the 2001 Decision of the Ministerial Conference on "Implementation-Related Issues and Concerns", Members decided that the threshold of GNP per capita of USD 1,000 per year is met when Annex VII(b) Members reach USD 1,000 in constant 1990 dollars for three consecutive years. (WTO, Ministerial Conference, Decision of 14 November 2001, WT/MIN(01)/17, para. 10.1).

[58] Committee on Subsidies and Countervailing Measures, Annex VII(b) of the Agreement on Subsidies and Countervailing Measures, G/SCM/110/Add.14 (11 July 2017); Committee on Subsidies and Countervailing Measures, Annex VII(b) of the Agreement on Subsidies and Countervailing Measures, G/SCM/110/Add.15 (20 April 2018).

[59] United States' first written submission, para. 26; India's first written submission, para. 119.

[60] India's first written submission, paras. 10 and 119.

[61] India's first written submission, paras. 155-160, 162, and 164; second written submission, paras. 14, 16, 18, 20, 23-26, and 30. See also India's request for review, para. 5, and Annex A-2, para. 2.1.

[62] India's second written submission, paras. 8 and 27.

[63] India's second written submission, para. 7.

[64] India's first written submission, paras. 166-179; second written submission, para. 33.

[65] United States' first written submission, paras. 24-26.

Article 27.2(b) is clear. Other means of interpretation, as invoked by India, cannot override that treaty text.[66]

7.26. Egypt and Sri Lanka as third parties support India's position concerning the interpretation of Article 27.2(b). Egypt argues that an interpretation of Article 27.2(b) as proposed by the United States would be "unfair" and "unreasonable" for Annex VII(b) Members and would leave those Members "unprotected".[67] Sri Lanka argues that it would not be "equitable" to treat low-income developing countries (when their GNP per capita reaches USD 1,000 per year) less favourably than higher-income developing countries, which benefited from an eight-year period at the entry into force of the WTO Agreement, when their GNP per capita already exceeded USD 1,000 per year.[68]

7.27. Brazil, Canada, the European Union, Japan, and Thailand as third parties contend that the ordinary meaning of the text of Article 27.2(b) is clear and disallows India's interpretation.[69] These third parties also disagree with India's contextual arguments concerning Annex VII(b) and Articles 27.4 and 27.5.[70]

7.3.3 Analysis

7.28. The parties agree that India has reached a GNP per capita of USD 1,000 per year and that as of 2017 India had graduated under Annex VII(b) and Article 27.2(a) of the SCM Agreement. The question is whether Article 27.2(b) now applies to India, excluding the applicability of Article 3.1(a) (and as a consequence also Article 4) of the SCM Agreement for a further eight years after graduation, as India argues, or whether instead Article 27.2(b) expired for all Members on 1 January 2003, as the United States argues.

7.29. The interpretative question for us to resolve is whether, in the case of Members graduating from Annex VII(b), the eight-year period afforded by Article 27.2(b) to developing country Members must be counted "from the date of entry into force of the WTO Agreement", or from the date of graduation from Annex VII(b).

7.30. Below, after recalling certain rules of treaty interpretation, we consider, first, the terms of Article 27.2(b), and then India's arguments concerning context (specifically, Annex VII(b), Article 27.4, and Article 27.5), and object and purpose.

7.3.3.1 Treaty interpretation

7.31. Article 3.2 DSU provides that Members recognize that the WTO dispute settlement system serves among other objectives to clarify the existing provisions of the covered Agreements "in accordance with customary rules of interpretation of public international law".[71] The customary rules of interpretation of public international law are codified, in particular, in Articles 31 and 32 of the Vienna Convention.[72]

7.32. Article 31 of the Vienna Convention sets out the "General Rule of Interpretation". Pursuant to Article 31.1 of the Vienna Convention, WTO adjudicators must interpret the covered Agreements "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Articles 31.2 and 31.3, respectively, list items that form part of "context", and other items that "shall be taken into account, together with the context".

[66] United States' second written submission, paras. 55-58 and 62-63, and fn 48.
[67] Egypt's third-party statement at the meeting of the Panel, paras. 7 and 9.
[68] Sri Lanka's third-party statement at the meeting of the Panel, p. 2.
[69] Brazil's third-party submission, paras. 14 and 15; Canada's third-party submission, paras. 6 and 9; European Union's third-party submission, paras. 5 and 9; Japan's third-party submission, para. 11; and Thailand's third-party statement at the meeting of the Panel, paras. 6 and 8.
[70] Brazil's third-party submission, paras. 16-24; European Union's third-party submission, paras. 7 and 9.
[71] Article 27.2(b) is one of "the existing provisions of the covered Agreements" as the SCM Agreement is a covered Agreement in accordance with Article 1.1 and Appendix 1 to the DSU.
[72] Appellate Body Reports, *US – Gasoline*, DSR 1996:I, pp. 15-16; *Japan – Alcoholic Beverages II*, DSR 1996:I, p. 104.

7.33. Article 31 of the Vienna Convention "is meant to assist an interpreter in ascertaining the ordinary meaning of treaty terms, reflecting the common intention of the parties to the treaty".[73] It is generally presumed that parties to a treaty were deliberate in the specific terms they used; interpretation must therefore be based "above all" on the text of the treaty.[74] From this follows also that a treaty interpreter must give meaning and effect to each term and not render redundant whole clauses or paragraphs.[75]

7.34. Moreover, the rules of treaty interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[76] Rather, "[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used".[77]

7.35. The ordinary meaning of treaty terms is not to be equated solely with dictionary meaning.[78] Instead, "[u]nder Article 31 of the Vienna Convention, the 'ordinary meaning' of treaty terms may be ascertained only in their context and in the light of the object and purpose of the treaty".[79] While it may help to organize an analysis to discuss text, context, and object and purpose in turn, it must be borne in mind that "interpretation pursuant to the customary rule codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components".[80]

7.36. Regarding the relationship between the plain textual meaning of treaty terms, on the one hand, and context, and object and purpose (and "possibly" the tools in Article 32 of the Vienna Convention), on the other, the Appellate Body has stated:

> While context is a necessary element of an interpretative analysis under Article 31 of the Vienna Convention, its role and importance in an interpretative exercise depends on the clarity of the plain textual meaning of the treaty terms. If the meaning of treaty terms is difficult to discern, determining the ordinary meaning under Article 31 may require more reliance on the context and the object and purpose of the treaty and possibly other elements considered "together with the context" and the tools mentioned in Article 32.[81]

7.37. Article 32 of the Vienna Convention provides for recourse to "[s]upplementary means of interpretation". Pursuant to Article 32, a treaty interpreter may resort to supplementary means of interpretation either to confirm the meaning resulting from the application of Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to manifestly absurd or unreasonable results. Supplementary means of interpretation include "the preparatory work of the treaty and the circumstances of its conclusion"[82], but this listing is not exhaustive.[83]

7.38. The Appellate Body has repeatedly emphasized the "holistic" nature of the interpretive exercise under the rules codified in Articles 31 and 32 of the Vienna Convention, stressing that this

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[73] Appellate Body Report, *Peru – Agricultural Products*, para. 5.93.
[74] Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:I, p. 105.
[75] See, e.g. Appellate Body Report, *US – Gasoline*, DSR 1996:I, p. 21. The principle of effectiveness in treaty interpretation is a corollary of the general rule of interpretation in the Vienna Convention. See also Appellate Body Report, *Korea – Dairy*, para. 81.
[76] Appellate Body Report, *India – Patents (US)*, para. 45.
[77] Appellate Body Report, *EC – Hormones*, para. 181.
[78] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348.
[79] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348. Object and purpose is that of the treaty as a whole. (Appellate Body Report, *EC – Chicken Cuts*, para. 238).
[80] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348.
[81] Appellate Body Report, *Peru – Agricultural Products*, para. 5.94. However, the holistic exercise under Article 31 cannot "be used to develop interpretations … that appear to subvert the common intention of the treaty parties as reflected in the text of [the provisions being interpreted]". (Ibid.)
[82] Article 32 of the Vienna Convention.
[83] Appellate Body Report, *EC – Chicken Cuts*, para. 283. The reference to the circumstances of the conclusion of a treaty "permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated". (Appellate Body Report, *EC – Computer Equipment*, para. 86).

"exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective".[84]

7.3.3.2 Interpretation of Article 27.2(b) based on ordinary meaning, context, and object and purpose

7.3.3.2.1 Article 27.2(b)

7.39. Based on the above rules of treaty interpretation, the starting point for our analysis in this case is the text of Article 27.2(b) of the SCM Agreement. Article 27.2(b) provides for a transition period of "eight years from the date of entry into force of the WTO Agreement", during which the prohibition in Article 3.1(a) "shall not apply". The WTO Agreement entered into force on 1 January 1995. Thus, "a period of eight years from the date of entry into force of the WTO Agreement" is the period running from 1 January 1995 to 1 January 2003. The text of Article 27.2(b) does not leave scope for ambiguity in respect of the end date of that transition period.[85]

7.40. India does not contest the ordinary meaning of the phrase in Article 27.2(b). Rather, it argues that in respect of Members graduating after the entry into force of the WTO Agreement, the Panel should depart from giving the terms in Article 27.2(b) their ordinary meaning and rely instead on supplementary means of interpretation pursuant to Article 32 of the Vienna Convention.[86] India justifies such departure from the text of Article 27.2(b) with arguments pertaining to context, and object and purpose of the SCM Agreement.[87] According to India, when Article 27.2(b) is read in conjunction with the context provided by Annex VII(b), Article 27.4, and Article 27.5, its interpretation "results in ambiguity or obscurity".[88] Further, according to India, the ordinary meaning of the phrase in Article 27.2(b) also runs counter to the special and differential treatment tenet of the object and purpose of the SCM Agreement.

7.41. For purposes of interpreting Article 27.2(b), we therefore turn, first, to the context provided by Annex VII(b), Article 27.4, and Article 27.5 of the SCM Agreement and, second, to the object and purpose of the SCM Agreement.

7.3.3.2.2 Annex VII(b)

7.42. India argues that a "literal interpretation" of Article 27.2(b) based on its ordinary meaning and resting on an eight-year transition period starting upon the entry into force of the WTO Agreement would:

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[84] Appellate Body Report, *US – Continued Zeroing*, para. 268. See also e.g. Appellate Body Reports, *Korea – Dairy*, para. 81; *Argentina – Footwear (EC)*, para. 81; *US – Upland Cotton*, para. 549; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 570.

[85] See also Appellate Body Report, *Brazil – Aircraft*, para. 139 ("[t]he ordinary meaning of the text of Article 27.2(b) is clear").

[86] India's first written submission, paras. 159, 164, and 166; second written submission, paras. 8, 10, 12, 19, 27, and 31; opening statement at the meeting of the Panel, paras. 15, 26, and 28; response to Panel question No. 18; and comments on the United States response to Panel question No. 21, first para. Similarly, Sri Lanka's third-party statement at the meeting of the Panel, pp. 2-3.

[87] The parties and certain third parties have also invoked the "Joint Proposal concerning the scope of Articles 27.2 and 27.4" (WTO, Negotiating Group on Rules, Amendment to Articles 27.2 and 27.4 of ASCM in relation to developing countries covered under Annex VII, Communication from the Plurinational State of Bolivia, Egypt, Honduras, India and Sri Lanka, TN/RL/GEN/177/Rev. 1 (9 March 2011), (Exhibit IND-7)) as supporting either India's or the United States' interpretative position (India's first written submission, para. 184; response to Panel question No. 20, pp. 6-8; United States' opening statement at the meeting of the Panel, para. 65; and Japan's third-party statement at the meeting of the Panel, para. 5). The Members sponsoring the Joint Proposal suggested adopting the following language as a footnote to Article 27.2(b): "[i]n the case of developing country Members included in Annex VII, the 8-year period shall commence from the year in which they graduate out of Annex VII". However, the Joint Proposal remained a *proposal* by a sub-group of Members to *amend* Articles 27.2(b) and 27.4, which has not been adopted by the WTO Membership. The purpose of treaty interpretation is to ascertain the common intention of the parties (Appellate Body Report, *EC – Computer Equipment*, para. 84), whereas unadopted negotiating proposals by some Members reflect the position of only those Members supporting the proposal.

[88] India's second written submission, para. 27.

a. render the mandatory language of Annex VII(b) ineffective[89]; and

b. treat graduating Annex VII(b) Members differently from other developing country Members.[90]

7.43. We address India's arguments in turn below.

7.44. Regarding India's first argument, India recalls that the text of Annex VII(b) mandates ("shall be subject") Article 27.2(b) to apply when Annex VII(b) Members reach the threshold of GNP per capita of USD 1,000 per year. India posits that the ordinary meaning of the terms in Article 27.2(b), limiting the transition period to eight years from the entry into force of the WTO Agreement, invalidates the mandatory language in Annex VII(b). After 1 January 2003, graduating Annex VII(b) Members would no longer be "subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27", contrary, in India's view, to what Annex VII(b) requires.

7.45. We consider that India's argument is not persuasive. India seems to conflate two distinct issues: the applicability of Article 27.2(b) and its content. Annex VII(b) regulates the *applicability* of Article 27.2(b) in respect of those developing country Members listed therein. By contrast, Article 27.2(b) sets out the *conditions* governing the entitlement to the non-application of Article 3.1(a).

7.46. The phrase in Annex VII(b) "shall be subject to the provisions" renders applicable[91] Article 27.2(b), without modifying the latter's content. The subclause "*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" qualifies the provisions made applicable.[92] This phrase indicates that Annex VII(b) Members are subject to the *same* provisions applying to other developing country Members *at the time* the cross-reference in Annex VII(b) to Article 27.2(b) operates. We therefore consider that the text of Annex VII(b) does *not* support a reading that Article 27.2(b) is made applicable with a *modified starting date* for the eight-year transition period.

7.47. We also reject India's contention that using the ordinary meaning of Article 27.2(b) in case of Annex VII(b) Members graduating late would render Annex VII(b) ineffective or redundant. As set out above, Annex VII(b) provides for a simple cross-reference to Article 27.2(b). The expiry of the transition period in Article 27.2(b) does not render ineffective or redundant this cross-reference: the substance of the cross-reference is determined by the content of the provision referred to. Developing country Members in Annex VII(b), in the event of graduation before 1 January 2003, still enjoyed a transition period that in no case would have been less than the eight-year transition period until 1 January 2003 pursuant to Article 27.2(b). The possibility that Members graduating from Annex VII(b) no longer benefit from an additional transition period under Article 27.2(b) is inherent in the reference by Annex VII(b) to a provision that contains a time-limited transition period.

7.48. In light of the above, rather than rendering Annex VII(b) ineffective, an eight-year transition period from the date of entry into force of the WTO Agreement is precisely what Annex VII(b) envisages by stipulating that the listed Members "shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27".

7.49. India's second argument relates to graduating Annex VII(b) Members not being granted the same full eight-year transition period to phase out their export subsidies that other developing country Members are afforded pursuant to Article 27.2(b). India submits that graduating Annex VII(b) Members would thus have less or no time to phase out their export subsidies, although Annex VII(b) seeks to grant additional special and differential treatment.[93] In the same vein, certain third parties contend that the less developed Annex VII(b) Members should not be treated less

[89] India's first written submission, paras. 157-160; second written submission, para. 18; opening statement at the meeting of the Panel, para. 15; and response to Panel question No. 18, pp. 3-4.
[90] India's second written submission, paras. 16 and 18; opening statement at the meeting of the Panel, para. 15; and response to Panel question No. 18, pp. 2-3.
[91] The application of Article 27.2(b) is triggered by meeting the GNP per capita threshold.
[92] Emphases added.
[93] India's first written submission, paras. 157-160; second written submission, para. 18.

favourably than other more advanced developing countries which did not fall under Annex VII(b) in the first place and yet could avail themselves of an eight-year transition period.[94]

7.50. Article 27.2 and Annex VII provide for special and differential treatment and establish different degrees of flexibility in excluding developing country Members from the application of the prohibition of export subsidies under Article 3.1(a). The flexibilities differ between three categories of Members in respect of the period during which the prohibition in Article 3.1(a) "shall not apply", i.e. the transition period. First, for developing country Members in general, Article 27.2(b) stipulates a transition period of eight years from the entry into force of the WTO Agreement. During this period, the first sentence of Article 27.4 imposes a progressive phase-out obligation on developing country Members referred to in Article 27.2(b). Second, for least developed country Members, Article 27.2(a) in connection with Annex VII(a) provides that the prohibition in Article 3.1(a) shall not apply as long as the Members in question are designated as least developed countries by the United Nations. Third, for the developing country Members listed in Annex VII(b), Article 27.2(a) in connection with Annex VII(b) provides for a transition period that lasts as long as these Members remain below the relevant threshold, even *after* the eight-year period available to the first category of Members referred to above.

7.51. Under this scheme of different flexibilities, we consider that a literal interpretation of Article 27.2(b) in respect of graduating Annex VII(b) Members does not reduce the additional flexibilities afforded by Annex VII(b). First, such literal interpretation does not affect the additional, and more favourable, flexibility of a transition period that lasts as long as GNP remains below the relevant threshold, irrespective of a strict deadline, and without an additional phase-out obligation. Second, beyond this additional flexibility, Annex VII(b), through its express cross-reference to Article 27.2(b), ensures that graduating Members have at least the *same* flexibility as the other developing country Members, namely "a period of eight years from the date of entry into force of the WTO Agreement".

7.52. Based on the above, we consider that Annex VII(b) does not provide a basis for departing from the text of Article 27.2(b) in respect of graduating Annex VII(b) Members. In particular, a textual interpretation of Article 27.2(b) neither renders Annex VII(b) ineffective, nor results in an interpretation that is ambiguous, obscure, absurd, or unreasonable. To the contrary, it allows for a harmonious application of both provisions.

7.53. Members graduating from Annex VII(b) after 1 January 2003 are also not required to eliminate export subsidies without prior notice. Graduation does not come as a surprise "overnight".[95] In fact, in the 2001 Decision of the Ministerial Conference on "Implementation-Related Issues and Concerns", Members agreed that Annex VII(b) graduation would depend on reaching the threshold of GNP per capita of USD 1,000 per year in constant 1990 US dollars *for three consecutive years*.[96]

7.3.3.2.3 Article 27.4

7.54. India relies on the fact that the first sentence of Article 27.4 refers to an eight-year period without qualifying this period as commencing on the date of entry into force of the WTO Agreement. India argues that Article 27.4 therefore allows Members graduating from Annex VII(b) after the entry into force of the WTO Agreement to benefit from an eight-year transition period that begins when they graduate. It follows, according to India, that Article 27.4 requires interpreting Article 27.2(b) harmoniously in favour of an eight-year transition period upon Annex VII(b) graduation.[97] In India's view, Article 27.4 also leads to the conclusion that the text of Article 27.2(b) results in internal contradictions and is ambiguous and obscure, thus necessitating recourse to supplementary means of interpretation.

[94] Egypt's third-party statement at the meeting of the Panel, paras. 6-7; Sri Lanka's third-party statement at the meeting of the Panel, pp. 2-3.
[95] India's first written submission, paras. 177 and 186-187.
[96] WTO, Ministerial Conference Decision of 14 November 2001, WT/MIN(01)/17, para. 10.1.
[97] India's first written submission, para. 162; opening statement at the meeting of the Panel, para. 17.

7.55. The first sentence of Article 27.4 provides:

> Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within *the* eight-year period, preferably in a progressive manner.[98]

7.56. We disagree with India's argument that the eight-year period in Article 27.4 does not start from the entry into force of the WTO Agreement and that the phrase "from the date of entry into force of the WTO Agreement" in Article 27.2(b) cannot be read into Article 27.4.[99] Rather, for the following reasons, we consider that the first sentence of Article 27.4 must be read as referring to the period of eight years from the date of entry into force of the WTO Agreement stipulated in Article 27.2(b).[100]

7.57. First, the first sentence of Article 27.4 expressly connects with Article 27.2(b) through the reference to "any developing country Member referred to in paragraph 2(b)". Second, having made this connection in respect of the same developing country Members, the first sentence of Article 27.4 then refers to phasing out export subsidies within "the eight-year period". The use of the definite article "the" demonstrates that Article 27.4 refers to a particular or already specified eight-year period. This period is defined in Article 27.2(b) to which Article 27.4 refers. Third, we find support for this reading of Article 27.4 in the fact that this provision serves to qualify the obligation on Members during the Article 27.2(b) transition period.[101] During this period, developing country Members are not, without more, entitled to the non-application of Article 3.1(a). The entitlement to the transition period in Article 27.2(b) is made "subject to compliance with the provisions in paragraph 4". Those Members shall (preferably in a progressive manner) phase out their export subsidies as provided in Article 27.4.

7.58. It follows that while Article 27.2(b) establishes an eight-year transition period from Article 3.1(a), the first sentence of Article 27.4 does not establish a separate and independent phase-out period. Rather, it imposes an additional phase-out obligation *during* the Article 27.2(b) period.[102] Article 27.2(b) and the first sentence of Article 27.4 refer to the same transition period of eight years starting on the date of entry into force of the WTO Agreement.

7.59. We therefore deny India's request to depart from the text of Article 27.2(b) because of Article 27.4. Instead, we conclude that the text of these provisions ensures the provisions operate harmoniously. For the same reason, we also reject India's proposition that, based on Article 27.4, the text of Article 27.2(b) can be characterized as ambiguous, obscure, absurd, or unreasonable.

7.3.3.2.4 Article 27.5

7.60. India argues that a textual interpretation of Article 27.2(b) would lead to inconsistency with Article 27.5 and render the latter inutile and ineffective. More specifically, India invokes an "internal contradiction"[103] that arises, according to India, because of separate phase-out timelines between export subsidies for products that reach export competitiveness pursuant to Article 27.5 and all other export subsidies under Article 27.2(b).

7.61. India notes that under the second sentence of Article 27.5, an Annex VII Member has eight years to phase out export subsidies for products in which it has reached export competitiveness. India contrasts this with an interpretation of Article 27.2(b) which does not provide for an additional eight-year transition period after graduation from Annex VII(b). According to India, the result would be that, on graduating from Annex VII, a Member would be required to eliminate

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[98] Emphasis added.
[99] India's second written submission, para. 20.
[100] See also United States' second written submission, paras. 37 and 60; Brazil's third-party submission, para. 21; European Union's third-party submission, paras. 3-9; and Canada's third-party statement at the meeting of the Panel, para. 4.
[101] Brazil's third-party submission, para. 20.
[102] Panel Report, *Brazil – Aircraft*, para. 7.55; Appellate Body Report, *Brazil – Aircraft*, para. 140.
[103] India's second written submission, paras. 22 and 25.

all export subsidies but at the same time would be allowed eight years to phase out export subsidies for products for which it has reached export competitiveness.[104]

7.62. We disagree with India's premise that the eight-year phase-out period in the second sentence of Article 27.5 survives graduation. The second sentence of Article 27.5 applies to developing country Members "referred to in Annex VII". On graduating, a Member ceases to be one "referred to in Annex VII", and the second sentence of Article 27.5 is no longer available to it.

7.63. In other words, Article 27.5 does not extend the transition period set forth in Article 27.2. Its phase-out timelines and requirements operate within the framework of that transition period, and in fact limit on a product-specific basis the scope of the exclusion from Article 3.1(a) granted in Articles 27.2(a) and (b). Article 27.5 therefore qualifies the scope of the special and differential treatment conferred by Article 27.2; it does not grant an additional or extended exclusion from Article 3.1(a).[105] This mechanism is similar to the operation of the phase-out requirement in the first sentence of Article 27.4.[106]

7.64. As a result, the alleged internal contradiction is based on a misreading of Article 27.5. We therefore conclude that interpreting Article 27.2(b) using the ordinary meaning of its terms does not, in light of Article 27.5, lead to ambiguous, obscure, absurd, or unreasonable results.

7.3.3.2.5 Object and purpose

7.65. India appears to argue that interpreting the terms of Article 27.2(b) according to their ordinary meaning would undermine the object and purpose of providing special and differential treatment and of recognizing the economic development needs of developing country Members.[107]

7.66. As set forth in Article 31.1 of the Vienna Convention, the object and purpose of a treaty, as a whole[108], is relevant in determining the meaning of its provisions.[109] 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".[110] Part of this balance is to grant developing country Members special and differential treatment.[111] This emerges in particular from Article 27.1, which provides that "Members recognize that subsidies may play an important role in economic development programmes of developing country Members".[112]

7.67. Part VIII of the SCM Agreement, devoted to "Developing Country Members", consists of Article 27, entitled "Special and Differential Treatment of Developing Country Members". Article 27 "makes operational"[113] the principle of special and differential treatment in the context of the WTO rules on subsidies and countervailing measures. It "provide[s]"[114] special and differential treatment for developing country Members under certain specified conditions. Articles 27.2 to 27.7 and Annex VII, in particular, provide for special and differential treatment in respect of the prohibited export subsidy disciplines. It is therefore difficult to see how, in India's view, the text of Article 27.2(b) "would run contrary to the object and purpose of Part VIII of the SCM Agreement".[115] Rather, it reflects part of a delicate balance, struck by the drafters, between constraining certain

[104] India's first written submission, para. 164; second written submission, paras. 23-26; and opening statement at the meeting of the Panel, paras. 21-24.

[105] See also Brazil's third-party submission, paras. 23-24; and Japan's third-party statement at the meeting of the Panel, para. 10.

[106] The first sentence of Article 27.4 equally does not establish a phase-out period that is separate and independent from the transition period in Article 27.2(b). See para. 7.57 above.

[107] See, e.g. India's first written submission, paras. 151, 163, and 183; opening statement at the meeting of the Panel, paras. 6 and 16; and response to Panel question No. 18, p. 5.

[108] Appellate Body Report, *EC – Chicken Cuts*, para. 238.

[109] Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:I, fn 20.

[110] Appellate Body Report, *US – Softwood Lumber IV*, para. 64. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 301.

[111] Panel Report, *Indonesia – Autos*, para 5.194.

[112] The preamble to the WTO Agreement also recognizes "[the] need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".

[113] Panel Report, *Canada – Aircraft (Article 21.5 – Brazil)*, fn 120.

[114] Appellate Body Report, *Brazil – Aircraft*, para. 140.

[115] India's second written submission, para. 10.

types of subsidies on the one hand and providing special and differential treatment through clear and unambiguous time-bound flexibilities on the other hand. A literal interpretation of Article 27.2(b) is thus in line with, and gives effect to, the purpose of furthering special and differential treatment for developing country Members.

7.68. We therefore take the view that considering the object and purpose of the SCM Agreement does not require a departure from the ordinary meaning of Article 27.2(b).

7.3.3.2.6 Conclusion

7.69. Based on the above, we find that the terms of Article 27.2(b) in the context of the SCM Agreement and in light of its object and purpose do not lead to conclude otherwise than that the eight-year transition period in Article 27.2(b) runs from 1 January 1995. In fact, a reading of Article 27.2(b) as referring to eight years from 1 January 1995 sits harmoniously with its context and with the object and purpose of the SCM Agreement.

7.3.3.3 Supplementary means of interpretation

7.70. Article 32 of the Vienna Convention allows recourse to supplementary means of interpretation either "to confirm the meaning resulting from the application of article 31" of the Vienna Convention or, when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to manifestly absurd or unreasonable results, "to determine the meaning".

7.71. India argues that the plain text of Article 27.2(b), when viewed in light of Annex VII(b) and Articles 27.4 and 27.5, results in ambiguity, obscurity, absurdity, and unreasonableness.[116] India submits that the Panel must therefore depart from the text of Article 27.2(b) and rely on supplementary means of interpretation according to Article 32 of the Vienna Convention in order to read Article 27.2(b) as entitling graduating Annex VII(b) Members to an eight-year transition period upon their graduation.[117]

7.72. Above, we found that a textual interpretation of the terms in Article 27.2(b) does not leave their meaning ambiguous or obscure, or lead to manifestly absurd or unreasonable results. To the contrary, the meaning of Article 27.2(b) is clear and unambiguous and its textual interpretation does not result in internal contradictions with Annex VII(b), Article 27.4, or Article 27.5. On this basis, we disagree with India on the need in this case to resort to supplementary means of interpretation because of alleged ambiguity, obscurity, absurdity, and unreasonableness resulting from the interpretation according to Article 31 of the Vienna Convention.

7.73. Article 32 of the Vienna Convention also allows us to have recourse to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31. However, in light of the clear meaning of Article 27.2(b), we do not consider it necessary in this case to have recourse to supplementary means of interpretation.[118]

7.3.3.4 Conclusion on Article 27.2 and Article 3.1(a) of the SCM Agreement

7.74. It is an undisputed fact that India has graduated from Annex VII(b). The text of Article 27.2(b), in its context and in light of the object and purpose of the SCM Agreement, leads us to conclude that the eight-year transition period from the date of entry into force of the WTO Agreement set forth in Article 27.2(b) has expired on 1 January 2003, also for Members graduating from Annex VII(b). Therefore, we find that Article 27 no longer excludes India from the application of Article 3.1(a) of the SCM Agreement.

[116] India's first written submission, para. 166; second written submission, paras. 10, 27, and 30-31.
[117] India's second written submission, paras. 12, 27, and 31.
[118] See also Annex A-2, paras. 2.19-2.28.

7.3.3.5 Conclusion on Article 4 of the SCM Agreement

7.75. Article 27.7 of the SCM Agreement excludes from the application of Article 4 of the SCM Agreement "a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 to 5" of Article 27.

7.76. As set out above, India has graduated from Annex VII to the SCM Agreement, and the transition period in Article 27.2(b) has expired. Therefore, the exclusion set out in Article 27.7 does not operate and, as a result, Article 4 of the SCM Agreement applies to this dispute.

7.4 Statement of available evidence

7.77. India asked the Panel to rule that the statement of available evidence included in the United States' request for consultations does not meet the requirements of Article 4.2 of the SCM Agreement.[119] India argues that the statement fails to provide any evidence of the character of the measures as subsidies, and merely reproduces the list of legal instruments appearing in the request for consultations and subsequently in the panel request.

7.78. We discuss, first, the legal standard under Article 4.2 of the SCM Agreement (section 7.4.1) and, second, the application of that legal standard to the statement of available evidence, in light of the arguments of the parties (section 7.4.2). As set out below, we find that the statement of available evidence contained in the United States' request for consultations meets the standard set out in Article 4.2 of the SCM Agreement.

7.4.1 The applicable legal standard under Article 4.2 of the SCM Agreement

7.79. Article 4.2 of the SCM Agreement is a special or additional rule listed in Appendix 2 to the DSU, applying to disputes involving allegations of prohibited subsidies under Article 3 of the SCM Agreement. Pursuant to Article 1.2 of the DSU, such special or additional rules apply together with the DSU, except that, to the extent there is a conflict, the special or additional rules prevail.[120]

7.80. Article 4.2 of the SCM Agreement provides:

> A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

7.81. Thus, a complainant in a prohibited subsidies case must "indicate, in its request for consultations, the evidence that it has available to it, at that time, 'with regard to the existence and nature of the subsidy in question'".[121] This must be "available evidence of the character of the measure as a 'subsidy' ... and not merely evidence of the existence of the measure".[122]

7.82. In *Australia – Automotive Leather II*, the panel interpreted the requirement for a "statement of available evidence" in Article 4.2 as meaning that the complainant must include in its request for consultations:

> [A]n expression in words of the facts at its disposal at the time it requests consultations in support of the conclusion that it has, in the words of Article 4.1, "reason to believe that a prohibited subsidy is being granted or maintained".[123]

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[119] India's first written submission, paras. 16-18; see also DSB, Minutes of the meeting held on 28 May 2018, WT/DSB/M/413, para. 7.3, reporting India's concerns that the request for consultations failed to meet the requirements of the SCM Agreement, as well as of the DSU. The Panel declined the request for a ruling at preliminary stage. (Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 4.1-4.8).
[120] Appellate Body Report, *Guatemala – Cement I*, para. 65.
[121] Appellate Body Report, *US – FSC*, para. 161.
[122] Appellate Body Report, *US – FSC*, para. 161.
[123] Panel Report, *Australia – Automotive Leather II*, para. 9.19.

7.83. Further, "the requirement is to provide a 'statement' of the evidence and not the evidence itself"[124], nor "disclosure of arguments".[125]

7.84. The Appellate Body has emphasized the importance of the requirement in Article 4.2 of the *SCM Agreement* to provide a statement of available evidence, given the "accelerated timeframes for disputes" under Article 4 and the "complex factual questions" that these disputes raise.[126] It has underlined that this requirement is "distinct from – and not satisfied by compliance with – the requirements of Article 4.4 of the DSU".[127] In other words, it is additional to "giving the reasons for the request for consultations and identifying the measure and the legal basis for the complaint under Article 4.4 of the DSU".[128]

7.85. At the same time, the statement "is the *starting point* for consultations, and for the emergence of more evidence concerning the measures by reason of the clarification of the 'situation'".[129] The statement "informs the beginning of the dispute settlement process", and "does not limit the scope of evidence and argument for the entire proceeding".[130] As a result, in assessing the sufficiency of the statement, which must be done "on a case by case basis"[131], it is "important to bear in mind that the requirement to submit a statement of available evidence applies in the earliest stages of WTO dispute settlement".[132]

7.4.2 Whether the statement of available evidence meets the requirements of Article 4.2 of the SCM Agreement

7.86. In the present case, the United States' statement of available evidence lists: all the legal instruments listed in the body of the request for consultations, and subsequently in the panel request[133]; and two publications of the Ministry of Commerce and Industry of India, namely (a) "Highlights of the Foreign Trade Policy 2015-2020 Mid Term Review (5 December 2017)" (the Highlights); and (b) an accompanying press release entitled "Release of the Mid-Term Review of Foreign Trade Policy 2015-2020 – Annual Incentives Increased by 2% amounting to over Rs 8,000 crore for Labour Intensive/MSME sectors (5 December 2017)" (the Press Release).[134]

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[124] Appellate Body Report, *US – Upland Cotton*, para. 308.
[125] Panel Report, *Australia – Automotive Leather II*, para. 9.18.
[126] Appellate Body Report, *US – FSC*, para. 160.
[127] Appellate Body Report, *US – FSC*, para. 161.
[128] Appellate Body Report, *US – FSC*, para. 161.
[129] Appellate Body Report, *US – Upland Cotton*, para. 308 (referring to Panel Report, *US – Upland Cotton*, para. 7.100). (emphasis added)
[130] Panel Report, *Australia – Automotive Leather II*, para. 9.29. See also ibid. para. 9.27. Also, Article 4.2 of the SCM Agreement "does not, on its face, require disclosure of arguments". (Ibid. para. 9.18).
[131] Appellate Body Report, *US – Upland Cotton*, para. 308.
[132] Appellate Body Report, *US – Upland Cotton*, para. 308 (referring to Panel Report, *Australia – Automotive Leather II*, para. 9.19).
[133] These are Instruments Nos. 1-27 in the panel request, discussed in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), section 2.3.1 and annex A. The numbering of the same legal instruments in the body of the two requests and in the statement of available evidence, while overlapping in part, is not the same. The Panel therefore refers to "Instruments", with the corresponding numbering, when referring to the panel request and to the body of the request for consultations; and to "Items", with the corresponding numbering, when referring to the statement of available evidence submitted together with the request for consultations.

A number of these Instruments/Items were also submitted as exhibits by the parties. For those that were not also submitted (or not submitted in their entirety) as exhibits, with a communication dated 15 July 2019, the Panel transmitted to the parties the electronic files it downloaded from the web pages listed in its Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), annex A, at the date of access stated therein. On 19 July 2019, the United States submitted versions of these documents as Exhibits USA-74 to USA-84. On 26 July 2019, India submitted a replacement version of Exhibit USA-84 (Exhibit IND-23).
[134] Request for consultations, p. 4 (statement of available evidence). SAE Item 1 and SAE Item 2 in Communication dated 15 July 2019 from the Panel to the parties relating to the keeping of the record of the Panel. The Panel located these documents at: https://www.eoimadrid.gov.in/archives/documents/whatsnews/fthl17-051217.pdf and http://pib.nic.in/newsite/PrintRelease.aspx?relid=174117, respectively (both accessed on 28 November 2018).

7.87. India argues that this statement falls short of the requirements of Article 4.2 of the SCM Agreement.[135] Specifically, India argues that the statement (a) includes no evidence of the character of the measure as a subsidy[136]; (b) "reproduces a verbatim list" of the legal instruments cited in the request for consultations[137]; and (c) provides no "basis for the[] identified programmes/schemes providing a subsidy" because it does "not indicate any specific chapter or paragraph" of the cited legal instruments.[138] In addition, India considers that the lack of "substantive difference" between the request for consultations and the panel request is further evidence of the United States' failure to appreciate the substantive standard in Article 4.2 of the SCM Agreement.[139]

7.88. The United States responds that India confuses evidence with arguments.[140] Article 4.2 requires a statement of the former, not the latter.[141] The United States considers that it has demonstrated in its first written submission that the cited evidence "is indeed evidence regarding the existence and nature of the subsid[y] in question".[142] Specifically, the statement "identified twenty-five separate legal instruments that gave the United States reason to believe that there are five Indian export subsidy programs that are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement", and that "are the primary evidentiary basis for the U.S. claims".[143]

7.89. We now turn to consider the items in the statement of available evidence in light of the legal standard and the arguments of the parties.

7.90. Item No. 1 in the statement of available evidence consists of the Highlights of the Foreign Trade Policy (FTP) mid-term review, issued by the Government of India in December 2017.[144] This document describes some of the changes made to the FTP as part of the mid-term review, and refers in particular to the first, second, and third schemes[145] listed in the request for consultations, i.e. the EOU and Sector-Specific Schemes, MEIS, and the EPCG Scheme, respectively.

7.91. Regarding MEIS, the Highlights note that it "is a major export promotion scheme which seeks to promote export of notified goods manufactured/produced in India"; that "MEIS incentives are available at 2, 3, 4 and 5% of the [free on board] value of exports"; and that incentives in two textiles sub-sectors, as well as "for exports by MSMEs / labour intensive industries" have been increased, involving additional outlays of "Rs. 2743 Crore" and "Rs. 4567 Crore", respectively.[146] It further notes that the validity of scrips under MEIS has been extended by six months and the tax

The first of the two links has since stopped working, and the corresponding document can now be accessed at: https://www.eoimadrid.gov.in/pdf/fthl17-051217.pdf (accessed on 24 June 2019).

With a communication dated 15 July 2019, the Panel transmitted to the parties the electronic files it downloaded on 28 November 2018 from the first two web pages listed above. On 19 July 2019, the United States submitted these documents as Exhibits USA-85 and USA-86.

[135] India's first written submission, paras. 16-18. India also expressed concerns that the request for consultations failed to meet the requirements of the SCM Agreement (and of the DSU) at the DSB meeting at which the Panel was established. DSB, Minutes of the meeting held on 28 May 2018, WT/DSB/M/413, para. 7.3.

[136] India's first written submission, paras. 96 and 100. See also India's opening statement at the meeting of the Panel, paras. 33-34; and closing statement at the meeting of the Panel, para. 7.

[137] India's first written submission, paras. 95 and 97. See also India's response to Panel question No. 26, fourth para.

[138] India's first written submission, para. 101. See also India's responses to Panel question No. 26, fifth para., and No. 27, first para.

[139] India's first written submission, paras. 102-103. See also India's opening statement at the meeting of the Panel, para. 35.

[140] United States' second written submission, paras. 41-43.

[141] United States' second written submission, paras. 42-43 (referring to Panel Report, *Australia – Automotive Leather II*, para. 9.18).

[142] United States' second written submission, para. 41. See also, ibid. para. 44.

[143] United States' second written submission, para. 44.

[144] See fn 134 above.

[145] These are sometimes referred to as "programmes" and sometimes as "schemes". The two terms are used interchangeably in this context. In the body of this report, we have chosen to refer to them only as "schemes". We note however that in our Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), we used the term "programme". The same considerations also apply to the fourth and fifth schemes, discussed further below.

[146] Highlights, p. 4.

rate for their transfer reduced to zero[147]; and more generally that the "[s]cope and incentives as a percentage of exports under … MEIS … [have been] enhanced".[148] Regarding the EOU and Sector-Specific Schemes, MEIS and EPCG Scheme, the Highlights state that these are "continued".[149]

7.92. Item No. 2 in the statement of available evidence is a press release that accompanied the release of the FTP mid-term review. This press release explains, among other things, that "[t]he FTP will focus on exports from labour intensive and MSME sectors by way of increased incentives in order to increase employment opportunities"[150], and that "[w]hile restoring the benefits under the export promotion schemes of duty free imports under Advanced Authorisation, Export Promotion Capital Goods and 100 percent Export Oriented Units … the FTP review has focused on increasing the incentives for labour intensive MSME sectors".[151] It then goes on to describe, like the Highlights, the specific increases in the rate of incentives and the resulting additional outlays, as well as providing a breakdown by sector of some of the resulting incentives.[152]

7.93. Item No. 3 in the statement of available evidence is the FTP, which is the same as Instrument No. 1 in the request for consultations and in the panel request.[153]

7.94. Chapter 6 of Item No. 3 relates to the EOU and Sector-Specific Schemes. Section 6.00 of the FTP describes the units that may benefit from these schemes, as follows: "[u]nits undertaking to export their entire production of goods and services (except permissible sales in DTA [domestic tariff area])". Sections 6.01, 6.11, and 6.12 set forth exemptions from duties and taxes for import or procurement of goods, as well as other entitlements of units under the EOU and Sector-Specific Schemes.

7.95. Chapter 3 of Item No. 3 relates to MEIS. Section 3.02 of the FTP, on "Nature of Rewards", explains that "[d]uty credit scrips shall be granted as rewards under MEIS" and "shall be freely transferable", and goes on to describe the three types of uses to which these duty scrips can be put, i.e. payment of customs duties on certain goods, payment of excise on certain goods, and payment of certain other dues such as for shortfalls in export obligation. Section 3.04 of the FTP, on "Entitlement under MEIS", explains that "[e]xports of [certain goods to certain markets] shall be rewarded under MEIS"; that the "basis of calculation of reward" is "FOB value of exports"; and that certain "exports categories / sectors" are ineligible. The relevant goods and markets for purposes of Section 3.04 are set out in Item No. 8 of the statement of available evidence (Instrument No. 7 in the request for consultations and the panel request), as amended by Items No. 9-16 (Instruments No. 8-15 in the request for consultations and the panel request).

7.96. Chapter 5 of Item No. 3 relates to the EPCG Scheme. Section 5.01 of the FTP explains that this scheme: "allows import of capital goods … at zero customs duty"; allows for exemption from certain other taxes; and in some cases allows for advantages also in connection with the procurement of capital goods "from indigenous sources". Section 5.01 also provides that "[i]mport under EPCG Scheme shall be subject to an export obligation". Section 5.04 sets out the conditions applying to the fulfilment of this export obligation. As a general rule, it provides that the export obligation "shall be fulfilled by the authorisation holder through export of goods which are manufactured by him or his supporting manufacturer / services rendered by him, for which the EPCG authorization has been granted".[154] It further provides that the 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 within the overall [export obligation] period", with some exceptions.[155]

[147] Highlights, p. 5.
[148] Highlights, p. 12.
[149] Highlights, p. 13.
[150] Press Release, p. 1.
[151] Press Release, p. 1.
[152] Press Release, p. 2.
[153] See fn 133 above, and Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.27-2.36, 2.56-2.59, and 2.69-2.70.
[154] Subsection 5.04(a) of the Foreign Trade Policy, (Exhibit USA-3).
[155] Subsection 5.04(b) of the FTP.

7.97. Items Nos. 4-20, which correspond to Instruments Nos. 2-5, 7-15, and 17-20 in the request for consultations and in the panel request[156], set out details for the operation of the EOU and Sector-Specific Schemes, MEIS and EPCG Scheme, amendments to those schemes and, in the case of MEIS, the goods and markets of export that give rise to rewards under the scheme.

7.98. Items Nos. 21-26, which correspond to Instruments Nos. 21-26 in the request for consultations and in the panel request, relate to the fourth scheme listed in the request for consultations, i.e. the SEZ Scheme. In particular, Chapter VI of Item No. 21 (the Special Economic Zones Act (SEZ Act)) sets out "Special fiscal provisions for special economic zones", applying to developers and entrepreneurs for "authorised operations" under the Act.[157] It provides for exemptions from customs duties and other taxes that would otherwise be due under the 1962 Customs Act, the 1975 Customs Tariff Act, the 1944 Central Excise Act, the 1985 Central Excise Tariff Act, the 1956 Central Sales Tax Act, and other legislation.[158] It further provides that the 1961 Income Tax Act applies to developers and entrepreneurs for authorised operations "subject to … modifications" set out in Item No. 21, that is, it provides that special rules on income tax apply to Special Economic Zones[159]; these provisions are also reflected in Item No. 26, the 1961 Income Tax Act.

7.99. Item No. 22 (the Special Economic Zones Rules (SEZ Rules)) details the conditions subject to which entrepreneurs and developers are entitled to exemptions, drawbacks, and concessions. Among other conditions, it requires "positive net foreign exchange earning" as a condition for approving a Unit in an SEZ[160], and as a commitment that every developer and entrepreneur must undertake to be entitled to exemptions, drawbacks, and concessions.[161] In extreme summary, the positive net foreign exchange (NFE) earning requires the free on board (FOB) value of exports to exceed the cost insurance freight (CIF) value of imports during specified time periods; Item No. 22 provides a detailed definition of this requirement.[162]

7.100. Items Nos. 23 and 24 are amendments to Item No. 22. Item No. 25 provides that all goods or services imported by a developer or entrepreneur in an SEZ are exempt from the integrated tax that would otherwise be due on them under the 1975 Customs Tariff Act.

7.101. Item No. 27 relates to the fifth scheme listed in the request for consultations, i.e. DFIS. Specifically, it is the only legal instrument listed in the request for consultations as reflecting that scheme. It sets forth exemptions from or reductions to customs duties on the importation of certain goods, subject to certain conditions.[163]

7.102. The United States' request for consultations singled out nine conditions, as did, subsequently, the panel request. These nine conditions provide that the value of the imports benefiting from the duty exemptions or reductions is capped at a certain percentage (ranging from 1% to 25%, depending on the condition) of the value of exports during the preceding financial year.[164] Six of these nine conditions also require that the imported goods be used in the manufacture of goods for export.[165]

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[156] See fn 133 above and Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.37, 2.60, 2.71 (for Instrument No. 2), 2.38-2.39, 2.61, 2.72 (for Instrument No. 3), 2.40, 2.62, 2.73 (for Instruments Nos. 4 and 5), 2.63 (for Instruments Nos. 7-15), 2.74 (for Instrument No. 17), 2.75 (for Instrument No. 18), 2.76 (for Instrument No. 19), and 2.77 (for Instrument No. 20).

[157] Subsection 26(1)(a) of the Special Economic Zones Act, (Exhibit USA-22).

[158] Section 26 of the SEZ Act.

[159] Section 27 and Second Schedule of the SEZ Act.

[160] Subsection 18(2)(i) of the Special Economic Zones Rules, (Exhibit USA-28).

[161] Rule 22(1)(i) of the SEZ Rules.

[162] Rule 53 of the SEZ Rules.

[163] Notification No. 50/2017, (Exhibit USA-36), p. 1.

[164] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.104-2.107.

[165] These are Conditions Nos. 10, 21, 28, 32, 33, and 101. (Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.104-2.107).

7.103. We now turn to the question whether the list of items just described is a "statement of available evidence with regard to the existence and nature of the subsidy in question", in light of India's arguments.[166] To recall, India's first argument is that the request for consultations includes no evidence of the character of the measure as a subsidy, as is required by Article 4.2 of the SCM Agreement.[167]

7.104. As set out above, the items listed in the statement of available evidence describe, at least: an exemption from taxes, or the granting by the government of freely transferable "scrips" to be used to satisfy certain liabilities; and conditions for obtaining these exemptions and scrips, which, in each case, include some requirement to export. Most of the listed items are legislation or implementing regulations promulgated by India.

7.105. In this way, the listed items evidence the possible existence of a foregoing of government revenue, and of the government's granting of instruments, called "scrips", that can be used to satisfy liabilities *vis-à-vis* the government. Further, since the listed items provide for (a) exemptions from otherwise applicable duties and taxes; and (b) transferable instruments that may be used to satisfy obligations to pay customs duties, excise, and other dues, they also evidence the possible existence of a benefit, and thus a possible subsidy within the meaning of Article 1 of the SCM Agreement.[168] This evidence therefore relates not only to the existence of the possible subsidy but also to its nature as a subsidy.

7.106. Moreover, because they set out conditions for benefiting from the tax exemptions or from the award of scrips that include requirements to export, the listed items also evidence the possible export contingency of the measures in question, within the meaning of Article 3.1(a) of the SCM Agreement. This evidence therefore relates also to the nature of the possible subsidy as a prohibited export subsidy.

7.107. As a result, we consider that the statement indicates available evidence both of the *existence* of the possible subsidies and of their *nature* as possible subsidies and, indeed, as possible export-contingent subsidies. We therefore disagree with India's position that the statement of available evidence relates to the existence of the measure but not to its character as a subsidy.[169]

7.108. We now turn to consider India's second argument, namely, that the statement is insufficient because it reproduces "verbatim" the list of legal instruments provided to satisfy the requirement to identify the measures under Article 4.4 of the DSU.[170]

7.109. As India argues, the requirements in Article 4.2 of the SCM Agreement are additional to those in Article 4.4 of the DSU, and not satisfied by compliance with the latter requirements.[171] In this case, 25 of the 27 items of evidence in the statement of available evidence are legal instruments cited in the United States' request for consultations to identify the measures. The United States argues that these legal instruments "are the primary evidentiary basis for the U.S. claims"[172], and the Panel has ascertained, as set out above, that these legal instruments are evidence relating both to the existence and nature of the measures as subsidies.

7.110. This factual situation raises the question whether the near-identity between the request for consultations and the statement of available evidence included in it demonstrates, in itself, the insufficiency of the statement of available evidence.

7.111. Article 4.2 of the SCM Agreement requires a request for consultations to "include a statement of available evidence with regard to the existence and nature of the subsidy in question".

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[166] India's objections to the statement of available evidence do not appear to relate to existence: see e.g. India's first written submission, para. 96 ("merely demonstrating the existence of a measure … does not satisfy the mandate to evidence 'character'").

[167] See para. 7.87 above; and India's first written submission, paras. 96 and 100.

[168] The Panel refers to a "possible" subsidy because whether the challenged measures are ultimately found to be a subsidy is a different and further enquiry.

[169] See para. 7.87 above; and India's first written submission, paras. 96 and 100.

[170] India's first written submission, para. 97. See also para. 7.87 above; and first written submission, para. 95.

[171] India's first written submission, para. 95; Appellate Body Report, *US – Upland Cotton*, para. 302.

[172] United States' second written submission, para. 44.

As has been repeatedly found, this requirement is different from, and additional to, the requirement to identify the measures at issue and give an indication of the legal basis of the complaint, set out in Article 4.4 of the DSU. This however means that both sets of requirements must be satisfied; it does not necessarily mean that the same item cannot, in any case, serve both to identify the measure at issue and to provide evidence of the existence and nature of a subsidy. In this dispute, as noted above, the listed items appear to satisfy the requirements of Article 4.2 of the SCM Agreement.[173] The fact that the same items also serve to identify the challenged measures, in itself, does not render insufficient the statement of available evidence.

7.112. India's third argument is that the statement of available evidence is insufficient because it does "not indicate any specific chapter or paragraph which would result in a violation of the SCM Agreement", which is an "implicit failure to offer any … basis [for] the existence of a possible subsidy".[174] The United States responds that India confuses evidence with arguments.[175]

7.113. Pursuant to Article 4.2 of the SCM Agreement, the complainant must "state" the "evidence" it has available as to the existence and nature of the challenged subsidy. This did not require the complainant in this case to indicate the "specific chapter or paragraph" of the cited items of evidence. The complainant stated the evidence it was relying on, so as to meet the requirements of Article 4.2. Moreover, the body of the text of the request for consultations, which precedes and introduces the text of the statement of available evidence, provided sufficient information to put the respondent on notice as to which aspects of the legal instruments cited as evidence are relevant to this dispute.[176]

7.114. As examples of how the cited legal instruments fail to provide evidence of the existence and nature of the challenged subsidies, India refers to (a) the Income Tax Act (Item No. 26), (b) Items Nos. 21 to 24, and (c) Items Nos. 1 to 6.[177]

7.115. Regarding the Income Tax Act, India argues that "when read alone, [it does] not even vaguely indicate that [it] refer[s] to prohibited subsidies", and that the United States "has failed" "to demonstrate how the Indian Income Tax Act may be characterized as a subsidy".[178]

7.116. First, we disagree with India that the Income Tax Act must be "read alone". The 1961 Income Tax Act, which is listed in the statement of available evidence, appears in the context of a request for consultations where the same Income Tax Act is cited with reference to a specific scheme, namely, Special Economic Zones, and together with a number of related instruments.[179] Among these legal instruments, the SEZ Act, which establishes the scheme in question, provides that the Income Tax Act "shall apply … subject to the modifications specified in the Second Schedule".[180] Further, the Second Schedule lists the "Modifications to the Income-Tax Act, 1961", i.e. the provisions of the Income Tax Act that are added or modified by the SEZ Act.[181] Therefore, the 1961 Income Tax Act is far from having to be "read alone".

7.117. Second, regarding India's argument that the United States "has failed" "to demonstrate how the Indian Income Tax Act may be characterized as a subsidy"[182], we recall that the requirement is

[173] Perhaps unsurprisingly, given the largely *de jure* nature of the challenge.
[174] India's first written submission, para. 101. See also India's response to Panel question No. 27, first para. ("at the very least, the statement of available evidence must have included specific provisions within the legislation that are relevant to the characterization of the measure as a prohibited subsidy").
[175] United States' second written submission, paras. 41-43.
[176] As India acknowledges, the text of the request for consultations is almost identical to the text of the panel request. (India's first written submission, para. 102). With reference to the panel request, which is identical in relevant part to the request for consultations, see Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.41, 2.64, 2.78, 2.91, and 2.109.
[177] India's response to Panel question No. 26, fifth and sixth paras.
[178] India's response to Panel question No. 26, fifth para.
[179] Consultations request, p. 3.
[180] Section 27 of the SEZ Act.
[181] Second Schedule of the SEZ Act. See also Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), para. 2.89 and fn 146.
[182] India's response to Panel question No. 26, fifth para.

to provide a statement of the evidence, not "disclosure of arguments".[183] We note that the provisions on special economic zones in the 1961 Income Tax Act, identified in the Second Schedule of the SEZ Act, relate to tax exemptions and deductions, and some explicitly provide that the exemption or deduction in question relates to "export".[184] Thus, together with the other listed items, they give "reason to believe"[185] that a subsidy exists, has the character of a subsidy, and indeed has the character of a prohibited subsidy.[186]

7.118. Regarding Items Nos. 21 to 24, India argues that they do "not indicate that they refer to subsidies".[187] However, Items Nos. 21 to 24 provide for the establishment and operation of Special Economic Zones and set out, *inter alia*, special fiscal provisions for such zones; conditions under which participants are entitled to exemptions, drawbacks, and concessions; and rules on the NFE earnings requirement.[188] Thus, India's view that these Items do not "refer to subsidies" appears to be grounded in India's position on the merits of the present case, rather than in an assessment of Items Nos. 21 to 24 from the perspective of Article 4.2 of the SCM Agreement.

7.119. Regarding Items Nos. 1 to 6, India argues that "cited randomly with no reference to specific provisions within the legislation or the specific program being challenged also fail to meet the higher threshold in Article 4.2 of the SCM Agreement".[189] Once again, these items are neither "cited randomly" nor "with no reference to … the specific program being challenged". Instead, in the body of the request for consultations, Items Nos. 3 to 6 are listed with reference to the EOU and Sector-Specific Schemes, MEIS, and EPCG Scheme; and Items Nos. 3 and 5 contain a chapter expressly devoted to each of those schemes, setting out the bulk of the relevant provisions governing those schemes, including provisions giving reason to believe that India grants subsidies that are export contingent.[190]

7.120. Therefore, the Panel does not agree with India's arguments that, by listing these items, the complainant failed to state evidence of the existence of the challenged subsidies and of their nature as subsidies.

7.121. India's fourth and last argument is that "[a]dditionally … there is no substantive difference between the 'Request for Consultation' … and the Request for the Establishment of Panel".[191] According to India, this is evidence that the complainant also disregarded the difference in substantive standards between Article 4.2 of the SCM Agreement and Article 6.2 of the DSU.[192]

7.122. It is true that "precise and exact identity" between the request for consultations and the panel request is not required[193], and that there is often an evolution between the former and latter documents. However, nothing prevents complainants from presenting a panel request that is identical to their request for consultations, provided that each of these two documents meets the requirements set out in Articles 4.4 and 6.2 of the DSU and other applicable provisions.

7.123. Thus, to sum up, a review of the statement of available evidence indicates that the statement of available evidence is sufficient to meet the requirements of Article 4.2 of the SCM Agreement,

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[183] See para. 7.83 above.

[184] Income Tax Act, Section 10AA, accessed at the link set out in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), annex A, Instrument No. 26. See fn 133 above.

[185] See para. 7.82 above.

[186] See also paras. 7.104-7.106 above.

[187] India's response to Panel question No. 26, sixth para.

[188] See also paras. 7.98-7.100 above, and Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.83-2.86.

[189] India's response to Panel question No. 26, sixth para.

[190] See paras. 7.93-7.97 above. On Items Nos. 1 and 2, see paras. 7.90-7.92 above. Item No. 6 (on which see also para. 7.97 above), which corresponds to Instrument No. 4 in the request for consultations and in the panel request, is a one-page document setting forth changes to appendix 6-B to the FTP, which relates to the EOU/EHTP/BTP Schemes.

[191] India's first written submission, para. 102. See also para. 7.87 above.

[192] India's first written submission, paras. 102-103.

[193] Appellate Body Report, *Brazil – Aircraft*, para. 132.

because it "state[s] … available evidence with regard to the existence and nature of the subsidy in question"[194]; and India's arguments considered so far have not established otherwise.

7.124. In the context of the substantive meeting with the parties, the Panel asked the United States to articulate how each item in its statement of available evidence related to the existence of the alleged subsidy or its nature as a subsidy, and to point to the relevant provisions or paragraphs of the listed items.[195] The Panel then gave India the opportunity to comment on the United States' response at the hearing and in writing.

7.125. While the Panel has based its assessment of the sufficiency of the statement of available evidence on the statement itself, as contained in the United States' request for consultations, the Panel notes that the United States' response to the Panel's question, too, illustrates that the 25 legal instruments cited in the statement, themselves, provide evidence "with regard to the existence and nature of the subsidy in question"[196], because the language of those legal instruments gives reason to believe that a subsidy exists, has the character of a subsidy, and is export contingent.[197]

7.126. In its comments on the United States' response, India asserts, first, that the provisions cited by the United States support India's argument that the challenged schemes fall under footnote 1 of the SCM Agreement.[198] The Panel considers this to be a substantive argument regarding the merits of the dispute, and not an argument on the sufficiency of the statement of available evidence under Article 4.2 of the SCM Agreement.

7.127. Second, India argues that the United States has failed to engage with the nature of the legal instruments in question and, as an example, India writes that "the United States has not even acknowledged that [Item No. 12] notifies ITC codes that were not included in the harmonised list".[199] This comment bears no relevance on the assessment under Article 4.2 of the SCM Agreement. The document in question makes amendments to the list of goods the export of which gives rise to rewards under MEIS[200]; observing, or not, that these amendments relate to the Indian Tariff Code (ITC) classification of the products says nothing on the sufficiency of the statement of available evidence in this dispute.

7.128. Third, India argues that the United States has selectively or incorrectly quoted portions of the listed evidence. As an example, India refers to Item No. 22 (the SEZ Rules), for which the United States has listed, among others, Rule 9 of the SEZ Rules; India observes that Rule 9 pertains to exemptions provided to SEZ developers, and that the United States clarified in the course of the hearing that it is only challenging financial contributions provided to SEZ Units (not developers).[201] India's factual observation is correct; however, it does not render the statement of available evidence insufficient. The United States' listing of provisions from Item No. 22, in answer to the Panel's question, is prefaced with the phrase "[n]on-exhaustive excerpts of interest to a subsidy analysis include", and then lists the Rule referred to by India, together with other Rules whose substantive relevance to the United States' challenge India does not contest.[202] It is correct that in response to questioning from the Panel at the hearing and after the hearing, the United States clarified that it is not challenging financial contributions granted to SEZ developers.[203] This means that the United States included in its response to the Panel question a provision that it has ultimately chosen to exclude from its challenge; but it does not mean that the statement of available evidence was not sufficient under Article 4.2 of the SCM Agreement to sustain that portion of its challenge that the United States ultimately pursued.

[194] Article 4.2 of the SCM Agreement.
[195] Advance Panel question No. I, and Panel question No. 25.
[196] Article 4.2 of the SCM Agreement.
[197] United States' response to Panel question No. 25, appendix 1. The United States first provided appendix 1 in the course of the oral hearing.
[198] India's comments on the United States' response to Panel question No. 25, first para.
[199] India's comments on the United States' response to Panel question No. 25, second para.
[200] In fact, the United States notes this in its response to Panel question No. 25, appendix 1.
[201] India's comments on the United States' response to Panel question No. 25, third and fourth paras.
[202] United States' response to Panel question No. 25, appendix 1, pp. 46-47.
[203] United States' response to Panel questions Nos. 74-76, paras. 119-121.

7.129. Therefore, the exchanges with and between the parties in answer to Panel question No. 25 do not modify the Panel's preliminary conclusions in paragraphs 7.107 and 7.123 above, that the statement of available evidence included in the request for consultations was sufficient.

7.130. We therefore conclude that the statement of available evidence met the requirements of Article 4.2 of the SCM Agreement.

7.5 The measures at issue

7.131. Having found that Article 27 of the SCM Agreement no longer excludes the challenged measures from the application of Articles 3.1(a) and 4 of the SCM Agreement, and that the United States' statement of available evidence met the requirements of Article 4.2 of the SCM Agreement, we proceed to examine the United States' claims of inconsistency with Articles 3.1(a) and 3.2 of the SCM Agreement. As an introduction to that analysis, this section provides a brief description of each of the measures at issue.[204]

7.5.1 Export Oriented Units and Sector-Specific Schemes

7.132. The EOU/EHTP/BTP Schemes are three schemes for which India's FTP and Handbook of procedures (HBP) set forth common disciplines, including conditions for participating in the schemes and a range of "entitlements"[205] granted to participating enterprises ("EOU/EHTP/BTP Units", or "Units"). Two of these entitlements are at issue in this dispute. First, EOU/EHTP/BTP Units can import goods without payment of any customs duty.[206] This exemption from customs duties applies to "all types of goods"[207] required for the Units' activities, expressly including capital goods.[208] Second, EOU/EHTP/BTP Units can procure excisable goods[209] free of central excise duties.[210]

7.133. Units must commit "to export their entire production of goods and services"[211], subject to certain limited exceptions.[212] Further, each Unit must be a positive NFE earner[213], a requirement which is met when a Unit's total value of exports exceeds its total value of imports.[214]

7.134. The schemes set forth provisions to monitor compliance with the NFE requirement.[215] Failure to ensure positive NFE or to abide by other obligations under the schemes may result in sanctions,

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[204] We also refer to our overview of the relevant legal instruments in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.27-2.40 (for the EOU/EHTP/BTP Schemes), 2.56-2.63 (for MEIS), 2.68-2.77 (for the EPCG Scheme), 2.83-2.89 (for the SEZ Scheme), and 2.101-2.107 (for DFIS).

[205] Sections 6.01, 6.11 and 6.12 of the FTP, (Exhibit USA-3). Exhibit USA-3 contains two versions of the FTP. The first part of Exhibit USA-3 contains excerpts from the FTP in force as of 5 December 2017; the second part of Exhibit USA-3 contains the full version of the Foreign Trade Policy *before* it was amended in December 2017, i.e. an outdated version of the FTP.

[206] Section 6.01(d)(ii) of the FTP. Importation includes importation from abroad and procurement from bonded warehouses in the Domestic Tariff Areas (DTA) in India or international exhibitions held in India. (Idem). The FTP defines "Domestic Tariff Area (DTA)" to mean the "area within India which is outside SEZs and EOU/EHTP/STP/BTP" (definition 9.16 in chapter 9 of the FTP).

[207] Section 6.01(d)(i) of the FTP.

[208] Section 6.01(d)(i) of the FTP. Section 6.04 of the Handbook of procedures, (Exhibit USA-5), sets forth a non-exhaustive list of "[g]oods permitted to be imported / procured from DTA" under the EOU/EHTP/BTP Schemes, which includes items such as raw materials, components, capital goods (including certain equipment and tools), and "[a]ny other items" upon approval. A definition of "[c]apital goods" is set forth in definition 9.08 of Chapter 9 of the FTP.

[209] On the current scope of "excisable goods", see para. 7.229 below.

[210] Section 6.01(d)(iii) of the FTP.

[211] Section 6.00(a) of the FTP; see also Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D, para. (i).

[212] Section 6.08 of the FTP.

[213] Section 6.04 of the FTP; Section 6.10(a) of the HBP; Second Schedule of the SEZ Act; and Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D, para. (ii) and appendix 6E, para. 1.

[214] The details concerning the calculation of NFE, including the calculation formula and relevant definitions, are set out in Section 6.10(a) of the HBP, and are addressed in our discussion of export contingency (section 7.10.2).

[215] Section 6.20 of the FTP; Section 6.12 of the HBP; and Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6E, para. 2 and appendix 6F.

including penalties, penal action and the cancellation of the status of an enterprise as an EOU/EHTP/BTP Unit.[216]

7.135. The stated objectives of the EOU/EHTP/BTP Schemes are "to promote exports, enhance foreign exchange earnings, attract investment for export production and employment generation".[217]

7.5.2 Export Promotion Capital Goods Scheme

7.136. The EPCG Scheme exempts participants[218], upon authorisation, from paying customs duties[219] on the importation of capital goods.[220]

7.137. Importation under the EPCG Scheme is subject to two export obligations. First, over a six-year period, a scheme participant must achieve exports of the goods specified in the EPCG authorization equalling at least six times the duties, taxes, and cess[221] saved on capital goods.[222] This is referred to as the "specific export obligation".[223]

7.138. Second, with limited exceptions[224], a scheme participant must maintain exports of those same goods above the average level of its exports of the same or similar products during the three-year period preceding the EPCG authorization.[225] This is referred to as the "average export obligation".[226]

7.139. The scheme provides an "incentive for early … fulfilment" of these export obligations: when "75% or more of the specific export obligation and 100% of Average Export Obligation till date" are met within half of the required period, the "remaining export obligation shall be condoned".[227]

7.140. As part of the process to apply for EPCG authorisation, applicants must provide a certification by a chartered engineer of the "nexus" between the capital goods to be imported and the manufacture of products for export[228], certifying that the capital goods in question are "required" to manufacture specified "export product(s)".[229]

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[216] Sections 6.05(c) and 6.18(b) of the FTP; Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D, paras. (ii) and (ix), appendix 6F, para. 3(ii), and appendix 6E, para. 7.

[217] Section 6.00(b) of the FTP.

[218] Participation is open to "manufacturer exporters with or without supporting manufacturer(s), merchant exporters tied to supporting manufacturer(s) and service providers". (Section 5.02(a) of the FTP).

[219] The Scheme also used to set forth exemptions from the Integrated Goods & Services Tax (IGST) and Compensation Cess. (Section 5.01(a) of the FTP; India's first written submission, para. 296). These exemptions appear to have expired on 31 March 2018 and are not part of our analysis and findings, see fn 373 below.

[220] Sections 5.01(a) and 5.04(a) of the FTP. Capital goods for purposes of the EPCG Scheme are, per Section 5.01(i) of the FTP, those defined as capital goods in Chapter 9 of the FTP and certain items specified in Section 5.01(a)(ii)-(iv).

Alternatively, if exporters pay for duties and other charges on import of capital goods upfront and in full in cash, they receive freely transferable duty credit scrips ("Post Export EPCG Duty Credit Scrips") remitting the basic customs duty. (Section 5.12 of the FTP). These scrips are not at issue in this dispute.

[221] In India, "cess" designates a tax that is levied to raise funds for a specific purpose. The Education Cess, for instance, collects funds to finance educational institutions. (United States' first written submission, fn 119).

[222] Section 5.01(c) of the FTP; Section 5.14(a) of the HBP.

[223] E.g. Section 5.09 of the FTP.

[224] Section 5.13 of the HBP.

[225] Section 5.04(b) of the FTP; Section 5.12 of the HBP; and India's responses to Panel questions Nos. 51 and 52.

[226] E.g. Section 5.09 of the FTP; India's response to Panel question No. 53.

[227] Section 5.09 of the FTP.

[228] Section 5.03(a) of the HBP.

[229] Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 5A ("Format of Chartered Engineer Certificate for Nexus under EPCG Scheme"). Similarly, the authorization holder must submit a certificate from the customs authority or a chartered engineer confirming the installation of the imported capital good at the premises of the authorization holder. (Section 5.04(a) of the HBP).

7.141. Once authorisation is granted, participants' compliance with their export obligations is subject to regular monitoring.[230] Half of the specific export obligation must be fulfilled during the first four years[231], failing which an enterprise must pay customs duties corresponding to the unfulfilled export obligation.[232] Failure to meet the export obligations or to comply with any other applicable requirements may result in penal action.[233]

7.142. The stated objectives of the EPCG Scheme are to "facilitate import of capital goods for producing quality goods and services and enhance India's manufacturing competitiveness".[234]

7.5.3 Special Economic Zones Scheme

7.143. India's SEZ Act and SEZ Rules, as amended[235], are the two main legal instruments setting forth the framework for the SEZ Scheme. The SEZ Act "provide[s] for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto".[236] Among other things, the SEZ Act and SEZ Rules regulate the bodies charged with approving and administering SEZs, and set forth the procedures for establishing SEZs, provisions on the operation of SEZs, special fiscal provisions for SEZs, and the conditions applying to those special provisions.

7.144. India has submitted that an SEZ is a "distinct"[237] "geographical region which provides for more liberal economic measures to be applicable to the Units set up within it, as compared to the rest of India".[238] Further, India has pointed out that the SEZ Act defines the "domestic tariff area" (DTA) as the whole of India excluding SEZs, and that "export" for purposes of the SEZ Act includes not only "the taking of goods … out of India, from a[n SEZ]" and the supply of goods between different Units[239] within an SEZ, but also the supply of goods from the DTA to a Unit or developer[240] within an SEZ.[241]

7.145. Of the special fiscal provisions applying to SEZs[242], the following are at issue in this dispute:

a. the exemption of "every Developer and … entrepreneur" from customs duties on imports into, and exports from, "a Special Economic Zone or a Unit"[243];

b. the exemption of "all goods … imported by a unit or a developer in the Special Economic Zone" from India's Integrated Goods and Services Tax (IGST)[244]; and

c. the deduction, from the corporate income tax base of an entrepreneur, of the export earnings of the entrepreneur's SEZ Unit.[245]

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[230] Section 5.15 of the HBP.
[231] Section 5.14(a) of the HBP.
[232] Section 5.14(c) of the HBP.
[233] Section 5.26 of the HBP.
[234] Section 5.00 of the FTP.
[235] SEZ Rules, (Exhibit USA-28), incorporating amendments to the SEZ Rules up to July 2010. Subsequent amendments were made to the SEZ Rules on 19 September 2018, (Exhibit USA-60), and on 8 March 2019.
[236] Preamble of the SEZ Act.
[237] India's first written submission, para. 321; request for review, para. 23.
[238] India's first written submission, para. 326; request for review, para. 23. See also Annex A-2, paras. 3.2-3.4.
[239] See para. 7.149 below, defining SEZ "Units".
[240] See para. 7.147 below, defining SEZ "developers".
[241] India's first written submission, para. 326; request for review, para. 23. Sections 2(i) and 2(m) of the SEZ Act. See also Annex A-2, paras. 3.2-3.4.
[242] Set forth in the SEZ Act, SEZ Rules and elsewhere: e.g. fn 244 below.
[243] *Chapeau* in Section 26(1), Sections 26(1)(a) (for imports) and 26(1)(b) (for exports) of the SEZ Act.
[244] Notification No. 15/2017, (Exhibit USA-27). The United States has described IGST as a multi-stage value added tax, with a rate ranging from 0.25% to 28%. (United States' first written submission, para. 116). India has not contested the United States' description of IGST. See also the Integrated Goods and Services Tax Act, (Exhibits USA-32 and IND-14).
[245] Second Schedule of the SEZ Act.

7.146. These provisions refer to "developers", "entrepreneurs", and "Units", which are the principal economic actors setting up, and operating within, SEZs.

7.147. A "developer" is a person or state government that has been granted a letter of approval to set up an SEZ[246]: developers set up SEZs and develop and maintain their infrastructure.[247]

7.148. An "entrepreneur" is a person who has been granted a letter of approval to set up a Unit and undertake the operations authorized by that letter of approval[248]: entrepreneurs thus set up Units, and manufacture goods and render services through the Unit.[249]

7.149. A "Unit" is defined, somewhat circularly, as "a Unit set up by an entrepreneur in a Special Economic Zone".[250] Units are central to the operation of SEZs, because the manufacturing of goods and rendering of services in SEZs (except those incidental to setting up the SEZ itself) take place within the Units.[251]

7.150. As will be elaborated further in discussing export contingency, Units are required in particular to achieve a positive NFE.[252] Under the SEZ Scheme, NFE is the difference between, on the one hand, FOB value of exports, plus a number of certain other eligible "supplies", and, on the other hand, CIF value of imports, plus the value of goods obtained from certain other sources.[253] Compliance with the positive NFE requirement is subject to monitoring[254], and a Unit's failure to meet the requirement makes the entrepreneur "liable for penal action" and leads to cancellation of the Unit's approval.[255]

7.151. Regarding the scheme's objectives, as noted at the outset, the preamble of the SEZ Act refers to "the promotion of exports and … matters connected therewith or incidental thereto".[256] At the same time, India emphasizes that "the objective of the SEZ Scheme cannot be reduced to the promotion of exports": instead, India explains that the SEZ Act aims to achieve the "overall economic development of areas within its territorial control[, which] is crucial to the sovereign functions of a country".[257]

7.152. India refers, in particular, to Section 5 of the SEZ Act, which sets forth the considerations that must guide "[t]he Central Government" in discharging its functions under the Act. These considerations are: the "generation of additional economic activity", the "promotion of exports", the "promotion of investment", the "creation of employment opportunities", the "development of infrastructure facilities", and the "maintenance of sovereignty and integrity of India, the security of the State and friendly relations with foreign States".[258]

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[246] Subsections 2(g), 3(2)-3(4) and 3(10) of the SEZ Act. Developers and co-developers develop and maintain the necessary infrastructure for an SEZ, but do not engage in any export activity. (India's response to Panel question No. 74).

[247] India's response to Panel question No. 74, p. 58.

[248] Subsections 2(j) and 15(9) of the SEZ Act.

[249] India's response to Panel question No. 75, p. 58.

[250] Subsection 2(zc) of the SEZ Act.

[251] India's responses to Panel questions Nos. 74-75, p. 58. The United States' challenge only relates to the tax exemptions and deductions in question as they relate to Units. Thus, it does not extend to benefits provided to *developers* to set up or maintain the SEZs. (United States' response to Panel question No. 74, para. 119.)

[252] Rule 53 of the SEZ Rules.

[253] Rule 53 of the SEZ Rules.

[254] Rules 22(3) and 54(1) and Form I of the SEZ Rules.

[255] Form G of the SEZ Rules, setting out the letter of approval to be issued pursuant to Rule 19 of the SEZ Rules.

[256] Preamble of the SEZ Act.

[257] India's first written submission, para. 322.

[258] Section 5 of the SEZ Act.

7.5.4 Duty-Free Imports for Exporters Scheme

7.153. We found that the panel request identified, as a measure, alleged export subsidies provided under Conditions 10, 21, 28, 32, 33, 36, 60, 61, and 101 of Notification No. 50/2017.[259] These are the caps on the rate of import duty set out in line items 104, 229, 288, 312, 313, 327, 430, 431, and 612, respectively, of Notification No. 50/2017.[260]

7.154. The United States refers to these as the duty-free imports for exporters scheme (DFIS).[261] According to India, this measure is not a cohesive scheme, but just "a grouping of individual duty stipulations".[262] Indeed, we note that the nine stipulations at issue are nine individual line items, with their respective Conditions, scattered among more than 600 other customs duty stipulations in Notification No. 50/2017, and they do not appear to coalesce into a cohesive scheme. Nonetheless, India, too, refers to this measure as DFIS[263], and we, too, will refer to the nine duty stipulations that we have found to fall within our terms of reference as "DFIS".

7.155. Each of these nine duty stipulations provides that the import duty for specified goods is capped at zero ("nil"), provided that the corresponding Condition is met.

7.156. The following table lists the challenged line item capping the import duty at zero, and the corresponding duty-exempt goods and Condition number.

[259] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), para. 2.109.

[260] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.104-2.107 and fns 165 and 171-173; Notification No. 50/2017, (Exhibit USA-36); Excerpts from Notification No. 50/2017, (Exhibit USA-38); and United States' first written submission, para. 146.

[261] E.g. United States' first written submission, para. 140; panel request, p. 3 ("duty-free imports for exporters program").

[262] India's first written submission, para. 382; second written submission, para. 191. See also e.g. Council for Leather Exporters Guidelines, (Exhibit IND-11).

[263] India's first written submission, para. 382; second written submission, para. 191.

Table 1: Line items and Conditions in Notification No. 50/2017 challenged by the United States[264]

Line item	Duty-exempt goods[265]	Condition
104	36 items, or groups of items, used in the processing of sea-food, such as breadcrumbs, flavouring oil, food colours, citric acid, and milk protein	10
229	27 items, or groups of items, for use in the manufacture of handicrafts, such as electric parts, hinges, animal hair materials for brushes, glass sheet, air and electric operated screw driver with hose and couplings, and moisture measuring tools	21
288	Lining and inter-lining materials for use in the manufacture of textile or leather garments	28
312	42 items, or groups of items, for use in the manufacture of leather or synthetic footwear or other leather products, such as buckles, buttons and snap fasteners, elastic tape, lining, adhesives, heels, and fittings	32
313	18 items, or groups of items, for use in the manufacture of handloom, cotton or man-made made-ups, such as lace, elastic tape, tassel, and sewing threads	33
327	Samples of hand knotted carpets	36
430[266]	125 items, or groups of items, for use in the manufacture of commodities in the pharmaceutical and biotechnology sector, such as cell cultivation devices, low temperature freezers, spectrophotometers, centrifuges, x-ray diffraction equipment, automated sampling devices, and gas generators	60(ii)
431	119 items, or groups of items, for research and development in the agro-chemical sector, such as analytical balances, anemometers, centrifuges, dry ice makers, health monitoring equipment, and incubators	61
612	21 items, or groups of items, for use in the manufacture of sports goods, such as butyl bladders for inflatable balls, cork bottoms, table tennis rubber, and stitching thread for inflatable balls or sports gloves	101

7.157. Conditions 10, 21, 28, 32, 33, and 101 require the duty-exempt goods to be imported for use in the manufacture of specified final products for export. Further, they require that the value of the duty-exempt imported goods not exceed a certain percentage, ranging from 1% to 5%, of the FOB value of exports of those same final products during the preceding financial year.

7.158. In contrast, Conditions 36, 60(ii), and 61 do not contain a requirement that duty-exempt goods be used for manufacture in export production. However, similar to the other six conditions just described, they do peg the value of qualifying imports to past exports. Specifically, Condition 36 requires that the total value of duty-exempt imports of samples of carpets not exceed 1% of the FOB value of carpets exported during the previous financial year; whereas Conditions 60(ii) and 61 require that the value of duty-exempt goods not exceed 25% and 1%, respectively, of the FOB value "of exports" during the preceding financial year.

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[264] United States' first written submission, para. 146; Notification No. 50/2017, (Exhibit USA-36); and Excerpts from Notification No. 50/2017, (Exhibit USA-38).

[265] Enumerated in the respective line item or in the relevant List in the Annexure to Notification No. 50/2017, (Exhibit USA-36).

[266] Line item 430 includes two components, subject to Conditions 60(i) and 60(ii), respectively. The first exempts from duties goods imported for research and development purposes, subject to fulfilling Condition 60(i), which does not – unlike other conditions – limit the imports that can benefit from duty-free treatment to a certain percentage of past exports. The United States clarified that its challenge does not extend to this first component of line item 430 (United States' comments on India's response to Panel question No. 80, para. 158), which we therefore do not address.

7.159. All nine conditions also require the importer to produce a certificate from the competent export promotion council or, in the case of Conditions 60(ii) and 61, from the Joint Director General of Foreign Trade, stating (a) the value of relevant exports during the preceding financial year, and (b) the value of goods already imported under Notification No. 50/2017 during the current financial year.

7.160. Thus, for most of these duty stipulations, the competent export promotion council is given an important role, satisfying itself as to the accuracy of the data on past exports and on imports made under Notification No. 50/2017 and, on that basis, issuing the certificates that are necessary in order to benefit from zero customs duties under DFIS.[267] In at least one case, the competent export promotion council requires the manufacturer-exporter to certify that the imported items "will not be put to any other use or sold in the market except in the manufacture of Leather Garments for exports", and that it "understand[s] fully that any violation of … Notification … No. 50/2017 … shall be construed as malpractice" and results in liability "to penal and/or any other action" under applicable legislation.[268]

7.5.5 Merchandise Exports from India Scheme

7.161. MEIS provides a "reward" for "exports of notified goods/products … to notified markets".[269] This reward consists of "Duty Credit Scrips", which are paper-based notes that can be used to pay for (i) basic and additional customs duties on the importation of goods[270], (ii) central excise duties on domestically procured goods[271], and (iii) certain other charges and fees owed to the Government, such as basic and additional customs duties owed as a consequence of failing to fulfil one's export obligations under other schemes.[272] Scrips are "freely transferable".[273]

7.162. The value of the scrips that a recipient is entitled to is calculated by multiplying the FOB value of the recipient's exports of a particular ("notified") good to a particular ("notified") destination country market with the applicable "rate(s) of reward" assigned to that good and market.[274]

7.163. "Notified" goods and markets as well as the applicable reward rates are set out in Appendix 3B to the FTP.[275] This Appendix divides export destination countries into three "country groups".[276] It then lists the covered "notified" goods, indicating, for each notified good, the "MEIS reward rate" applying to exports of the good in question to each of the three country groups.[277] For each covered product, it therefore indicates three rates, the choice between the three being determined by the country to which the exports giving rise to the reward were made. Depending on the product and destination country, the reward rates range from 0% to 5%.

7.164. The stated objectives of MEIS are "to provide rewards to exporters to offset infrastructural inefficiencies and associated costs"[278], and specifically "to promote the manufacture and export of notified goods/products".[279]

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[267] Notification No. 50/2017, (Exhibit USA-36), Conditions 10, 21, 28, 32, 33, 36, and 101; India's first written submission, para. 390; second written submission, paras. 191-194; opening statement at the meeting of the Panel, para. 110; and Council for Leather Exporters Guidelines, (Exhibit IND-11).

[268] Council for Leather Exporters Guidelines, (Exhibit IND-11), Annexure III, "Specimen of affidavit to be submitted by manufacturer-exporter of leather garments or merchant exporter tied-up with manufacturer exporter for import of lining and interlining materials in terms of serial No. 288 of Customs Notification (Tariff) No. 50/2017 dated 30.06.2017".

[269] Section 3.04 of the FTP.

[270] Section 3.02(i) of the FTP.

[271] Section 3.02(ii) of the FTP.

[272] Sections 3.02(iv) and 3.18 of the FTP.

[273] Section 3.02 of the FTP.

[274] Section 3.04 of the FTP.

[275] Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B.

[276] Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B, table 1.

[277] Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B, table 2.

[278] Section 3.00 of the FTP.

[279] Section 3.03 of the FTP.

7.6 Footnote 1 of the SCM Agreement

7.165. The United States challenges the five sets of measures described in the previous section as prohibited export subsidies under the SCM Agreement. India argues, however, that four of those sets of measures (i.e. those under the EOU/EHTP/BTP Schemes, the EPCG Scheme, DFIS, and MEIS) must be deemed not to be a subsidy, because they meet the conditions of footnote 1 of the SCM Agreement.[280]

7.166. We therefore begin by examining whether these four sets of challenged measures meet the conditions of footnote 1. We first set out the applicable legal standard (section 7.6.1); we then apply it, in turn, to each of the four sets of measures in question, namely, certain exemptions under the EOU/EHTP/BTP Schemes (section 7.6.2), the EPCG Scheme (section 7.6.3), and DFIS (section 7.6.4), and the provision of scrips under MEIS (section 7.6.5).

7.6.1 The applicable legal standard under footnote 1

7.167. Footnote 1 of the SCM Agreement, appended to Article 1, provides that certain measures "shall not be deemed to be a subsidy".

7.168. The footnote has two main parts. The first clause of the footnote directs the interpreter to read the remainder of the footnote "[i]n accordance with the provisions of" the Note to Article XVI of the GATT 1994[281] and of Annexes I to III of the SCM Agreement. The second part of the footnote describes the two groups of measures that "shall not be deemed to be a subsidy", provided they are also in accordance with the Note to Article XVI and Annexes I to III.

7.169. These two groups of measures are (a) "the *exemption* of an exported product from the duties or taxes borne by the like product when destined for domestic consumption"; and (b) "the *remission* of such duties or taxes in amounts *not in excess* of those which have accrued".[282] We understand the difference between these two groups of measures to be that, in the case of exemptions, the duty or tax liability never arises[283], whereas, in the case of remissions, the liability first arises, but is later remitted[284], including by returning the payment if one was already made.[285]

7.170. Thus, the description of these two groups of measures in footnote 1 contains four definitional elements, namely, there must be (1) an exemption or remission (2) of duties or taxes (3) on an exported product, (4) not in excess of the duties and taxes which have accrued.[286]

[280] Regarding the remaining set of measures, i.e. the alleged subsidies under the SEZ Scheme, see fn 303 below.

[281] The language of footnote 1 includes the full text of the Note.

[282] Footnote 1 of the SCM Agreement. (emphasis added)

[283] The ordinary meaning of "exemption" includes "[t]he action of exempting, or the state of being exempted (see exempt v. 4) from a liability, obligation, penalty, law, or authority" and, in turn, the ordinary meaning of the verb "exempt" includes "[t]o grant to (a person, etc.) immunity or freedom *from* a liability to which others are subject: a. from (the payment of) a fine, tax, etc". (Oxford Dictionaries online, definition of "exemption", *n*., meaning 2.a, https://www.oed.com/view/Entry/66070?redirectedFrom=exemption#eid (accessed 7 June 2019), and "exempt", *v*., meaning 4.a, https://www.oed.com/view/Entry/66066?rskey=p32DCg&result=2&isAdvanced=false#eid (accessed 5 June 2019)).

[284] The ordinary meaning of "remission" includes "[r]elease from the obligation of a debt or payment", and "[t]he cancellation or reduction of a debt, payment, etc.". (Oxford Dictionaries online, definition of "remission", *n*., meanings 3.a, 4.a., https://www.oed.com/view/Entry/162216?redirectedFrom=remission#eid (accessed 7 June 2019)).

[285] The Panel in *EU – PET (Pakistan)* did not find there to be a need, in that case, to precisely demarcate the line between the two categories of measures covered by the footnote, observing:

> Although the two situations described in footnote 1 may be related, we see no reason why the issues at stake in this dispute cannot be effectively resolved with particular reference to the second.
>
> (Panel Report, *EU – PET (Pakistan)*, fn 93.)

As noted in fn 286 below, Annexes I(g), I(h), and I(i), together with the definitions in footnote 58, do not emphasize the distinction between the two categories of measures.

[286] In footnote 1, the "not in excess" language appears only in the clause relating to remissions, and it is indeed difficult to conceive of an exemption from more than what one would be liable for in the absence of the

7.171. Footnote 1 also provides that the footnote must be read in accordance with the Note to Article XVI of the GATT 1994 and Annexes I to III of the SCM Agreement. As has already been observed, "the words 'in accordance with' in footnote 1 may be understood as implying that footnote 1 is to be read 'in agreement', 'in conformity', or 'in harmony' with all of the provisions referred to therein".[287] That is, footnote 1, the *Ad* Note, and the Annexes must be read together.

7.172. The text of the Note to Article XVI is repeated in its entirety in footnote 1 itself. Therefore, the cross-reference to that provision does not add to the text of the footnote; however, it reminds the interpreter that Article XVI of the GATT 1994 forms part of the context of footnote 1.

7.173. Annex I contains the illustrative list of export subsidies. Items (g), (h), and (i) list, as export subsidies, the exemption, remission, deferral, or drawback of certain indirect taxes and import charges on exported products, in certain defined circumstances.[288] Because footnote 1 must be read in accordance with Annex I, a measure falling within the definition of any of items (g), (h), or (i) would not benefit from the shelter of footnote 1.

7.174. Thus, item (g) identifies as a prohibited export subsidy:

> The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.[289]

7.175. As a result, to meet the conditions of footnote 1, any exemption or remission of "indirect taxes" "in respect of the production and distribution of exported products" must not be "in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption", as it would otherwise not be "in accordance with" Annex I(g).

7.176. Turning to item (h), this identifies as a prohibited export subsidy the exemption, remission, or deferral of prior-stage cumulative indirect taxes on goods and services used in the production of exported products, when the same is in excess of the exemption, remission or deferral of "like … taxes" on goods and services used in the production of like products destined for domestic consumption. As a result, such an exemption would not benefit from the shelter of footnote 1, because it would not be "in accordance with" Annex I(h).

7.177. At the same time, Annex I(h) carves out from that prohibited export subsidy the situation in which the "exemption, remission or deferral" relates to "prior-stage cumulative indirect taxes … levied on *inputs that are consumed in the production* of the exported product (making normal allowance for waste)".[290] As a result, an exemption, remission, or deferral that complies with this condition, and is otherwise in accordance with footnote 1, is not deemed to be a subsidy.

7.178. Similarly, under footnote 1 read together with Annex I(i), for a "remission or drawback" (which "includes … exemption or deferral"[291]) of import charges to benefit from the shelter of footnote 1, such remission or drawback must not be "in excess of [import charges] levied on *imported inputs that are consumed in the production* of the exported product".[292]

7.179. Further, footnote 58, which is appended to each of Annexes I(g), I(h), and I(i), elaborates on the scope of the terms "remission", and "remission or drawback", as well as providing definitions

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exemption. At the same time, Annexes I(g), I(h), and I(i), invoked by India in this dispute, set out clauses that refer to two or more of exemptions, remissions, deferrals and drawbacks, together; further footnote 58 explains that "'[r]emission' of taxes includes the refund or rebate of taxes", and "'[r]emission or drawback' includes the full or partial exemption or deferral of import charges"; in line with this, while noting the distinction between exemptions and remissions, we do not emphasize it further in this outline of the legal standard.

[287] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.105.

[288] Items (e) and (f), which have not been invoked in this case, relate instead to the exemption or remission of *direct* taxes and deductions from the base from which to calculate such taxes.

[289] Fn omitted.

[290] Annex I(h) of the SCM Agreement. (emphasis added)

[291] Footnote 58 of the SCM Agreement.

[292] Annex I(i) of the SCM Agreement. (emphasis added)

for the types of duties and taxes referred to in Annexes I(g), I(h), and I(i). When Annexes I(g), I(h), and I(i) are read together with footnote 58, each of these covers both remissions and exemptions.[293]

7.180. Thus, to summarize, when footnote 1 is read together with Annexes I(g), I(h), and I(i), each of these paragraphs of Annex I first identifies the nature of the remission or exemption at issue[294], and then sets forth a requirement that the remission or exemption not exceed the benchmark set out in the item in question.

7.181. Next, footnote 1 must also be read "in accordance with" Annex II to the SCM Agreement. Annex II sets forth "Guidelines on Consumption of Inputs in the Production Process". As Annex II itself recalls, both items (h) and (i) in Annex I refer to "inputs that are consumed in the production of the exported product"[295], and the Guidelines in Annex II relate to the examination, for that purpose, of "whether inputs are consumed in the production of the exported product".[296]

7.182. Part II of these Guidelines is expressly directed at this examination "as part of a countervailing duty investigation".[297] This, however, does not make Annex II irrelevant outside the context of countervailing duty investigations. While some of the provisions in this Annex (such as those envisaging that the investigating authority carry out "certain practical tests") are not directly applicable outside the context of countervailing duty investigations, Annex II helps inform the understanding of footnote 1 also beyond the context of countervailing duty investigations.

7.183. Footnote 61, appended to Annex II, defines "inputs that are consumed in the production of the exported product", providing that:

> Inputs consumed in the production process are *inputs physically incorporated*, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.[298]

7.184. Annex II(II)(3) provides further guidance on the interpretation of this phrase, by stipulating that:

> Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are *physically present in the product exported*. The Members note that an input need not be present in the final product in the same form in which it entered the production process.[299]

7.185. Finally, footnote 1 refers to Annex III to the SCM Agreement. Annex III sets forth guidelines for the examination of "substitution drawback systems", which are a particular type of drawback system envisaged in Annex I(i). While the present dispute does not concern the issue of substitution drawback systems, Annex III, too, informs the understanding of footnote 1 of the SCM Agreement.[300]

7.186. In reading footnote 1 together with the provisions of the Annexes that are directly relevant in this case, we therefore identify four steps for our analysis of whether the measures in question meet the conditions of footnote 1. We summarize these steps in the table below.

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[293] In light of footnote 58, Annex I(g) includes the exemption, remission, refund, or rebate of indirect taxes; Annex I(h) includes the exemption, remission, deferral, refund, or rebate of prior-stage cumulative indirect taxes; and Annex I(i) includes the remission, drawback, exemption, or deferral of import charges.

[294] It does so through elements that are parallel to those we have identified as elements 1 to 3 in para. 7.170 above. In particular, each of Annexes I(g), I(h), and I(i) identifies the type of duties or taxes concerned (which we have referred to as element 2) and clarifies the required relationship to the exported product (which we have referred to as element 3).

[295] Annex II(I)(2) of the SCM Agreement.

[296] *Chapeau* of Annex II(II) of the SCM Agreement.

[297] *Chapeau* of Annex II(II) of the SCM Agreement.

[298] Emphasis added.

[299] Emphasis added.

[300] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.111 and fn 246.

Table 2: Steps in the Panel's analysis under footnote 1 and Annexes I(g), I(h), and I(i)

	Footnote 1	Annex I(g)	Annex I(h)	Annex I(i)
(1)	Exemption or remission	Exemption or remission, including (footnote 58) refund or rebate	Exemption, remission, or deferral, including (footnote 58) refund or rebate	Remission or drawback, including (footnote 58) full or partial exemption or deferral
(2)	of duties or taxes	of indirect taxes (defined in footnote 58)	of prior-stage cumulative indirect taxes (defined in footnote 58)	of import charges (defined in footnote 58)
(3)	on an exported product	in respect of the production and distribution of exported products	on inputs that are consumed in the production of the exported product (defined in footnote 61; see also Annex II)	on imported inputs that are consumed in the production of the exported product (defined in footnote 61; see also Annex II)
(4)	not in excess of the duties and taxes which have accrued	not in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption	(not in excess of those) levied on those inputs[301]	not in excess of those levied on those inputs (or on substitute inputs in case of substitution drawback, on which see Annex III)[302]

7.187. As with any framework for analysis, we are mindful that these steps are not isolated from each other, and that each measure must be viewed as a whole in assessing its consistency with footnote 1.

7.188. With this in mind, we now turn to examine whether the four measures at issue meet the conditions of footnote 1, read together with the relevant Annexes to the SCM Agreement. To recall, if they do, they are "not … deemed to be a subsidy".[303]

7.6.2 Whether the Export Oriented Units and Sector-Specific Schemes meet the conditions of footnote 1

7.189. India argues that the exemptions from customs and excise duties under the EOU/EHTP/BTP Schemes meet the conditions of footnote 1 of the SCM Agreement.[304] Specifically,

[301] Annex II(I)(2) describes this requirement as not "in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product".

[302] Annex II(I)(2) describes this requirement as not "in excess of those actually levied on inputs that are consumed in the production of the exported product".

[303] Thus, when all the relevant conditions are met, footnote 1 excludes a measure from the definition of a subsidy, and therefore from the application of the prohibition on export subsidies in Article 3 of the SCM Agreement. It therefore acts, *vis-à-vis* Article 3, as an excluding provision. We have discussed excluding provisions in paras. 7.7-7.12 above. We allocate the burdens under footnote 1 accordingly.

We note that for the SEZ Scheme, neither party has raised footnote 1 of the SCM Agreement. For this scheme, India chose not to address at all the United States' arguments on the existence of a subsidy under Article 1 (on the basis that the United States had not established export contingency), and did not raise footnote 1 of the SCM Agreement in this context. India's first written submission, para. 329; second written submission, paras. 187-189. In response to a question from the Panel, India confirmed its choice not to address the question of the existence of a subsidy; in response to another question, India "accept[ed] its burden of raising footnote 1." India's responses to Panel questions Nos. 64 and 90. In these circumstances, the Panel does not consider it appropriate to examine the applicability of footnote 1 to the SEZ Scheme.

[304] We limit our examination to the exemptions from customs and excise duties under the EOU/EHTP/BTP Schemes. In its first and second written submissions, the United States only articulated a challenge with respect to these exemptions. (United States' first written submission, paras. 38, 40-41, 44, and 46; second written submission, paras. 79 and 92). It did not articulate a challenge in respect of the exemptions from IGST and compensation cess, despite mentioning compensation cess in its introductory overview of the measures. (United States' first written submission, para. 37). Only after its second written submission did the United States refer also to the exemptions from IGST and compensation cess in its arguments on the merits. (United States' opening statement at the meeting of the Panel, para. 10; response to Panel question No. 48, paras. 75 and 77-78).

according to India, the exemption from customs duties meets the conditions of footnote 1 read together with Annex I(i)[305] or, alternatively, with Annex I(g).[306] And the exemption from central excise duties meets the conditions of footnote 1 read together with Annex I(h).[307] We examine these in turn.

7.6.2.1 Whether the customs duty exemption meets the conditions of footnote 1 read together with Annex I(i)

7.190. We begin by examining whether the exemption from customs duties meets the conditions of footnote 1 read together with and Annex I(i) of the SCM Agreement.

7.191. We recall our discussion of the legal standard under footnote 1 and the relevant Annexes in the previous section. In accordance with that discussion, to ascertain whether the challenged customs duty exemption under the EOU/EHTP/BPT Schemes is not "deemed to be a subsidy" by virtue of footnote 1 together with Annex I(i), we will examine whether the exemption constitutes:

(1) a remission, drawback, exemption or deferral;

(2) of import charges;

(3) on imported inputs that are consumed in the production of the exported product;

(4) not in excess of those levied on those inputs.[308]

7.192. It is not disputed that the customs duty exemption under the EOU/EHTP/BTP Schemes constitutes (1) an exemption or remission[309] (2) of import charges.[310]

We note that the Panel's Working Procedures and timetable envisaged a single substantive meeting, after the filing of the first and second written submissions; and, as a result of this, the Panel's Working Procedures required the parties to present the facts of the case and their arguments in their first written submission. (Working Procedures (Annex A-1), para. 3(1)(a)). We further note that the United States requested, and insisted on, proceedings with a single substantive meeting, or even with no substantive meeting at all, despite India's opposition; and throughout the proceedings, the United States insisted that the Panel hold a single substantive meeting. Considering all these circumstances together, we see no reason to allow a departure from the requirement in the Panel's Working Procedures that each party articulate its *prima facie case* in the first written submission, by allowing the United States to pursue new elements of the challenged measures at the stage of the single substantive meeting, after the filing of both the first and second written submissions. Further, pursuant to the revised FTP which came into force on 5 December 2017, the exemption from IGST and compensation cess only applied through the end of March 2018. (Section 6.01(d)(ii) of the FTP). For these reasons, we will not consider further the United States' arguments concerning the exemptions from IGST and compensation cess.

[305] India's first written submission, paras. 197-202 and 210-211; second written submission, para. 79; and opening statement at the meeting of the Panel, para. 57.

[306] India's first written submission, paras. 206-209.

[307] India's first written submission, paras. 203-205; second written submission, para. 79; and opening statement at the meeting of the Panel, para. 57.

[308] Schemes meeting the first three conditions, but allowing for excess remission, have been found to be a subsidy only to the extent of the excess remission. (Appellate Body Report, *EU – PET (Pakistan)*, para. 5.134).

[309] In answering a question from the Panel, India described the schemes as providing for the remission of, rather than exemption from, duties or taxes. (India's response to Panel question No. 46, first and second para.). The Panel recalls its understanding that in the case of an exemption, the duty or tax liability does not arise, whereas in the case of a remission, the liability first arises, but is later remitted, including by returning the payment if one was already made. (See para. 7.169 above). Under the challenged schemes, India itself has explained that importation is duty-free, and liability for the customs duties only arises if ultimately the goods are sold in the domestic tariff area. (See e.g. India's second written submission, para. 75). Therefore, the Panel considers that the schemes are properly characterized as providing for the *exemption* from duties, rather than for the remission of duties.

[310] The exemption is set forth in Section 6.01(d)(ii) of the HBP. The United States described the exemption and the relevant import charges in its first written submission, paras. 37-40 and its response to Panel question No. 48, para. 76. India's reliance on footnote 1 and Annex I(i) is premised on the position that the relevant aspect of the EOU/EHTP/BTP Schemes sets out exemptions from import charges. (India's first

7.193. Regarding the third element set out above, India argues that the customs duty exemption for goods imported under the EOU/EHTP/BTP Schemes is only available for "approved activities", which are limited to the production of goods (or services) for export. Therefore, according to India, the exemption is limited to inputs consumed in the production of exported products and thus meets the conditions of footnote 1 read together with Annex I(i).[311] India adds that in the limited circumstances in which sales to the domestic tariff area are permitted, such sales "are subject to payment of duties as well as reversal of customs duties", which are "aggregated on the basis of [Standard Input Output Norms] or other norms established by the Norms Committee, to ensure that the amounts to be reversed are the amounts that were actually due".[312]

7.194. However, the United States argues that the schemes do not meet the third element set out above. According to the United States, the EOU/EHTP/BTP Schemes are not at all designed to ensure, and do not ensure, that the duty-free treatment is afforded only to inputs "consumed in the export production process", as required by footnote 1 with Annex I(i).[313]

7.195. The United States articulates a number of ways in which, in its view, the EOU/EHTP/BTP Schemes fail to limit the import duty exemption to inputs consumed in the production of exported products. In particular, first, the United States argues that the schemes make the exemption available for the importation of goods whose very nature means that they do not constitute inputs consumed in the production of products. According to the United States, this is the case of capital goods[314] and of certain other goods named in the applicable legal instruments.[315] Second (and related to the previous point), the United States points out that the schemes also make the exemption available for the importation of "any other items", with no requirement that such items be inputs consumed in the production of exported products.[316] Third, the schemes also exempt from customs duties the importation of "certain specified goods for creating a central facility"; according to the United States, this means that those goods are not intended (and not required) to be consumed in the production of exported products.[317] We examine these arguments, and India's response, in turn.[318]

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written submission, paras. 197-202 and 210-211; second written submission, paras. 69-79; and opening statement at the meeting of the Panel, paras. 51-57).

[311] India's first written submission, para. 198; second written submission, para. 73; and responses to Panel questions Nos. 43, 44, and 45, pp. 34-36.

[312] India's second written submission, para. 75. See also e.g. opening statement at the meeting of the Panel, paras. 53-57.

[313] United States' second written submission, para. 82. See also ibid. paras. 67, 81-86, and 59; opening statement at the meeting of the Panel, paras. 48 and 49; closing statement at the meeting of the Panel, para. 3; response to Panel question No. 40, para. 57; and comments on India's response to Panel question No. 43, para. 94.

[314] United States' second written submission, paras. 83-86; response to Panel question No. 40, para. 57.

[315] United States' response to Panel question No. 40, para. 57. See also response to Panel question No. 39, para. 56.

[316] United States' response to Panel question No. 40, para. 58; comments on India's response to Panel question No. 43, para. 98.

[317] United States' second written submission, para. 89; response to Panel question No. 40, para. 59; comments on India's response to Panel question No. 43, para. 97; and Section 6.01(f) of the FTP.

The United States also argues that the requirement, in the schemes, that imported goods shall be "utilized" for export production "is not equivalent to requiring them to be 'consumed in' the exported product". (United States' response to Panel question No. 40, paras. 61 and 63; second written submission, paras. 82-86; comments on India's response to Panel question No. 43, para. 95; and Section 6.01(d)(i) of the FTP). We do not consider that WTO law prescribes the specific terminology that Members must use in implementing their WTO obligations in domestic legal instruments. Therefore, we do not consider that the use of the word "utilized" in the challenged schemes, in itself, demonstrates an inconsistency with footnote 1 read together with Annex I(i).

[318] We note that India also argues that the United States has failed to establish the fourth element, that is, the existence and degree of an excess exemption. However, the United States explains that this response from India misses the point, because "[b]efore reaching the question of whether a remission was in excess of the import charges levied, one must first determine whether, as part of the drawback scheme, imported inputs were consumed in the production of an exported product". (United States' second written submission, para. 82). We agree with the United States that the question whether the duty-exempt goods are at all inputs consumed in the production of the exported product (third element) is one that precedes the question of *excess* remission (fourth element). We find, below, that the third element is not met.

7.6.2.1.1 The nature of certain goods covered by the exemptions

7.196. The parties disagree on whether a number of goods whose importation is exempt from customs duties under the EOU/EHTP/BTP Schemes are inputs consumed in the production of an exported product, in accordance with footnote 1 read together with Annex I(i).

7.197. The FTP provides that EOU/EHTP/BTP Units may import without payment of customs duties "all types of goods, including capital goods, required for its activities"[319], and sets forth the following definition of capital goods:

> "Capital Goods" means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological up-gradation or expansion. It includes packaging machinery and equipment, refrigeration equipment, power generating sets, machine tools, equipment and instruments for testing, research and development, quality and pollution control.[320]

7.198. The HBP contains a more detailed, non-exhaustive listing of goods "permitted to be imported" (or procured from the domestic tariff area).[321] This list includes a large number of items that the HBP itself labels as "capital goods", including for example diesel generator sets, captive power plants, modular office furniture, and many others[322], as well as "[r]aw materials for making capital goods for use within unit".[323] In addition, the list includes "other[]" items such as, for example, prototypes, drawings, and office equipment including multi-line telephone systems, fax machines, and servers.[324]

7.199. The SCM Agreement, at footnote 61, defines inputs consumed in the production process as comprising three categories of goods, as follows:

> Inputs consumed in the production process *are* [1] inputs physically incorporated, [2] energy, fuels and oil used in the production process and [3] catalysts which are consumed in the course of their use to obtain the exported product.[325]

7.200. The structure of the sentence, with the phrase "inputs consumed in the production process", followed by the verb "are", followed in turn by the three categories of goods, conveys that the three listed categories *exhaust* the scope of "inputs consumed in the production process".

7.201. As regards "inputs physically incorporated", Annex II(II)(3) further provides that "[i]nvestigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported", even in a different form.

7.202. As defined in the legislation governing the EOU/EHTP/BTP Schemes, capital goods are "plant, machinery, equipment or accessories", which are "required for manufacture or production, either directly or indirectly".[326] These include, according to the same legislation, packaging machinery,

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[319] Section 6.01(d)(i) of the FTP.

[320] Section 9.08 of the FTP.

[321] Section 6.04 of the HBP.

[322] Section 6.04(b) of the HBP. There is some divergence on whether certain goods are capital goods. For example, the HBP lists office furniture as a capital good, whereas the United States has submitted that office furniture is not a capital good. (Section 6.04(b) of the HBP; United States' response to Panel question No. 39, para. 56). This divergent characterization extends to other items benefiting from duty exemptions, such as security systems, projectors, and data transmission cables. (Section 6.04(b) of the HBP; United States' responses to Panel questions Nos. 39-40, paras. 56-57). For purposes of WTO law, however, the relevant question is not whether the goods are capital goods, but whether they are inputs consumed in the production of the exported product.

[323] Section 6.04(c) of the HBP.

[324] Section 6.04(d) of the HBP.

[325] Emphasis added.

[326] See paras. 7.197-7.198 above. This definition is consistent with a widely shared notion of capital goods as tangible and durable assets, such as buildings, machinery, equipment, vehicles and tools, used to produce goods or services. For example, dictionary definitions include "the buildings, machines, and equipment that are used to produce products or provide services", and "economic goods (e.g. railways, ships, machinery,

power generating sets, testing equipment, fork lifts, and many others. By their very nature, these goods are not "physically incorporated" in the goods or services they are used to produce, as envisaged in footnote 61, nor are they "physically present", even in a different form, in the final product, as envisaged in Annex II(II)(3). Capital goods also do not fall under any of the other listed categories in footnote 61, because they are not energy, fuels, oil, or catalysts.

7.203. Similarly, certain other items expressly listed in Section 6.04 of the HBP are not energy, fuels, oil, or catalysts, and are also not of a nature as to be "physically incorporated" in the product they are used to produce.[327]

7.204. On this basis, we reach the preliminary conclusion that capital goods as defined in the FTP, and certain other goods the importation of which is free of customs duties under the EOU/EHTP/BTP Schemes, are not "inputs consumed in the production of the exported product", for purposes of Annex I(i). India however makes a number of contrary arguments, which we now turn to consider.

7.205. Regarding capital goods, India argues that they fall within the definition of inputs consumed in the production of the exported product, within the meaning of Annex I(i).[328]

7.206. First, India argues that imported capital goods are inputs within the meaning of Annex I(i) because they "contribute to the cost of the final exported product".[329] India notes that a duty drawback scheme is meant to offset the cost impact of import duties on inputs incorporated in exported products. According to India, since capital goods contribute to the final cost of the exported product, capital goods must therefore fall within the meaning of inputs covered by Annex I(i) with footnotes 1 and 61.

7.207. However, footnote 1 with Annex I(i) only allows for the exemption from customs duties on "inputs that are consumed in the production of the exported product". Contributing to a product's cost is not the same as being "consumed" in the production of that product. Indeed, under the definition provided by footnote 61, whether goods are "consumed" does not depend on whether they contribute to the cost of the final product.

7.208. Second, India notes that the EOU/EHTP/BTP Schemes set forth depreciation rates for computers, computer peripherals, and other capital goods. According to India, this shows that the schemes "calculate[] the manner in which capital goods are 'physically incorporated' in the production process of exported products".[330]

7.209. Depreciation is an accounting method for allocating the cost of a tangible asset over its useful life and accounts for the asset's decline in value.[331] Depreciation rules reflect the notion that capital goods are durable assets for repeated use in the production of other goods. The value of

buildings) destined for use in production (as opposed to *consumers' goods*)". (Cambridge dictionary online, definition of "capital goods", https://dictionary.cambridge.org/us/dictionary/english/capital-goods (accessed 1 February 2019); Oxford English Dictionary online, definition of "capital goods" in capital, *adj*. and *n*., S3, http://www.oed.com/view/Entry/27450?redirectedFrom=capital+goods#eid216882892 (accessed 16 April 2019) (emphasis original)).

[327] E.g. "[r]aw materials for making capital goods for use within unit", and prototypes. See para. 7.198 above.

[328] India's first written submission, para. 199; second written submission, paras. 49-55.

[329] India's first written submission, para. 199.

[330] India's first written submission, para. 201. See also ibid. para. 200; second written submission, paras. 53-54 and 78; and Section 6.37 of the HBP.

[331] Depreciation is defined as "the amount by which something, such as a piece of equipment, is reduced in value in a company's financial accounts, over the period of time it has been in use. The loss in value reduces a company's profits, and the amount of tax it must pay", and "fall in the market value of an (*esp.* durable) asset, brought about by age, wear and tear, etc.; a conventional allowance made for this in balance sheets, etc.". (Cambridge dictionary online, definition of "depreciation", https://dictionary.cambridge.org/us/dictionary/english/depreciation (accessed 1 February 2019); Oxford dictionary online, definition of "depreciation" https://www.oed.com/view/Entry/50423?redirectedFrom=depreciation#eid (accessed 11 June 2019)).

capital goods decreases during their life cycle as reflected in the depreciation rates.[332] However, the fact that a good depreciates in value does not mean that it is "physically incorporated" into another product, nor does the existence of depreciation *rules* evidence *physical incorporation*. In fact, the very reason why depreciation rules are necessary is precisely that capital goods are not consumed in the production process – i.e. the opposite of India's argument. We therefore reject India's arguments based on the use of depreciation rules.

7.210. Third, India notes that footnote 61 of the SCM Agreement, which defines inputs consumed in the production process, includes in that definition catalysts, which undergo no permanent chemical change. According to India, it would therefore be "counter-intuitive" not to include in the same definition capital goods, which depreciate over time and use.[333]

7.211. However, as noted above, footnote 61 sets forth an exhaustive definition of inputs consumed in the production process, and not merely an illustrative list of such inputs. In setting forth the three categories of goods that are "inputs consumed in the production process", the drafters explicitly chose to list catalysts *in addition to* inputs that are physically incorporated[334], and *not* capital goods.[335, 336] Thus, the fact that catalysts are listed in footnote 61 does not overcome the fact that capital goods are not.

7.212. Fourth, India argues that to establish that the duty-exempt goods are not inputs consumed in the production of the exported product, the United States must provide "a technical, data-driven analysis", in accordance with Annex II of the SCM Agreement.[337] India has also argued that to satisfy this burden, the United States must carry out a countervailing duty investigation.[338] India presents this as a cross-cutting argument, pertaining to the legal interpretation of footnote 1 and Annex II[339], and therefore valid also for the EPCG Scheme, MEIS, and DFIS.[340]

7.213. Annex II sets out "guidelines on consumption of inputs in the production process", for purposes of Annexes I(h) and I(i). As set out at paragraphs 7.181-7.184, footnote 1 must be read "in accordance with" Annex II.

7.214. However, India errs in the manner in which it seeks to rely on Annex II. First, the issue before us is whether the goods that can be imported duty-free under the EOU/EHTP/BTP Schemes are of a kind that can even qualify as inputs consumed in the production of an exported product. That is, we are faced with the threshold question of whether footnote 1 applies to the schemes at issue, and in particular with what we have described as the third element in the test under

[332] For example, the depreciation rates for "other capital goods" in the EOU/EHTP/BTP Schemes are: 4% for every quarter in first year, 3% for every quarter in second and third year, 2.5% for every quarter in fourth and fifth year, 2% for every quarter thereafter. (Section 6.37(b) of the HBP).

[333] India's second written submission, para. 54.

[334] We note that contrary to India's argument, nothing in footnote 61 suggests that catalysts are considered to be "physically incorporated" in the exported product.

[335] The Tokyo Round precursors to Annexes I(i) and I(h) of the SCM Agreement referred to "goods that are physically incorporated". During the Uruguay Round negotiations, proposals were made to replace the "physical incorporation test" and include goods, inputs or "auxiliary materials" not physically incorporated, such as capital goods, energy, and fuel. Ultimately, the drafters replaced the references in the Illustrative List to goods "physically incorporated" with "inputs that are consumed in the production of the exported product", and introduced footnote 61 to define "inputs consumed in the production process" as including not only physically incorporated inputs but also energy, fuels, oil, and catalysts. They did not however include capital goods in this definition.

[336] In their arguments, India and the United States also point to the discussions among WTO Members on the definition of "inputs consumed in the production process", including concerning the treatment of capital goods. (India's second written submission, fns 7 and 52; United States' opening statement at the meeting of the Panel, paras. 43-46). These discussions took place as part of the work on Implementation-Related Issues and Concerns as well as in the context of the Negotiating Group on Rules. These discussions, however, evidence the different points of view of various Members, and not the common understanding of WTO Members concerning the inclusion of capital goods in the definition of "inputs consumed in the production process".

[337] India's second written submission, para. 72. See also India's first written submission, paras. 131-134 and 201; second written submission, para. 39; opening statement at the meeting of the Panel, paras. 46-47; and comments on the United States' response to Panel question No. 36, fifth para.

[338] E.g. India's second written submission, para. 39; comments on the United States' response to Panel question No. 36, fifth para.

[339] E.g. India's first written submission, paras. 131-134.

[340] Our observations in paras. 7.213-7.215 also apply to these three other schemes.

footnote 1. Instead, the "quantitative analysis of the amounts and prices of the inputs consumed"[341] proposed by India *presupposes* (through the reference to "inputs consumed") the existence of a scheme that meets the first three elements of the test under footnote 1, and it asks: is there excess remission and, if so, in what amount (fourth element)?

7.215. Second, Annex II(II) does not stand for the proposition, put forward by India, that "any contention regarding whether or in what quantity inputs are 'consumed' … in a duty drawback … scheme is to be examined by an investigating authority".[342] It is true that Part II of Annex II is expressly addressed to "investigating authorities" "as part of a countervailing duty investigation".[343] This provision could apply, therefore, in the context of a countervailing duty investigation conducted pursuant to Part V of the SCM Agreement. However, this does not mean that a complainant is obliged to carry out a countervailing duty investigation before it can challenge a measure that might fall under Annex II. While footnote 35 of the SCM Agreement makes it clear that the provisions of Part II and III "may" be invoked in parallel with the provisions of Part V, there is no suggestion that Parts II and V *must* always be invoked in parallel.

7.216. Therefore, India has not rebutted the United States' showing that the EOU/EHTP/BTP Schemes exempt from customs duties inputs that are not consumed in the production of the exported products, namely, capital goods and certain other goods listed in Section 6.04 of the HBP that, like capital goods, are not energy, fuels and oil, catalysts, or inputs physically incorporated in the exported product. Therefore, this duty exemption does not meet the conditions of footnote 1 read together with Annex I(i) to the SCM Agreement.

7.6.2.1.2 "Any other items"

7.217. In addition, we recall that the schemes also allow the exemption from customs duties, upon application, for the importation of "[a]ny other item[]" not expressly listed in Section 6.04 of the HBP.[344] The United States argues that this too evidences that the duty exemption is not limited to inputs consumed in the production of exported products.[345] India responds that the competent authority has the discretion to dismiss applications and the United States had not demonstrated that it would not use that discretion to dismiss applications not meeting the requirements of footnote 1.[346]

7.218. We have found that the FTP and HBP expressly provide for the duty-free importation of items that do not qualify as inputs consumed in the production of an exported product, and we are therefore not persuaded by India's response. We also note that the letter of permission relied on by India provides that "[i]mport/local purchase of all items except those listed in prohibited list for import/export will be permitted".[347] As a result, we are not persuaded that under the challenged schemes, the competent authority would dismiss applications that are not compliant with footnote 1. Therefore, the schemes fail to meet the conditions of footnote 1 and Annex I(i) also to the extent that the competent authority approves the duty-free importation of other items that are not inputs consumed in the production of the exported product.

7.6.2.1.3 Goods imported "for creating a central facility"

7.219. The EOU/EHTP/BTP Schemes, under Section 6.01(f) of the FTP, also exempt from customs duties the importation of "certain specified goods for creating a central facility". According to the United States, this provides further evidence that the schemes exempt from customs duties goods

[341] India's second written submission, para. 39.
[342] India's second written submission, para. 39.
[343] *Chapeau* of Annex II(II) of the SCM Agreement.
[344] Section 6.04(f) of the HBP.
[345] United States' response to Panel question No. 40, para. 58; comments on India's response to Panel question No. 43, para. 98.
[346] India's comments on United States' response to Panel question No. 40, first para. (referring to Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D "Format for Letter of Permission").
[347] Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D "Format for Letter of Permission".
India submitted copies of issued letters of permission for illustration. (Letter dated 16 March 2017 from the GOI to an enterprise to be set up as EOU, (Exhibit IND-21)). These copies contain the same clause as foreseen in the template letter. Neither the template, nor the actual letters indicate that "any other items" under Section 6.04(f) may not pertain to goods other than "imported inputs that are consumed in the production of the exported product".

other than inputs consumed in the production of an exported product, and that therefore they do not meet the conditions of footnote 1 read together with Annex I(i).[348]

7.220. We recall however that the United States only challenges the exemptions under Section 6.01(d), and not the exemption set forth in Section 6.01(f).[349] We therefore do not consider this argument to be relevant to our analysis of the challenged exemptions.

7.6.2.2 Whether the customs duty exemption meets the conditions of footnote 1 read together with Annex I(g)

7.221. We now examine whether the challenged customs duty exemption under the EOU/EHTP/BTP Schemes meets the conditions of footnote 1 read together with Annex I(g).[350] As set out above, we do so by ascertaining whether this measure constitutes (1) an exemption or remission (2) of indirect taxes (3) in respect of the production and distribution of exported products, (4) not in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.[351]

7.222. Annex I(g) applies to exemptions or remissions of "indirect taxes". Footnote 58, appended to Annex I(g), defines the term "indirect taxes" to "mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes *other than* direct taxes and *import charges*".[352] Footnote 58 also defines the term "import charges" as "tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports". Since customs duties thus fall within the definition of "import charges", footnote 58 makes it clear that the customs duties from which the EOU/EHTP/BTP Schemes provide an exemption do not constitute "indirect taxes" within the meaning of Annex I(g). Accordingly, the customs duty exemption provided by the EOU/EHTP/BTP Schemes does not meet the conditions of footnote 1 read together with Annex I(g).

7.6.2.3 Whether the central excise duty exemption meets the conditions of footnote 1 read together with Annex I(h)

7.223. We now examine whether the exemption from central excise duties under the EOU/EHTP/BTP Schemes meets the conditions of footnote 1 read together with Annex I(h). We do so by ascertaining whether this measure constitutes (1) an exemption, remission or deferral (2) of prior-stage cumulative indirect taxes (3) on inputs that are consumed in the production of the exported product, (4) levied on those inputs.[353]

7.224. The United States does not contest that the central excise duty exemption meets the first element set out above, i.e. it involves an exemption.[354]

7.225. Turning to the second element set out above, the exemption must pertain to "prior-stage cumulative indirect taxes". Excise is expressly included in the definition of "indirect taxes" in footnote 58 of the SCM Agreement. Footnote 58 further defines "prior stage" indirect taxes as taxes "levied on goods or services used directly or indirectly in making the product", and "cumulative" indirect taxes as "multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production".

7.226. India explained, and the United States did not contest, that Indian central excise duties are an indirect tax within the meaning of footnote 58 and, absent any subsequent crediting mechanism

[348] United States' second written submission, para. 89; response to Panel question No. 40, paras. 59-60; and comments on India's response to Panel question No. 43, para. 97.
[349] United States' first written submission, paras. 38 and 40 and fns 57 and 61; second written submission, para. 79 and fn 82.
[350] India's first written submission, paras. 206-209.
[351] See para. 7.186 above.
[352] Emphasis added.
[353] See para. 7.186 above.
[354] United States' second written submission, paras. 79-90.

under India's Central Excise Tax Act, fall within the meaning of prior-stage cumulative taxes.[355] On this basis, we assume that the second element set out above is met.

7.227. We now turn to the third element in our analysis of footnote 1 read together with Annex I(h), i.e. whether the central excise duty exemption is granted on "inputs that are consumed in the production of the exported product".

7.228. The United States argues that the exemption from central excise duty is not limited to inputs consumed in the production of the exported product, for the same reasons applying, *mutatis mutandis*, to the exemption from customs duty.[356] To recall, the United States argued that certain goods benefiting from the exemptions are of such a nature that they cannot be inputs consumed in the production of an exported product[357], that the exemptions are also available to acquire goods for creating a central facility[358], and that the EOU/EHTP/BTP Schemes do not require the duty-exempt goods to be consumed as inputs in the production of the exported product.[359]

7.229. We begin with the nature of the duty-exempt goods. We have found, above, that the goods eligible for customs duty exemptions under the EOU/EHTP/BTP Schemes include goods that are not capable of constituting inputs consumed in the production of an exported product within the meaning of Annex I.[360] We note, however, that the exemption "from duty of excise", at issue here, applies to the procurement of "excisable goods".[361] The 1944 Central Excise Tax defines excisable goods as those listed in its Fourth Schedule, and salt.[362] The goods listed in the Fourth Schedule are tobacco products ranging from unmanufactured tobacco to cigarettes, tobacco substitutes, and mineral products including petroleum oils, oils obtained from bituminous minerals, and gaseous hydrocarbons.[363] The United States has not established that any of these goods is of a nature that makes it incapable of being an input consumed in the production of the exported product, either as an input that is "physically incorporated" in the exported product or as "energy, fuels and oil used in the production process".[364]

7.230. Next, the United States argues that goods for creating a central facility are not inputs consumed in the production of an exported product. While we agree with the United States' factual proposition, we note that the exemption the United States is challenging is not the one on goods acquired for creating a central facility.[365]

7.231. Finally, the United States argues more generally that the EOU/EHTP/BTP Schemes do not limit the central excise duty exemption to inputs consumed in the production of an exported product. The Schemes do not set out such a requirement expressly. In the context of the customs duty exemptions, we have rejected the equivalent US argument, noting, in particular, that the Schemes require the "imported" goods to be "utilized for export production" and that the fact that the Schemes use this wording, rather than the wording "inputs consumed", does not in itself establish that the Schemes do not meet the conditions of footnote 1.[366] However, the relevant language applicable to the exemption from central excise duties differs from that applying to customs duties. While the FTP requires goods "*imported*" free of customs duties to "be utilized for export production"[367], the FTP

[355] India's first written submission, para. 204.

[356] United States' second written submission, paras. 87-90. See para. 7.195 and fn 317 above.

[357] See para. 7.195 and sections 7.6.2.1.1 and 7.6.2.1.2 above.

[358] See para. 7.195 and section 7.6.2.1.3 above.

[359] See fn 317 above.

[360] Sections 7.6.2.1.1 and 7.6.2.1.2 above.

[361] Section 6.01(d)(iii) of the FTP. The FTP defines "[e]xcisable goods" to mean "any goods produced or manufactured in India and subject to duty of excise under Central Excise and Salt Act 1944 (1 of 1944)". (Definition 9.19 in chapter 9 of the FTP).

[362] Central Excise Act (1944) as amended, (Exhibit USA-88), Section 2(d).

[363] Central Excise Act (1944) as amended, (Exhibit USA-88), Fourth Schedule. The Central Excise Tariff Act (1985) and its First Schedule, submitted as Exhibits USA-62 and USA-63, have been repealed. (India's communication dated 19 July 2019; see also comments on the United States' response to Panel question No. 42.)

[364] Footnote 61 of the SCM Agreement.

[365] Section 7.6.2.1.3 above.

[366] See fn 317 above.

[367] Section 6.01(d)(i) of the FTP. (emphasis added)

does not set forth such a requirement for goods procured domestically without payment of central excise duties.

7.232. India argues that the goods exempted from central excise duty are necessarily inputs consumed in the production of *exported* products as a result of the requirement for Units to export their entire production.[368] However, as India itself recognizes, Units are allowed to sell on the *domestic* market, albeit subject to a number of limiting conditions.[369] India points out that pursuant to Sections 6.08(a)(i) and (v) of the FTP, to the extent that Units are allowed to sell on the domestic market, such sales are "subject to payment of duties as well as reversal of customs duties".[370]

7.233. In that regard, we note that pursuant to Sections 6.08(a)(i) and (v) of the FTP, domestic market sales by EOU/EHTP/BTP Units are subject to "payment of excise duty, if applicable".[371] As a result of these provisions, if the product being sold domestically is subject to central excise duties (e.g. cigarettes), then indeed the effect of the central excise duty exemption on goods acquired to produce it (e.g. tobacco) is undone through the payment of excise duty on the product sold domestically (in our example, through the payment of excise duty on the cigarettes). However, if the product being sold domestically is *not* subject to central excise duties (e.g. computers), then the domestic sale in question is not itself subject to payment of excise duty within the meaning of Sections 6.08(a)(i) and (v).

7.234. However, during the interim review, India clarified that pursuant to Section 6.08(a)(vi) of the FTP, even when the finished good being sold in the DTA is not itself subject to excise duty, that sale triggers the obligation on the part of EOU/EHTP/BTP Units to pay the excise duty initially foregone on any inputs used to produce the good in question.[372]

7.235. Therefore, the United States has not established that the exemption from the central excise duty is not limited to inputs consumed in the production of an exported product, and that, for this reason, it does not meet the conditions of footnote 1 read together with Annex I(h).

7.6.2.4 Conclusion

7.236. We find that the exemption from customs duties under the EOU/EHTP/BTP Schemes does not meet the conditions set out in footnote 1 read together with Annexes I(g), I(h), and I(i). We also find that the United States has not established that the exemption from central excise duty under the EOU/EHTP/BTP Schemes does not meet the conditions of footnote 1 read together with Annex I(h).

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[368] E.g. India's first written submission, para. 198, and second written submission, para. 73.

[369] Section 6.08 of the FTP; see also e.g. India's second written submission, para. 75.

[370] India's second written submission, para. 75, referring to Section 6.08(a)(v) of the FTP.

[371] Sections 6.08(a)(i) and (v) of the FTP. This is different from the language used in the same provisions for customs duties, i.e. "reversal of duties of Customs".

[372] Section 6.08(a)(vi) of the FTP. See India's opening statement at the interim review meeting, para. 21; and responses to Panel questions Nos. 95-101. See also Annex A-2, paras. 5.12-5.20.

7.6.3 Whether the customs duty exemption under the Export Promotion Capital Goods Scheme meets the conditions of footnote 1

7.237. India argues that the exemption from customs duties[373] on the importation of capital goods, under the EPCG Scheme, meets the conditions of footnote 1 read together with Annex I(i).[374] In this section, we examine whether this is the case.

7.238. We recall our discussion of the legal standard under footnote 1 read together with Annex I(i) in section 7.6.1. As summarized in paragraphs 7.186 and 7.191 above, for the challenged customs duty exemption not to be "deemed to be a subsidy" by virtue of footnote 1 together with Annex I(i), it must constitute (1) a remission, drawback, exemption or deferral (2) of import charges (3) on imported inputs that are consumed in the production of the exported product, (4) not in excess of those levied on those inputs.

7.239. The parties do not dispute that the EPCG Scheme provides for an exemption from customs duties on importation, thus meeting the first two elements set out above.

7.240. Regarding the third element, the United States contends that the customs duty exemption does not relate to the importation of inputs that are consumed in the production of the exported product.[375] The United States provides two arguments as a basis for this contention. First, the duty-exempt goods are capital goods, and therefore incapable of serving as "inputs consumed" in the production of the exported product.[376] Second, although beneficiaries are subject to an export obligation[377], they are not required to use the imported goods in connection with the manufacture of exported products.[378]

7.241. Regarding the capital goods issue, India repeats the arguments already considered when examining the EOU/EHTP/BTP Schemes.[379] India also refers to Members' work on Implementation-Related Issues and Concerns as evidence of a political will to include capital goods among inputs consumed in the production process.[380] As for the United States' second argument, India responds that "the requirement to use the imported capital goods only in the production of exported products is verified during the application process".[381]

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[373] We limit our review to the exemption from customs duties. In its first and second written submissions, the United States did not articulate a challenge with respect to exemptions from IGST and compensation cess under the EPCG Scheme (United States' first written submission, paras. 72, 73 and 76-77; second written submission, paras. 125 and 131-132), although India did present arguments on those exemptions. (India's first written submission, paras. 299-303; second written submission, para. 133). Only after its second written submission did the United States refer also to the exemptions from IGST and compensation cess in its arguments on the merits. (United States' opening statement at the meeting of the Panel, para. 20; response to Panel question No. 50, paras. 81 and 83-84).

For the same reasons set out with reference to the EOU/EHTP/BTP Schemes in fn 304 above, we will not consider further the United States' arguments concerning the exemptions from IGST and compensation cess. (Regarding the expiry of these exemptions under the EPCG Scheme at the end of March 2018, see Section 5.01(a) of the FTP).

[374] India's first written submission, paras. 304-308 and 311; second written submission, paras. 132 and 134-137. India suggested that the exemption from customs duties also meets the conditions of footnote 1 read together with Annex I(g) (India's first written submission, para. 300); in that regard, we refer to our findings above, at para. 7.222, that customs duties are not "indirect taxes" and that Annex I(g) thus does not apply.

[375] United States' second written submission, paras. 118-123. See also ibid. paras. 65-71 and 76.

[376] United States' second written submission, para. 119.

[377] See paras. 7.137-7.138 above, and paras. 7.502-7.504 and 7.506 below.

[378] United States' first written submission, paras. 122-123.

[379] India's first written submission, paras. 306 and 308; second written submission, para. 134.

[380] India's first written submission, para. 307 (referring to WTO, General Council Decision on Implementation-Related Issues and Concerns of 15 December 2000, and the report thereon of the Chairman of the Committee on Subsidies and Countervailing Measures of 3 August 2001, WT/L/384, (Exhibit IND-9); and WTO, Committee on Subsidies and Countervailing Measures, "Chairman's Report on the Implementation-Related Issues referred to the Committee on Subsidies and Countervailing Measures in the 15 December 2000 Decision of the General Council", G/SCM/34 (3 August 2001), (Exhibit IND-10)).

[381] India's second written submission, paras. 135-136 (referring to, among others, Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 5A). We note that, indeed, applicants must provide a certificate

7.242. The FTP provides that the customs duty exemption at issue applies to the importation of "capital goods".[382] The FTP provides that, for the purpose of the EPCG Scheme, "capital goods" include: capital goods as defined in Chapter 9 of the FTP[383], i.e. the same definition applying under the EOU/EHTP/BTP Schemes, discussed above; "[c]omputer systems and software which are a part of the Capital Goods being imported"[384]; "[s]pares, moulds, dies, jigs, fixtures, tools & refractories"[385]; and "[c]atalysts for initial charge plus one subsequent charge".[386]

7.243. We refer to our discussion in paragraphs 7.196-7.217 above. With the exception of the last item in the definition of capital goods for purposes of the EPCG Scheme, i.e. "catalysts"[387], the goods that can be imported duty-free under the EPCG Scheme, therefore, are not energy, fuels and oil, catalysts, or inputs physically incorporated in the exported product. Instead, they are machines, tools, and equipment (as well as components thereof or software therefor) that may be used to produce goods but are not physically incorporated in the goods produced. Therefore, they are not inputs "consumed" in the production of the exported product and, as a result, the exemption from customs duties under the EPCG Scheme does not meet the conditions of footnote 1 read together with Annex I(i).

7.244. India relies on the same rebuttal arguments that we have considered, and dismissed, in paragraphs 7.206-7.207 and 7.210-7.215 above. The same considerations set out there apply to the present scheme, whose scope of application is in part identical[388] to that of the EOU/EHTP/BTP Schemes, and in part includes goods of a similar nature, i.e. goods that are not physically incorporated in the product for whose manufacture they are used, as well as not being energy, fuels and oil, or catalysts.

7.245. In addition to repeating those arguments, India relies on Members' work on Implementation-Related Issues and Concerns as evidence of a political will to include capital goods among inputs consumed in the production process.[389]

7.246. The Panel notes that Members decided, in 2000, that the Committee on Subsidies and Countervailing Measures (SCM Committee) would "examine as an important part of its work the issue[] … of the definition of 'inputs consumed in the production process', taking into account the particular needs of developing-country Members".[390] In the report that India itself relies upon, the chairperson of the SCM Committee noted the divergent views of Members on the matter, and observed that "[s]ome Members ha[d] noted that footnote 61 was specifically negotiated to exclude capital goods and therefore could not lend itself to interpretation as including such goods".[391] The Panel does not view this as showing that footnote 61 includes capital goods.

7.247. We therefore find that the customs duty exemption under the EPCG Scheme does not meet the conditions of footnote 1 read together with Annex I(i), because it provides for the importation of goods that are not "inputs consumed" in the production of the exported product.

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by a chartered engineer that "the Capital Good(s) proposed to be imported … is/are required for use … for manufacture of the export product(s)". (Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 5A).

[382] Section 5.01 of the FTP.

[383] Section 5.01(a)(i) of the FTP.

[384] Section 5.01(a)(ii) of the FTP.

[385] Section 5.01(a)(iii) of the FTP.

[386] Section 5.01(a)(iv) of the FTP.

[387] Footnote 61 of the SCM Agreement includes in the definition of "inputs consumed in the production process" "catalysts which are consumed in the course of their use to obtain the exported product". Neither party has addressed the question whether the catalysts that can be imported duty-free under the EPCG Scheme meet the definition of catalysts in footnote 61 and, in any event, we do not understand the United States' challenge to extend to catalysts. (See e.g. United States' second written submission, paras. 84, 116, and 119 ("capital equipment")). Therefore, we do not include catalysts in the scope of our finding, below, that the duty exemption at issue does not pertain to inputs "consumed" in the production of the exported product because of the nature of the goods in question.

[388] For capital goods as defined in Section 9.08 of the FTP. See also Section 5.01(a)(i) of the FTP.

[389] See para. 7.241 above.

[390] General Council decision WT/L/384, (Exhibit IND-9), para. 6.3 (referred to in India's first written submission, fn 254).

[391] SCM Committee decision G/SCM/34, (Exhibit IND-10), p. 2. See also ibid. paras. 14 and 11-31, and India's first written submission, para. 307 and fn 255.

7.6.4 Whether the customs duty exemptions under the Duty-Free Imports for Exporters Scheme meet the conditions of footnote 1

7.248. India argues that the DFIS exemptions from customs duties meet the conditions of footnote 1 read together with Annex I(i) and, therefore, are not subsidies.[392]

7.249. For the DFIS exemptions not to be "deemed to be a subsidy" by virtue of footnote 1 read together with Annex I(i), they must constitute (1) a remission, drawback, exemption or deferral (2) of import charges (3) on imported inputs that are consumed in the production of the exported product, (4) not in excess of those levied on those inputs.[393]

7.250. We begin with the first two elements set out above, namely, the existence of an (1) exemption or remission (2) from import charges. As set out in section 7.5.4 above, DFIS caps at zero the customs duties on importation of certain specified goods, provided the requirements in the applicable Condition are met. More precisely, through DFIS, "the Central Government … exempts [the specified goods] … from so much of the duty of customs leviable thereon under the [First Schedule of the 1975 Customs Tariff Act] as in excess of [zero]".[394] Further, as clarified by footnote 58 of the SCM Agreement, "duties … levied on imports" are "import charges" for purposes of Annex I(i). Therefore, DFIS meets the first two conditions in footnote 1 read together with Annex I(i), i.e. it constitutes an exemption from import charges.

7.251. Regarding the third element in the analysis under footnote 1 read together with Annex I(i), the United States argues, first, that the DFIS exemptions cover the importation of certain goods that, by their nature, cannot be consumed in the production process.[395] In this regard, the parties rely on the arguments already considered when discussing the EOU/EHTP/BTP and EPCG Schemes.[396]

7.252. Second, the United States argues that DFIS does not require the use of the imported goods as inputs in the production of exported products.[397] According to India, however, the criteria in the measure, enforced by the competent bodies, ensure the duty exemption is limited to inputs consumed in the production process.[398]

7.6.4.1 The nature of certain goods covered by the exemptions

7.253. The United States asserts that all the goods that can be imported duty free under Conditions 60(ii) (line item 430)[399] and 61 (line item 431)[400] are capital goods consisting of equipment, machinery and tools. The United States argues that, even assuming these goods are used in the production of the exported product, they are not physically incorporated into it.[401] India

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[392] India's first written submission, paras. 388-394; second written submission, paras. 199-202.

[393] See para. 7.186 above.

[394] Notification No. 50/2017, (Exhibit USA-36), p. 1 ("from so much… as is in excess of … the standard rate specified in the corresponding entry in column (4)", which, for the duty stipulations comprising DFIS, is "nil" (nothing), i.e. zero).

[395] United States' second written submission, para. 167; opening statement at the meeting of the Panel, para. 57; response to Panel question No. 80, para. 133 and appendix 2; and response to Panel question No. 81, para. 135.

[396] For the United States, see previous footnote. For India, see second written submission, paras. 201-202; comments to the United States' response to Panel question No. 79.

[397] United States' second written submission, para. 166; opening statement at the meeting of the Panel, paras. 36-39, and 57; responses to Panel questions Nos. 79, 81 and 82; and comments on India's responses to Panel question No. 82.

[398] E.g. India's first written submission, para. 390; second written submission, paras. 191-194.

[399] These are the goods in Lists 21 and 22 of Notification No. 50/2017, (Exhibit USA-36), i.e. 125 items for use in the manufacture of commodities in the pharmaceutical and biotechnology sector, such as, for example, cell cultivation devices, low temperature freezers, spectrophotometers, centrifuges, x-ray diffraction equipment, automated sampling devices, and gas generators.

We recall that the United States only challenges the duty-free treatment provided under Condition 60(ii), and not under Condition 60(i). (See fn 266 above).

[400] These are the goods in List 23 of Notification No. 50/2017, (Exhibit USA-36), i.e. 119 items for research and development purposes in the agro-chemical sector, such as, for example, analytical balances, anemometers, centrifuges, dry ice makers, health monitoring equipment, and incubators.

[401] United States' response to Panel question No. 80, para. 132 and Appendix 2.

agrees that, as a matter of fact, all the goods falling under Conditions 60(ii) and 61 "may be qualified as capital goods".[402] However, India considers that, as a matter of law, capital goods used in the production of an exported product are "inputs … consumed" in the production of the exported product within the meaning of Annex I(i).[403]

7.254. The parties rely on their arguments concerning the issue of capital goods which we have already considered when examining the EOU/EHTP/BTP and EPCG Schemes.[404] As we have explained in that context, equipment, machinery and tools that are used in the production of a product but are not "physically incorporated", i.e. physically present, even in a different form, in the final product[405], are not "inputs … consumed" within the meaning of Annex I(i).[406] Therefore, the duty exemptions available under Conditions 60(ii) and 61 do not meet the conditions of footnote 1. Specifically, they do not meet the third element in our analysis, namely, that the duty-exempt goods must be "inputs … consumed" in the production of the exported product.

7.255. The United States also argues that six of the 27 items (or groups of items) that can be imported duty-free under Condition 21 (line item 229) constitute tools that are not "inputs … consumed" within the meaning of Annex I(i).[407] India, too, factually describes five of these six items as "capital goods", but repeats that capital goods are inputs consumed in the production of the exported product.[408] As already explained, "inputs … consumed" within the meaning of Annex I(i) are inputs "physically incorporated", "energy, fuels and oil", or "catalysts". The tools in question fall in none of these categories. Therefore, to the extent that it exempts from customs duties the importation of these six items, the duty exemption under Condition 21 does not meet the conditions of footnote 1.

7.256. Further, the United States argues that one of the 36 items that can be imported duty-free under Condition 10 (line item 104)[409], namely, food tenderizers for use in processing seafood products for export, may also not qualify as an input consumed in the production of the seafood products in question.[410] The evidence submitted by the United States indicates that at least one type of tenderizer involves a tool for mechanical tenderization, which would therefore not be physically incorporated into the processed seafood product, and is also not "energy, fuels and oil", or a "catalyst[]".[411] Therefore, to the extent that it exempts from customs duties the importation of such tenderizers, the duty exemption under Condition 10 does not meet the conditions of footnote 1.

[402] India's response to Panel question No. 80. In the same response, India argues that the relevant duty exemption is not export contingent, a point we consider in para. 7.541 below.

[403] United States' second written submission, para. 167; India's first written submission, paras. 388 and 390; and response to Panel question No. 80, first para.

[404] United States' opening statement at the meeting of the Panel, para. 57; comments on India's response to Panel question No. 80, para. 157; India's second written submission, para. 201; response to Panel question No. 80, third para.; and comments on the United States' response to Panel question No. 80.

[405] And are not "energy, fuels and oil", or "catalysts". Footnote 61 of the SCM Agreement.

[406] See paras. 7.199-7.216 above.

[407] United States' response to Panel question No. 80, Appendix 2. These are: air and electric operated screw driver with hose and couplings; tool bits, for motorizer and screw driver; glue applicator; moisture measuring tool; air operated guns and tools for inserting fasteners for brands, flexi points, pins, staples, nails and hinges; and power operated mitre saw.

[408] India's response to Panel question No. 80. The item left out of India's listing of capital goods, as compared to the United States', is "tool bits, for motorizer and screw driver". In the view of the Panel, on the face of the evidence, these "tools bits", when used for the manufacture of handicrafts (as required by Condition 21), are also not "physically incorporated" into the production of the exported product (i.e. the handicraft).

[409] These goods are in List 1 of Notification No. 50/2017, (Exhibit USA-36).

[410] United States' response to Panel question No. 80. India has been silent with regard specifically to this item.

[411] A "food tenderizer" does not always involve a tool or device for mechanical tenderization, as there may also be other ways of tenderizing food, such thermal or enzymatic tenderization. See https://www.foodsharkmarfa.com/best-meat-tenderizers/ (accessed 8 May 2019) referred to in the United States' response to Panel question No. 80, Appendix 2, p. 59, fn 208 (Exhibit USA-90).

7.6.4.2 Whether the imported goods must be used as inputs consumed in the production of an exported product

7.257. The United States argues that DFIS does not require that the imported goods be used as inputs in the production of exported products.[412] In response to questioning from the Panel, the United States "recognize[d] that [unlike Conditions 60 and 61, already disposed of above,[413]] other conditions contain language regarding the processing/manufacturing of the imported good in the exported product".[414] Indeed, six of the challenged Conditions, namely, Conditions 10, 21, 28, 32, 33, and 101, expressly require the duty-exempt goods to be imported for use in the manufacture of specified final products for export.[415]

7.258. The United States argues that, despite the requirement in certain Conditions that the exemption should only apply in respect of inputs used in the manufacture of final products for export, the exemption or remission[416] of import charges is "disconnected" from the charges actually levied on imported inputs consumed in the production of the exported product.[417] According to the United States, this is because "the amount of duty exemption … is uniform across broad categories of exports based on the FOB value of exports"[418], which shows that the exemption is rather a "reward contingent upon the exporter's export performance".[419]

7.259. India counters that the challenged duty stipulations *exempt* inputs from customs duties, and that therefore "the value of this exemption is necessarily not in excess of those [duties] levied on the inputs".[420] As for the pegging of the duty exemption to the value of exports during the previous year[421], India asserts that this, too, serves to ensure that the duty exemptions afforded under DFIS do not exceed the value of the duty liability on inputs consumed in the production of the exported product.[422] India also argues that the existence of this ceiling on duty exemptions, which is based on the value of past exports, does not otherwise affect the operation of DFIS.[423] And, finally, India notes that the United States' argument that DFIS rewards export performance is misplaced, because the question under Article 1 and footnote 1 of the SCM Agreement is whether there is a subsidy, and not (yet) whether the subsidy is export contingent.[424]

7.260. We begin with Conditions 10, 21, 28, 32, 33, and 101.[425] One element of each of these Conditions requires that the duty-exempt goods themselves be used in the production of the exported product, as summarized in the table below.

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[412] United States' second written submission, para. 166; opening statement at the meeting of the Panel, para. 57.

[413] See para. 7.254 above.

[414] United States' response to Panel question No. 79, para. 126.

[415] Notification No. 50/2017, (Exhibit USA-36), Conditions 10(a), 21(a), 28(a), 32(a), 33(a), and 101(a).

[416] The United States refers to the duty stipulations comprising DFIS in several different ways, namely as remissions, drawbacks and exemptions. We consider them to be an exemption: see paras. 7.169 and 7.250 above, and fn 429 below.

[417] E.g. United States' responses to Panel questions Nos. 79 and 82, paras. 127-129 and 141.

[418] United States' response to Panel question No. 79, para. 129.

[419] United States' response to Panel question No. 79, para. 129. See also United States' second written submission, para. 163; opening statement at the meeting of the Panel, para. 57.

[420] India's comments on the United States' response to Panel question No. 82.

[421] See paras. 7.157-7.159 above.

[422] India's first written submission, para. 390; second written submission, paras. 191-198.

[423] India's response to Panel question No. 82.

[424] India's second written submission, para. 197.

[425] To recall, Conditions 10, 21, 28, 32, 33, and 101 expressly require that the use of the duty-exempt goods be limited to the manufacture of the specified exported products; Condition 36, which we discuss separately below, does not. As for Conditions 60(ii) and 61, we have exhaustively addressed these in para. 7.254 above.

Table 3: Link to production of exported products in Conditions 10, 21, 28, 32, 33, and 101

Condition	Link to production of exported product[426]
10	"If,- (a) the goods are imported by an exporter of sea-food products for use in processing sea-food products for export ..."
21	"If,- (a) the goods are imported,- ... for use in the manufacture of handicrafts for export ..."
28	"If, (a) the goods are imported, ... for use in the manufacture of textile garments or leather garments for export ..."
32	"If (a) The goods are imported ... for use in manufacture of [leather footwear or synthetic footwear or other leather products] for export ..."
33	"If,- (a) the goods are imported ... for use in the manufacture of [handloom made ups or cotton made-ups or man-made made ups] for export ..."
101	"If,- (a) the goods are imported ... for use in the manufacture of sports goods for export ..."

7.261. On the face of the measure, each iteration of this first element appears to correspond to the condition, in footnote 1 read together with Annex I(i), that a duty exemption be limited to duties on inputs consumed in the production of the exported product.[427]

7.262. A second element of each of these Conditions, which we refer to as the "backward-looking element", requires that the value of the duty-exempt imported goods not exceed a certain percentage, ranging from 1% to 5%, of the FOB value of exports of those same final products during the preceding financial year.[428]

7.263. These two elements are cumulative, i.e. they both limit the amount of the exemption from customs duties that is available to an importer. On the face of the measure, if the backward-looking element entitles a recipient to import duty-free inputs that are worth 5, but the recipient imports inputs that are worth 1, the theoretical entitlement to import 5 is of no avail (i.e. it does not expand the scope of the duty-free entitlement): only 1 will be duty-exempt.[429]

7.264. The United States' arguments, to the effect that the duty exemption is "disconnected" from the duties actually levied on imported inputs, look exclusively at the backward-looking element. Those arguments ignore the first element discussed above, i.e. the requirement that the imported goods be used in the manufacture of the specified products for export.[430]

[426] Notification No. 50/2017, (Exhibit USA-36) and Excerpts from Notification No. 50/2017, (Exhibit USA-38).

[427] As set out in the table, these six conditions in Notification No. 50/2017 require "use" in the manufacture or processing. As seen in paras. 7.255-7.256 above, for six items under Condition 21, and one item under Condition 10, "use" is not consumption, as is instead necessary under footnote 1 read together with Annex I(i). For the remaining items under Conditions 10 and 21, and for all items under the other Conditions listed in this table, however, our review of the listed items leads us to conclude that the only way in which they can be "used" in the manufacture or processing of the products concerned is by being consumed, within the meaning of Annex I(i). By way of example, this is the case of "breadcrumbs" used in processing of seafood (under Condition 10), and table tennis rubber for use in the manufacture of sports goods (under Condition 101). The United States has not argued otherwise.

[428] Notification No. 50/2017, (Exhibit USA-36); Excerpts from Notification No. 50/2017, (Exhibit USA-38).

[429] As India points out, the scheme provides for a duty exemption. And as we have seen earlier, a duty exemption operates *ex ante*, i.e. it entails that the duty liability never arises. Therefore, as India puts it, "the value of this exemption is necessarily not in excess of those [duties] levied on the inputs". (India's comments on the United States' response to Panel question No. 82; and para. 7.169 above).

[430] This despite the fact that in response to a question from the Panel, the United States concedes that all Conditions (except for Conditions 60 and 61, which are not at issue here) "contain language regarding the processing/manufacturing of the imported good in the exported product" (United States' response to Panel question No. 79, para. 126).

7.265. In light of this requirement, the United States has not shown to this Panel that the six duty stipulations at issue do not meet the conditions of footnote 1. The Panel will therefore not examine these six duty stipulations under Article 3 of the SCM Agreement.[431]

7.266. Last, we turn to Condition 36, which provides for the duty-free importation of carpet samples by exporters of carpets. There is nothing limiting this duty exemption to inputs consumed in the production of the exported product, and indeed carpet samples are neither inputs physically incorporated in the exported product, nor energy, fuels, oil, or catalysts. Therefore, Condition 36 is not excluded from the definition of a subsidy by virtue of footnote 1.

7.6.4.3 Conclusion

7.267. Based on the arguments and evidence before us, we find that Conditions 60(ii), 61, and 36, in their entirety, and Conditions 10 and 21, for one and six items respectively[432], do not accord with footnote 1. For all other items under Conditions 10 and 21, and for Conditions 28, 32, 33, and 101, the United States has not demonstrated that the challenged duty stipulations fail to meet the conditions of footnote 1.

7.6.5 Whether the Merchandise Exports from India Scheme meets the conditions of footnote 1

7.268. India contends that MEIS scrips are refunds for past payments of indirect taxes, consistent with the conditions of footnote 1 read together with Annexes I(g) and I(h)[433]; or, alternatively, that their use results in the remission of import charges, consistent with footnote 1 read together with Annex I(i).[434]

7.6.5.1 Whether MEIS scrips meet the conditions of footnote 1 read together with Annexes I(g) and I(h)

7.269. We begin by assessing whether MEIS scrips meet the conditions of footnote 1 read together with Annexes I(g) and I(h).

7.270. We recall our discussion of the legal standard under footnote 1 and the relevant Annexes in section 7.6.1 above. In accordance with that discussion, whether MEIS scrips are not "deemed to be a subsidy" by virtue of footnote 1 read together with Annexes I(g) and I(h), respectively, depends on whether MEIS scrips meet the following four cumulative elements:

Under Annex I(g) –

(1) They constitute an exemption or remission, including a refund or rebate;

(2) of indirect taxes;

(3) in respect of the production and distribution of exported products;

(4) not in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

Under Annex I(h) –

(1) They constitute an exemption, remission, or deferral, including a refund or rebate;

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[431] Except for one item under Condition 10 and six items under Condition 21. See paras. 7.255-7.256 and fn 426 above.

[432] See fns 407 and 408, and para. 7.256 above.

[433] India's first written submission, paras. 231-236 and 263-278; second written submission, paras. 96-98 and 104-113; opening statement at the meeting of the Panel, paras. 65-73; responses to Panel questions No. 57, No. 60, and No. 62; and comments on the United States' response to Panel question No. 55.

[434] India's second written submission, paras. 114-118; opening statement at the meeting of the Panel, para. 76.

(2) of prior-stage cumulative indirect taxes;

(3) on inputs that are consumed in the production of the exported product;

(4) not in excess of those levied on those inputs.

7.271. As we will see below, the parties disagree that even the first of these four elements is met.

7.272. Pursuant to the FTP Chapter on MEIS, India grants "Duty Credit Scrips" as a reward for exports.[435] The value of scrips that a recipient is entitled to is determined by multiplying the FOB value of exports of "notified" goods to "notified" markets by the "rates of reward" assigned to those goods and markets.[436] The recipient of the scrips can then use them to offset certain liabilities *vis-à-vis* the government, including customs and excise duties[437]; in addition, the scrips are "freely transferable".[438]

7.273. Although the value of the scrips is a fixed percentage of exports, India argues that the scrips in fact are a mechanism chosen by India to refund two categories of indirect taxes, namely: indirect taxes in respect of the production and distribution of the exported products, in accordance with footnote 1 and Annex I(g); and prior-stage cumulative indirect taxes on inputs consumed in the production of the exported products, in accordance with footnote 1 and Annex I(h).[439]

7.274. India explains that the value of these taxes necessarily represents a percentage of the value of the exports in question: in India's words, these taxes are thus "embedded" in the value of the exports.[440]

7.275. The Panel asked India to explain how it determined the different reward rates, and to provide the evidence supporting its answer.[441] India responded that it sets the rates at a level that "approximate[s] but [is] less than" the taxes to be refunded.[442] According to India, relying on a uniform but low rate allows it to avoid the "administratively cumbersome" task of "calculat[ing] the precise refund for every product and every export".[443]

7.276. As an "example", India provided a table that, according to India, contains "actual information" for exporter "ABC" on "the total cost of embedded indirect taxes on electricity, freight and fuel" per metric ton of its exports under Harmonised System code 73259100 during financial year 2016-2017.[444] The table states the alleged cost incurred by exporter "ABC" for specified taxes on electricity, fuel and freight, and concludes by stating that these taxes amounted to 6.10% of the FOB value of the corresponding exports.[445] India then points out that the value of scrips that ABC

[435] Sections 3.02 and 3.04 of the FTP.

[436] Section 3.04 of the FTP. "[N]otified" goods and markets are set out in Appendix 3B. Appendix 3B groups export destination countries into three "country groups". Appendix 3B then lists, over 332 pages, the "MEIS-Reward Rate" for each covered product; specifically, for each covered product, it lists three rates, the choice between the three being determined by the country to which the exports giving rise to the reward were made. (Public Notice 2/2015 2020, (Exhibit USA-11), Appendix 3B, tables 1 and 2).

[437] Sections 3.02 and 3.18 of the FTP. For a fuller description, see para. 7.161 above.

[438] Section 3.02 of the FTP.

[439] India's first written submission, paras. 231, 232, 268, 273, and 275; second written submission, para. 105; and opening statement at the meeting of the Panel, para. 73. According to India, the taxes so refunded include taxes on electricity and fuel, stamp duty, entry tax, road tax, and others. (India's first written submission, paras. 231, 232, 268, and 269; second written submission, paras. 105 and 106; and response to Panel question No. 57).

[440] India's first written submission, paras. 232, 235, and 277; second written submission, paras. 105-106 and 109; opening statement at the meeting of the Panel, paras. 65-66; and response to Panel question No. 60.

[441] Panel question No. 60 after the substantive meeting with the parties. The Panel also asked this question orally during the substantive meeting.

[442] India's response to Panel question No. 60, first para.

[443] India's response to Panel question No. 60, fifth para. See also e.g. India's first written submission, paras. 232 and 279.

[444] India's response to Panel question No. 60, third para.

[445] India's response to Panel question No. 60, table.

would have been eligible for under the applicable MEIS reward rates would have been 3% of the value of exports, i.e. less than 6.10%.[446]

7.277. According to the United States, the record evidence belies the argument that scrips are a refund of indirect taxes already paid, and this argument is "a fiction".[447] The United States argues that there is no connection between taxes actually paid and the value of scrips[448]; that the FTP expressly describes scrips as a reward for exports, and bases the rate of reward on the product exported and the country it was exported to;[449] that India does not even ask scrip recipients for information that would allow it to determine the amount of indirect taxes paid on exported products;[450] that the taxes to be refunded under footnote 1 and Annex I(g) and (h) are actual taxes, not averages or estimates (and that in any event under MEIS India does not even estimate taxes already paid)[451]; and that "one happenstance example" in which the applicable MEIS reward rate is lower than the ratio between indirect taxes paid and value of exports does not show that MEIS scrips are actually a tax refund.[452]

7.278. Therefore, regardless of whether the type of taxes referred to by India are relevant indirect taxes, the parties disagree on whether, in awarding MEIS scrips, India is at all providing a "remission"[453] of such taxes. According to India, the award of scrips is a *remission of indirect taxes* on products exported in the past; but according to the United States, it is merely a *reward* for past exports, and India is "refram[ing] these rewards *post hoc* as reimbursed indirect taxes".[454]

7.279. To recall, the scrips in question are "rewards under MEIS"[455], and Section 3.04 of the FTP describes the trigger for, and the basis for calculating, such rewards. Pursuant to Section 3.04, the basis for calculating the reward is the FOB value of exports of "notified" goods to notified markets, which must then be multiplied by the applicable rate of reward set out in Appendix 3B.

7.280. Appendix 3B sets forth the notified markets, dividing them into three groups; it then sets out the notified goods, indicating, for each notified good, the MEIS reward rate applying to exports of the good in question to each of the three country groups.[456] Depending on the product and destination country, the reward rates range from 0% to 5%. We thus learn, for example, that for exports of butter, the MEIS reward rate is 2% if the butter is exported to country group B, and 0% if the butter is exported to country groups A and C; on the other hand, the rate of reward for desiccated coconut is 5% for export to any of the three country groups.[457]

7.281. India has not pointed to anything in the FTP, in Appendix 3B, or in any other evidence on the record, indicating that indirect taxes paid in connection with the exported product were the basis for the award of MEIS scrips, nor has the Panel found any such indication in its review of the evidence.[458] Instead, the legal instruments providing for MEIS very plainly establish that the value

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[446] India's response to Panel question No. 60, fourth and fifth paras.
[447] E.g. United States' second written submission, paras. 108-109; comments on India's response to Panel questions Nos. 56 and 60, paras. 122 and 133-134.
[448] E.g. United States' second written submission, para. 109; comments on India's response to Panel questions Nos. 56 and 60, paras. 122 and 133-134.
[449] E.g. United States' comments on India's response to Panel question No. 60, para. 133.
[450] E.g. United States' opening statement at the meeting of the Panel, paras. 51-53. See also United States' comment on India's response to Panel question No. 60, para. 133.
[451] E.g. United States' response to Panel question No. 37, paras. 50-53.
[452] United States' comments on India's response to Panel question No. 60, para. 139.
[453] We refer to our discussion on the notions of "exemption" and "remission" in para. 7.169 above. Here India argues that the taxes are first paid, and then refunded or rebated in the form of MEIS scrips; therefore, the question is whether there is a remission (which, according to footnote 58, includes a "refund or rebate"), not whether there is an exemption.
[454] United States' second written submission, para. 109.
[455] Section 3.02 of the FTP.
[456] Public Notice 2/2015 2020, (Exhibit USA-11), Appendix 3B, tables 1 and 2.
[457] Public Notice 2/2015 2020, (Exhibit USA-11), Appendix 3B, table 2, HS codes 040510 and 08011100.
[458] As the United States points out, India does not even seek information on indirect taxes paid, as part of the application process for MEIS scrips. (United States' opening statement at the meeting of the Panel, para. 52). See also Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix ANF-3A ("Application Form for Merchandise Exports from India Scheme (MEIS)").

of scrips is determined by multiplying past exports by the percentage set forth in Appendix 3B for the particular product-country combination.

7.282. Nor is there any record evidence that the rates set out in Appendix 3B were in fact determined on the basis of indirect taxes actually paid. To the contrary, the Panel notes that the scheme envisages different rates for the same product, depending on the country to which the product was exported.[459] It would be difficult to see why MEIS differentiates among destination markets if it served as the basis for refunding previously accrued indirect taxes.

7.283. In a similar vein, the Panel notes that in its Highlights of the Foreign Trade Policy 2015-2020, Mid Term Review, India explained that it increased the rate of reward for ready-made garments and made-ups from 2% to 4%, and that it granted an "[a]cross the board increase of 2% in existing MEIS incentive for export by MSMEs / labour intensive industries".[460] Nothing in that document or elsewhere links the increase in the MEIS rates to the level of indirect taxes paid on the exported products and, in the absence of any such link, it is again difficult to reconcile this decision to increase reward rates with the characterization of MEIS scrips as remitting or refunding indirect taxes.

7.284. As noted earlier, the Panel asked India to explain, with supporting evidence, how it determined "the different reward rates". In response, India provided a table that it described as setting forth the indirect tax expenses of exporter "ABC", during financial year 2016-2017, on a particular exported product.[461]

7.285. The Panel notes that although it explicitly requested, in its question, "evidence supporting [India's] answer", India entirely failed to provide any evidence supporting (a) the allegations of fact in the table or even (b) the relevance of exporter ABC's alleged costs to MEIS. In any event, even accepting the information on ABC provided by India, this information merely establishes that, for ABC, in financial year 2016-2017 and for the product in question, the level of indirect taxes at issue was higher than the level of the MEIS reward rate. It does not establish that MEIS serves to remit those taxes.

7.286. The characterization of MEIS in the underlying domestic legal instruments, while alone not dispositive, further confirms the conclusion that MEIS does not remit indirect taxes. For example, the FTP provides that "[d]uty credit scrips shall be granted as rewards under MEIS"[462], and that "[e]xports of notified goods/products … to notified markets … shall be rewarded under MEIS".[463] The HBP speaks of an "application for claiming rewards under MEIS on exports".[464] And Appendix 3B refers throughout to "reward rates". Nowhere does any of these legal instruments refer to any notion of MEIS remitting indirect taxes.

7.287. India refers to Section 3.00 of the FTP, according to which the objective of the two schemes in Chapter 3 of the FTP, which include MEIS, is "to offset infrastructural inefficiencies and associated costs". India argues that these inefficiencies and costs include the indirect taxes that, according to India, MEIS refunds.[465] However, first, we note that the complete text of the description of the MEIS objective in the FTP reads as follows:

[459] Appendix 3B, table 2, contains, for the "MEIS reward rate" for each notified product, three columns, one for the rate applicable to each of the three country groups. For a number of goods, the rates do indeed differ by country of export. (Public Notice 2/2015 2020, (Exhibit USA-11), Appendix 3B, table 2.)

[460] Excerpt from Highlights of the Foreign Trade Policy Review, 2015-2020, mid-term review (December 2017), (Exhibit USA-20), also in Highlights of the Foreign Trade Policy Review, 2015-2020, mid-term review (December 2017), (Exhibit USA-85), p. 4.

[461] India's response to Panel question No. 60.

[462] Section 3.02 of the FTP.

[463] Section 3.04 of the FTP.

[464] Section 3.01(b) of the HBP.

[465] India's first written submission, para. 231.

> Exports from India Schemes
>
> 3.00 Objective
>
> The objective of schemes under this chapter is to provide rewards to exporters to offset infrastructural inefficiencies and associated costs.
>
> ...
>
> Merchandise Exports from India Scheme (MEIS)
>
> 3.03 Objective
>
> Objective of ... MEIS is to promote the manufacture and export of notified goods/products.

7.288. Thus, even when we consider, as directed by India, the stated objectives of the scheme, we see that the emphasis is on "rewarding", or "promoting", exports, and nothing is said about refunding taxes already paid. Moreover, the language excerpted by India refers to offsetting "infrastructural inefficiencies", which are not the same as "indirect taxes". We are therefore unable to agree with India that the reference to "offset[ting] infrastructural inefficiencies" in Section 3.00 of the FTP should lead us to conclude that, despite the text, structure and design of MEIS, this scheme's underlying objective is in fact to refund indirect taxes connected to the exported products.

7.289. Based on the foregoing, we find that MEIS does not "remit" or "refund" indirect taxes and therefore does not meet the first of the conditions set out in footnote 1 read together with Annex I(g) or I(h).

7.6.5.2 Whether MEIS scrips meet the conditions of footnote 1 read together with Annex I(i)

7.290. We now turn to India's arguments in respect of footnote 1 and Annex I(i). As an alternative to its arguments under footnote 1 and Annexes I(g) and I(h), India argues that when MEIS scrips are used to pay for customs duties on importation, or to regularize a default in an export obligation, this "results in" a remission of import charges that meets the conditions of footnote 1 read together with Annex I(i).[466]

7.291. To ascertain whether a measure must "not be deemed to be a subsidy" by virtue of footnote 1 read together with Annex I(i), we examine whether it constitutes (1) a remission or drawback, including full or partial exemption or deferral, (2) of import charges (3) on imported inputs that are consumed in the production of the exported product, (4) not in excess of those levied on those inputs.[467]

7.292. Even assuming that MEIS scrips, when used to pay for customs duties[468], do operate as remitting import charges, MEIS scrips fail the third of the four elements set out above, namely, that the import charges must be on imported inputs consumed in the production of exported products.

7.293. MEIS in no way limits the import charges that may be paid for with scrips to import charges on inputs consumed in the production of the exported product. Instead, the FTP provides expressly that scrips may be used to pay for import charges on the "import of inputs *or goods*, including capital

[466] India's second written submission, paras. 114-119.

[467] See paras. 7.186 and 7.191 above.

[468] Sections 3.02(i), 3.02(iv) and 3.18(a) of the FTP expressly provide that MEIS scrips can be used to pay for customs duties. In addition, also regarding payments for shortfalls in export obligations pursuant to Section 3.18(b) of the FTP, India appears to argue that paying for such shortfalls ultimately results in paying customs duties on goods imported under the schemes at issue and therefore "results in a remission of these import charges". (India's second written submission, para. 117) See also India's response to Panel question No. 61. A shortfall in an export obligation is the difference between a participant's actual export performance for a year and its applicable export obligation.

goods".[469] Therefore, MEIS does not meet, at least, the third condition of footnote 1 read together with Annex I(i). Indeed, India elsewhere acknowledges that "the use of the MEIS scrips … does not require the import of inputs to be consumed in the production of an exported product".[470]

7.6.5.3 Conclusion

7.294. Therefore, we find that MEIS scrips do not meet the conditions set out in footnote 1 read together with Annexes I(g), I(h), and I(i).

7.7 Revenue foregone under Article 1.1(a)(1)(ii)

7.295. This section addresses the United States' argument that, under four of the challenged schemes, India provides a financial contribution by foregoing government revenue that is otherwise due, within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. More specifically, in respect of the EOU/EHTP/BTP Schemes, the EPCG Scheme, the SEZ Scheme, and DFIS[471], the United States alleges that India foregoes government revenue because each of these schemes provides certain exemptions or deductions from taxes and customs duties.[472]

7.296. We first describe the legal standard under Article 1.1(a)(1)(ii) of the SCM Agreement and then apply it to the four schemes at issue.

7.7.1 The applicable legal standard under Article 1.1(a)(1)(ii)

7.297. Article 1.1(a)(1)(ii) of the SCM Agreement provides that a financial contribution in the form of revenue foregone exists if "government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)".

7.298. The words "foregone", "not collected" and "otherwise due" indicate that "the government has given up an entitlement to raise revenue that it could 'otherwise' have raised".[473] This entitlement cannot be one that is "abstract", because "[a] Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes".[474] Therefore, to ascertain whether there is foregoing of revenue otherwise due, there must be "some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'".[475]

[469] Section 3.02(i) of the FTP. (emphasis and underlining added)

[470] India's response to Panel question No. 59: "[t]he refund (by way of scrips) can be used for the specified uses listed in Paragraph 3.02 of the FTP. The use of the MEIS scrips (refund of taxes already paid on exported products) does not require the import of inputs to be consumed in the production of an exported product." Moreover, "[s]ince the scrip is only received upon the export of the product (post facto), the scrip can only [be] used for payment of duties on subsequently imported/procured inputs, and the award of the scrip can never be tied to the subsequently imported/procured inputs". (India's second written submission, para. 107).

[471] As set out earlier, we refer to the nine duty stipulations that we have found to fall within our terms of reference as "DFIS". However, in what remains of our analysis, our references to DFIS are limited to Conditions 60(ii), 61, and 36, in their entirety, and Conditions 10 and 21, for one and six items respectively. (See paras. 7.154 and 7.267 above).

[472] The parties do not dispute that the alleged foregoing of revenue is "by a government" within the meaning of Article 1.1(a)(1), which includes any organ of a Member at any level of government. As will be seen below, the duties and taxes that are allegedly foregone are owed to the "government" within the meaning of this provision, and the measures pursuant to which such duties and taxes are allegedly foregone are legislative and administrative instruments adopted by the "government". Therefore, to the extent it is established that there is revenue foregone, we are satisfied that such foregoing of revenue is "by a government".

[473] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 806; *US – FSC*, para. 90.

[474] Appellate Body Report, *US – FSC*, para. 90.

[475] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 806 (quoting Appellate Body Report, *US – FSC*, para. 90).

7.299. As an analytical tool to apply this legal standard, WTO adjudicators have articulated a "three-step test".[476]

7.300. The first step is to identify the tax treatment that applies to the alleged subsidy recipients, i.e. the tax treatment that is being challenged.[477]

7.301. The second step is to identify the treatment that will serve as the benchmark for comparison. Given that "Members, in principle, have the sovereign authority to determine their own rules of taxation"[478], the benchmark for comparison "must be the tax rules applied by the Member in question"[479] to "situations which it is legitimate to compare".[480]

7.302. We note that the measures in relation to which this test was first articulated related to the taxation of *income*. As a result as part of this second step of the test, adjudicators have typically referred to the need to identify "comparable *income* of comparably situated taxpayers".[481] Not all instances of revenue foregone, however, involve the taxation of income. For example, tax may be levied (or foregone) on the importation of a good, without reference to the taxpayers' income. In such an example, the relevant fiscal situation will not be "income" but the importation of goods. Therefore, in identifying the fiscal treatment which it is legitimate to compare, we consider it important not to refer mechanically to "income", and instead to keep in mind the nature of the measure at issue in each case.

7.303. To identify the tax treatment afforded by the Member in question to "fiscal situations which it is legitimate to compare"[482], we are required "to develop an understanding of the tax structure and principles that best explains that Member's tax regime, and to provide a reasoned basis for identifying [the benchmark]".[483] At the same time, we note that the rules of taxation of a Member are not part of the applicable law in WTO dispute settlement, and that therefore a panel is necessarily limited in its analysis to the facts properly before it.

7.304. The third step is to compare the challenged tax treatment with the benchmark tax treatment. This comparison allows a panel to determine whether, in light of the responding Member's treatment of the fiscal situations which it is legitimate to compare, the government is foregoing revenue otherwise due.[484]

7.305. The requirement to compare "the challenged treatment … to an objectively identifiable benchmark … does not presuppose … that such a comparison should necessarily be made between the group of the entities that allegedly benefits from a subsidy, on the one hand, and the group of

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[476] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, paras. 812-814; *Brazil – Taxation*, paras. 5.162 and 5.196; and Panel Report, *US – Tax Incentives*, paras. 7.48-7.51.

[477] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 812. We note that footnote 58 of the SCM Agreement distinguishes customs duties and other import charges from taxes. However, when speaking of "tax treatment", we use the term "tax" in a broader sense that also encompasses customs duties.

[478] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 808.

[479] Appellate Body Reports, *US – FSC*, para. 90; *US – Large Civil Aircraft (2nd complaint)*, para. 813.

[480] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 809 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 90). For example, "if the measure at issue involves income earned in sales transactions, it might not be appropriate to compare the treatment of this income with employment income"; and "if the measure at issue is concerned with the taxation of foreign-source income in the hands of a domestic corporation, it might not be appropriate to compare the measure with the fiscal treatment of such income in the hands of a foreign corporation". (Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 90 and 92).

[481] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 813 (emphasis added); *Brazil – Taxation*, para. 5.163 (emphasis added). More precisely, in *US – Large Civil Aircraft (2nd complaint)*, the tax in relation to which the Appellate Body thus articulated the legal test was a tax imposed on the "gross receipts of all businesses operating in Washington", where gross receipts "refer[red] to the gross proceeds of sales, the gross income of a business, or the value of products, depending upon which is applicable". (Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 7.47).

[482] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 809.

[483] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 813. Moreover, in identifying this benchmark (like with other questions of legal characterization), a panel is not bound by the arguments raised by the respondent whose tax regime is at issue. (Appellate Body Reports, *Brazil – Taxation*, para. 5.171).

[484] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 814.

all the other entities, on the other hand".[485] Thus, the fact that some taxpayers in the benchmark group do not pay "the full amount of the relevant tax … would not necessarily mean that there is no revenue foregone with respect to the taxpayers benefiting from a subsidy".[486]

7.306. The Appellate Body has held that, as part of this three-step test, adjudicators must "consider[] … the objective reasons behind" the challenged tax treatment.[487] This observation was first made in *US – Large Civil Aircraft (2nd complaint)*, in the context of a measure which lowered the tax rate previously applied, and in connection to which the respondent argued that the underlying aim was to counteract certain alleged distortions in the tax system and thus "approximate", for the entities concerned, "the average effective tax rate".[488] The Appellate Body considered this alleged reason behind the tax treatment, and found that it appeared "to be more in the nature of an *ex post* explanation" and "the Panel record [did] not support [it]".[489]

7.307. In *US – Tax Incentives*, the panel looked into the reasons for the challenged tax treatment and found that there was "no evidence" that the resulting difference in tax treatment was "reflective of any organizing principle of the [Business and occupation] tax system"; instead, the "express reason" for the different tax treatment was to "incentiviz[e] the maintenance and growth of Washington State's aerospace industry".[490] Consideration of these reasons therefore did not detract from a finding that the respondent was foregoing revenue otherwise due.[491]

7.308. Similarly, the panel in *Brazil – Taxation* considered the reasons for the challenged tax treatment. For example, with respect to one set of challenged schemes, the panel found that "the alleged reasons relate[d] to the objectives of setting up and developing technology-based industries in Brazil, and giving access to [information technology] products to the population".[492] The panel therefore concluded that these alleged reasons did not "impact"[493] its findings of revenue foregone.

7.309. Thus, in summary, adjudicators before us have looked into whether "objective reasons" behind the challenged treatment explained that treatment other than as revenue foregone.

7.310. India considers that for measures that do not "fall within the ambit of … footnote 1", the three-step test is the appropriate framework to analyse revenue foregone.[494] However, for the EOU/EHTP/BTP Schemes, EPCG Scheme, and DFIS[495], India makes the cross-cutting argument that, since the challenged measures fall under footnote 1, the appropriate framework for analysis is not a three-step test under Article 1.1(a)(1)(ii), as set out above. Instead, India argues that the Panel must compare the duties or taxes accrued with the duty or tax exemption.[496] This is the comparison carried out to determine whether there is revenue foregone under measures that do fall within the scope of footnote 1: with exemption or remission schemes falling under footnote 1, only the excess remission is a financial contribution.[497] But to the extent we examine them below, we have found

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[485] Appellate Body Reports, *Brazil – Taxation*, para. 5.209. (emphasis original)

[486] Appellate Body Reports, *Brazil – Taxation*, para. 5.209.

[487] Specifically, the Appellate Body has noted that the first step in the three-step analysis also "entail[s] consideration of the objective reasons behind that treatment", and that these reasons must then be taken into account as part of the third step in the analysis, when comparing the challenged treatment with the benchmark treatment. (Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, paras. 812 and 814; *Brazil – Taxation*, para. 5.162 and fn 542. See also Panel Reports, *US – Tax Incentives*, e.g. paras. 7.49, 7.51, 7.61-7.63, 7.79-7.82, 7.87, 7.94, 7.102, 7.107, 7.115, and 7.131, and *Brazil – Taxation*, paras. 7.394-7.395, 7.401, 7.407-7.413, 7.486-7.487, and 7.841).

[488] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 819 and 829 (the alleged distortion was so-called "pyramiding": ibid. para. 829).

[489] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 829 and 830, respectively.

[490] Panel Report, *US – Tax Incentives*, para. 7.79. See also e.g. paras. 7.80-7.82 and 7.87.

[491] Panel Report, *US – Tax Incentives*, para. 7.79. See also e.g. paras. 7.80-7.82 and 7.87.

[492] Panel Reports, *Brazil – Taxation*, para. 7.487.

[493] Panel Reports, *Brazil – Taxation*, para. 7.487.

[494] India's response to Panel question No. 35, last para.

[495] India makes the same argument also with regard to MEIS. However, the United States has chosen to challenge the alleged subsidies under MEIS as a direct transfer of funds, and we find that they are indeed a direct transfer of funds. (See section 7.8 below).

[496] See paras. 7.312, 7.329, and 7.405 below.

[497] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.134.

that the challenged measures fall *outside* the scope of footnote 1.[498] Therefore, "excess" remission under footnote 1 is not the applicable legal standard.

7.7.2 Whether India foregoes revenue otherwise due under the Export Oriented Units and Sector-Specific Schemes

7.311. The United States argues that EOU/EHTP/BTP Units are exempt from the payment of customs duties that would otherwise be due in the absence of the measure, and that, this way, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii).[499]

7.312. India, on the other hand, argues that the EOU/EHTP/BTP Schemes fall under footnote 1 of the SCM Agreement, and that therefore "the appropriate comparison analysis is … a comparison of duties that accrued as opposed to those that were exempted".[500] In paragraph 7.310 above, however, we have already rejected India's argument in this regard, because we are examining whether the challenged measures under the EOU/EHTP/BTP Schemes are a subsidy precisely to the extent that we have already found them to fall outside the scope of footnote 1.

7.313. We therefore examine whether India foregoes revenue otherwise due under the EOU/EHTP/BTP Schemes, using the analytical framework discussed in the previous section.

7.7.2.1 First step: Applicable treatment

7.314. We begin by identifying the tax treatment that allegedly constitutes a financial contribution. Section 6.01(d) of the FTP provides, in relevant part:

> (i) An EOU/EHTP/STP/BTP unit may import and/or procure, from DTA or bonded warehouses in DTA/international exhibition held in India, all types of goods, including capital goods, required for its activities, provided they are not prohibited items of import in the ITC (HS) subject to conditions given at para (ii) & (iii) below. …
>
> (ii) The imports and/ or procurement from bonded warehouse in DTA or from international exhibition held in India shall be without payment of duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 and additional duty, if any, leviable thereon under Section 3(1), 3(3) and 3(5) of the said Customs Tariff Act. …

7.315. Thus, for Units under the EOU/EHTP/BTP Schemes, the importation or purchase of goods is not subject to payment of the customs duties that would otherwise be leviable on those same transactions under the 1975 Customs Tariff Act.

7.316. Before turning to the second step in the analysis, we consider the "objective reasons" behind this tax treatment.[501] The underlying legislation states that the objectives of the EOU/EHTP/BTP Schemes "are to promote exports, enhance foreign exchange earnings, and attract investment for export production and employment generation".[502] With regard to the objective of promoting exports, we also note that the EOU/EHTP/BTP Schemes impose on participants an export obligation and a NFE requirement.[503] These elements of the schemes further confirm that the promotion of export performance is the central reason behind the tax treatment at issue.[504]

[498] See paras. 7.236, 7.247, and 7.267 above.

[499] United States' first written submission, paras. 40-41; second written submission, para. 92; and response to Panel question No. 48, paras. 76 and 79.

[500] India's first written submission, paras. 212-213; second written submission, para. 80 (referring to Appellate Body Report, *EU – PET (Pakistan)*, para. 5.79); responses to Panel questions No. 35, pp. 23-28, No. 36, pp. 28-31 and No. 47, p. 38; and comments on the United States' responses to Panel question No. 48, p. 16.

[501] See para. 7.316 and fn 487 above.

[502] Section 6.00(b) of the FTP.

[503] See paras. 7.133 above, and 7.490 below.

[504] Sections 6.00(a), 6.01(d)(i), 6.04, and 6.08 of the FTP.

7.7.2.2 Second step: Benchmark for comparison

7.317. As a second step, we identify the benchmark for comparison, i.e. the "fiscal situations which it is legitimate to compare".[505] We recall that the challenged tax treatment consists of customs duties (not) levied on the importation of goods. The fiscal situation which it is legitimate to compare, therefore, must be identified within India's regime for customs duties on the importation and domestic procurement of goods.[506]

7.318. In respect of import duties, Section 12 of India's 1962 Customs Act provides:

> Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.[507]

7.319. In accordance with Section 12 of the 1962 Customs Act, the First Schedule of India's 1975 Customs Tariff Act[508] sets forth the rate of import duty for the listed products. India's national tariff schedule therefore sets forth the applicable import duties that, in accordance with Section 12 of the 1962 Customs Act, apply except as otherwise provided. Moreover, Sections 3(1), 3(3), and 3(5) of the 1975 Customs Tariff Act provide for the possibility of imposing additional duties on imports equal to the level of excise duty, sales tax, local taxes and other charges applicable on like domestic goods.

7.320. Taxpayers subject to duties under the 1962 Customs Act and 1975 Customs Tariff Act are importers of (any) goods into India. Taxpayers under the EOU/EHTP/BTP Schemes are, equally, importers of "all types of goods" (subject to certain exclusions) into India.[509] Moreover, customs duties are an indirect charge imposed on the goods themselves upon their importation, rather than a direct tax that would vary, for example, based on taxpayers' income. Therefore, for the purpose of an analysis of India's customs duties on importation, taxpayers subject to duties under the 1962 and 1975 Acts, and taxpayers exempt from those duties under the EOU/EHTP/BTP Schemes, are comparably situated.

7.321. We have asked both parties to identify the normative benchmark against which the customs duty treatment under the EOU/EHTP/BTP Schemes must be assessed. The parties have not identified other elements of India's tax rules as forming part of the relevant normative benchmark.[510]

7.322. We therefore consider that the tax structure and principles outlined in paragraphs 7.318-7.320 provide the basis for identifying the treatment of comparable fiscal situations, i.e. of the importation of goods into India by comparably situated taxpayers. The express wording of the relevant statutes contemplates rates of customs duties applicable to "goods imported into … India" ("[e]xcept as otherwise provided"). We also note that the EOU/EHTP/BTP Schemes explicitly refer to the 1975 Customs Tariff Act as setting out the customs duty liability from which EOU/EHTP/BTP Units are exempt[511], which provides a further indication that the tax treatment under

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[505] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 90; see also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 809. On this "second step", see paras. 7.301-7.303 above.

[506] See e.g. Panel Report, *US – Tax Incentives*, para. 7.118.

[507] Customs Act (1962) as amended, Section 12 to Section 15, (Exhibit USA-8).

[508] Excerpt from Customs Tariff Act (1975) as amended, First Schedule, (Exhibit USA-89). The United States in footnote 259 of its first written submission referred to http://www.cbic.gov.in/htdocs-cbec/customs/cst1718-020218/cst1718-0202-idx (accessed 8 January 2019) which provides India's Customs Tariff Act (1975) and separately lists the chapters of its First Schedule. In response to a request to this effect from the Panel, the United States submitted the first twenty pages of the First Schedule as Exhibit USA-89. See also India's applied tariffs, https://www.wto.org/english/thewto_e/countries_e/india_e.htm.

[509] Section 6.01(d) of the FTP.

[510] United States' response to Panel question No. 48, para. 76; India's response to Panel question No. 47, p. 38.

[511] Section 6.01(d)(ii) of the FTP.

the 1975 Customs Tariff Act is the relevant benchmark for us to identify under the second step in the analysis.[512]

7.323. We therefore consider that the customs duty liability and rates set out under Sections 3(1), 3(3), and 3(5) and the First Schedule of the 1975 Customs Tariff Act are the appropriate benchmark for comparison.

7.7.2.3 Third step: Comparison of the applicable treatment with the benchmark

7.324. We now turn to comparing the tax treatment identified under the first step in the analysis with the benchmark identified in the second step in the analysis.[513]

7.325. As set out above, the 1975 Customs Tariff Act (at its First Schedule and Sections 3(1), 3(3), and 3(5)), in accordance with the 1962 Customs Act, provides that the importation of goods into India is subject to the customs duties set out thereunder. By contrast, under Section 6.01(d) of the FTP, EOU/EHTP/BTP Units may import goods into India "without payment of duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 and additional duty, if any, leviable thereon under Section 3(1), 3(3) and 3(5) of the said Customs Tariff Act". Therefore, the 1975 Customs Tariff Act entitles India to collect the specified customs duties on the importation of goods, and under the challenged EOU/EHTP/BTP Schemes India foregoes that revenue in case of the importation of the same goods by participating Units.

7.326. We recall that the objective reason behind this different treatment is the promotion of exports and investments.[514] Consideration of this reason does not suggest that the different tax treatment can be explained as treating different fiscal situations differently, rather than as the foregoing of revenue otherwise due.

7.327. We therefore conclude that by exempting the importation of goods by EOU/EHTP/BTP Units from customs duties, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), and therefore provides a financial contribution.

7.7.3 Whether India foregoes revenue otherwise due under the Export Promotion Capital Goods Scheme

7.328. The United States argues that the EPCG scheme exempts a participant from the payment of customs duties otherwise due on the importation of capital goods used for export pre-production, production, and post-production.[515] According to the United States, comparably situated enterprises importing the same capital goods must pay customs duties according to India's national tariff schedule. The United States refers to the Indian customs legislation to show that enterprises participating in the EPCG scheme receive an exemption from the payment of customs duties that comparably situated enterprises in India must instead pay.[516] The United States contends that therefore India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii).[517]

7.329. According to India, the customs duty exemption falls within the scope of footnote 1 and Annexes I(g), I(h), and I(i), and therefore the appropriate comparison is not between comparably

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[512] As we will see below, other schemes, too, provide for certain exemptions from customs duties. India has not argued that, taken together, these schemes indicate that the rules set out in the Customs Act (1962) and Customs Tariff Act (1975) are not the relevant benchmark. Based on the evidence before us, outside these and possibly other schemes providing for certain exemptions, the applicable customs duties are those provided for under the Customs Act (1962) and Customs Tariff Act (1975). The evidence before us does not lead us to conclude that India's choice to provide for exemptions under a number of schemes disqualifies the duties under the 1962 and 1975 Acts as a legitimately comparable benchmark. See also e.g. Panel Report, *US – Tax Incentives*, para. 7.125.

[513] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 814; *Brazil – Taxation*, para. 5.162; and Panel Report, *US – Tax Incentives*, para. 7.51.

[514] See para. 7.316 above.

[515] United States' first written submission, para. 72.

[516] United States' first written submission, fn 130; response to Panel question No. 50, paras. 81-82.

[517] United States' first written submission, para. 73.

situated enterprises, but rather between duties accrued and duties from which EPCG participants were exempted.[518]

7.330. However, in paragraph 7.310 above, we have already rejected India's argument in this regard, because we have already found that the duty exemption under the EPCG Scheme falls outside the scope of footnote 1. We therefore proceed with our analysis using the framework discussed in paragraphs 7.297-7.308.

7.7.3.1 First step: Applicable treatment

7.331. We begin by identifying the tax treatment that allegedly constitutes a financial contribution. Section 5.01(a) of the FTP provides that the "EPCG Scheme allows import of capital goods … for pre-production, production and post-production *at zero customs duty*".[519] That is, the importation of capital goods under the EPCG Scheme is subject to a customs duty rate of zero.

7.332. Before turning to the second step in the analysis, we consider the "objective reasons" behind this duty treatment.[520] The underlying legislation states that the objectives of the EPCG Scheme are "to facilitate import of capital goods for producing quality goods and services and enhance India's *manufacturing competitiveness*".[521] Elsewhere, India has stated that "[t]he objective of the EPCG Scheme is to facilitate import of capital goods for producing quality goods and services to enhance India's *export competitiveness*".[522] Moreover, the scheme imposes an export obligation, which also indicates that the promotion of export performance is the objective reason for the duty treatment at issue[523], and a further indication of this comes from the reference to "export promotion" in the name of the scheme.[524]

7.7.3.2 Second step: Benchmark for comparison

7.333. As a second step, we identify the benchmark for comparison, i.e. the fiscal situation which it is legitimate to compare. We recall that the challenged tax treatment consists of the customs duty treatment of imported goods. The fiscal situation that it is legitimate to compare, therefore, must be identified within India's regime for customs duties on the importation of goods.[525]

7.334. In paragraphs 7.318-7.319 above, we described the relevant customs rules that apply to the importation into India of goods, including capital goods, under the 1962 Customs Act and the 1975 Customs Tariff Act. The 1962 Customs Act provides that the "duties of customs" at the rates set forth under the 1975 Customs Tariff Act "shall be levied … on goods imported into India". The First Schedule of the 1975 Customs Tariff Act lists the rates of duty applicable on importation, by tariff heading and subheading, as required by the 1962 Customs Act.

7.335. Taxpayers exempt from duties on capital goods under the EPCG Scheme are importers of capital goods into India. Taxpayers subject to duties on the importation of those same goods under the 1962 Customs Act and 1975 Customs Tariff Act are, equally, importers of capital goods into India. Moreover, customs duties are an indirect charge imposed on the goods themselves upon their importation or exportation, rather than a direct tax that would vary, for example, based on taxpayers' income. Therefore, for the purpose of an analysis of India's customs duties on the importation of capital goods, taxpayers subject to duties under the 1962 and 1975 Acts, and taxpayers exempt from those duties under the EPCG Scheme, are comparably situated.

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[518] India's first written submission, paras. 309-310; second written submission, para. 138 (referring to Appellate Body Report, *EU – PET (Pakistan)*, para. 5.79); responses to Panel questions No. 35, pp. 23-28, No. 36, pp. 28-31, and No. 49, p. 39; and comments on the United States' responses to Panel question No. 50, p. 17.

[519] Emphasis added.

[520] See para. 7.306 and fn 487 above.

[521] Section 5.00 of the FTP. (emphasis added)

[522] MIS [Management Information System] Report on Export Promotion Schemes, (Exhibit USA-55), Foreword and Chapter II, p. 10; Ministry of Commerce and Industry Department of Commerce, Annual Report, 2017-2018, (Exhibit USA-56), p. 64. (emphasis added)

[523] Sections 5.01(c) and 5.04(b) of the FTP.

[524] Heading of Chapter 5 of the FTP.

[525] See e.g. Panel Report, *US – Tax Incentives*, para. 7.118.

7.336. We have asked both parties to identify the normative benchmark against which the tax treatment under the EPCG Scheme must be assessed. The parties have not identified other elements of India's tax rules as forming part of the relevant normative benchmark.[526]

7.337. We therefore consider that the customs duty liability and rates set forth under the 1962 Customs Act and the 1975 Customs Tariff Act are an appropriate benchmark for assessing whether India foregoes revenue under the EPCG Scheme.[527]

7.7.3.3 Third step: Comparison of the applicable treatment with the benchmark

7.338. We now compare the tax treatment identified under the first step in the analysis with the benchmark identified in the second step in the analysis.

7.339. As set out above, the 1975 Customs Tariff Act, in accordance with the 1962 Customs Act, provides that the importation of all goods (including capital goods) into India is subject to the customs duties set out thereunder. By contrast, under Section 5.01 of the FTP, EPCG participants can import capital goods into India "at zero customs duty". Therefore, the 1975 Customs Tariff Act entitles India to collect the specified customs duties on the importation of capital goods, whereas under the challenged EPCG Scheme India foregoes that revenue in case of the importation of the same goods by participants in the scheme.

7.340. We recall that the reason for this different treatment is the promotion of manufacturing and export competitiveness.[528] Consideration of this reason does not suggest that the different tax treatment is explained by differences in the underlying fiscal situation, and therefore does not detract from our finding that India is foregoing revenue otherwise due.

7.341. We therefore conclude that, by exempting from customs duties the importation of capital goods under the EPCG Scheme, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), and thus provides a financial contribution.

7.7.4 Whether India foregoes revenue otherwise due under the Special Economic Zones Scheme

7.342. To recall, the US challenge in respect of the SEZ Scheme extends to[529]:

a. The exemption from customs duties on imports and exports[530];

b. The exemption from IGST[531]; and

c. The deduction of export earnings from the income on which income tax is levied.[532]

7.343. The United States argues that SEZ Units benefit from exemptions from or reductions in duties and taxes that would otherwise be due in the absence of the measure.[533] According to the United States, enterprises that do not participate in the SEZ Scheme must generally pay these duties and taxes. The United States refers to the Indian customs and tax legislation to show that enterprises participating in the SEZ Scheme receive an exemption from, or reduction of, the payment of customs

[526] United States' response to Panel question No. 50, paras. 81 and 82; India's response to Panel question No. 49, p. 39.
[527] See also fn 512 above.
[528] See para. 7.332 above.
[529] The United States only challenges this treatment insofar as accorded to SEZ "Units"; it does not challenge (where applicable) the same treatment granted to developers of SEZs or entrepreneurs establishing SEZ Units (United States' responses to Panel questions No. 74, para. 119 and No. 76, para. 121). For the definitions of "developer", "entrepreneur" and "Unit", see paras. 7.147-7.149 above.
[530] Section 26(1)(a) (for imports) and Section 26(1)(b) (for exports) of the SEZ Act.
[531] Notification No. 15/2017, (Exhibit USA-27).
[532] Section 27 and the Second Schedule of the SEZ Act; Income Tax Act, 1961, Sections 10A and 10AA, (Exhibit USA-29).
[533] United States' first written submission, paras. 110-117.

duties and taxes that comparably situated enterprises in India must pay.[534] The United States contends that therefore the challenged exemptions and deductions under the SEZ Scheme constitute financial contributions in the form of "government revenue that is otherwise due [that] is foregone or not collected" within the meaning of Article 1.1(a)(1)(ii).[535]

7.344. India argues that the United States has failed to establish that the challenged aspects of the SEZ Scheme are export contingent.[536] India therefore asks the Panel not to consider whether the challenged measures under the SEZ Scheme constitute subsidies within the meaning of Article 1 of the SCM Agreement.[537]

7.345. Using the three-step framework for analysis discussed above, we will examine, in turn, the exemption from customs duties, the exemption from IGST, and the deduction from corporate income tax.

7.7.4.1 The exemption from customs duties on imports and exports

7.7.4.1.1 First step: Applicable treatment

7.346. We begin by identifying the challenged tax treatment through which India allegedly foregoes revenue otherwise due, as well as considering the objective reasons for this tax treatment.

7.347. Section 26(1)(a) of the SEZ Act provides for:

> [E]xemption from any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force, on goods *imported* into, or services provided in, a Special Economic Zone or a Unit, to carry on the authorized operations by the Developer or entrepreneur.[538]

7.348. Similarly, Section 26(1)(b) of the SEZ Act provides for:

> [E]xemption from any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force, on goods *exported* from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India.[539]

7.349. Thus, the SEZ Act exempts SEZ Units[540] from "any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force", on the importation and exportation of goods into and from India.[541]

7.350. Before turning to the second step in the analysis, we consider the objective reasons for this fiscal treatment.[542] India contends that the SEZ Scheme is not an export promotion scheme[543] and "cannot be reduced to the promotion of exports".[544] Instead, the scheme "is […] integral to the maintenance of the sovereignty and integrity of India", and its measures are "designed to increase

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[534] United States' first written submission, paras. 110, 112, 114, and 116; response to Panel question No. 67, paras. 92-96.

[535] United States' first written submission, paras. 105-106 and 109; second written submission, para. 136.

[536] India's first written submission, para. 329; opening statement at the meeting of the Panel, para. 105; and response to Panel question No. 64, p. 51.

[537] India's first written submission, para. 329; opening statement at the meeting of the Panel, para. 105; responses to Panel questions No. 64, p. 51 and No. 66, p. 52.

[538] SEZ Act. (emphasis added)

[539] SEZ Act. (emphasis added)

[540] The United States' challenge in the present case does not extend to the exemptions, if any, afforded to entities other than SEZ Units. (See fns 251 and 529 above).

[541] See e.g. United States' first written submission, paras. 103, 112, and 114.

[542] See para. 7.306 above.

[543] India's first written submission, para. 321; second written submission, paras. 152-155.

[544] India's first written submission, para. 322; second written submission, para. 149; and opening statement at the meeting of the Panel, paras. 87 and 88.

the production capacity of the SEZ Units, and result in additional economic activity, promotion of investment, and creation of employment opportunities".[545]

7.351. The opening paragraph of the SEZ Act describes it as an "Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto".[546] This suggests that the central objective of the Act and the measure set forth in it is the promotion of exports, other matters being "connected therewith or incidental thereto". Further, the NFE requirement is a central operational characteristic of the SEZ Scheme, in line with the central objective of promoting exports.[547]

7.352. In addition, Indian officials have stated[548] that "[t]he Special Economic Zones (SEZs) scheme has been a key instrument for promoting exports from India"[549] and that "SEZ Act and Rules provide a very competitive package for setting up export-oriented manufacturing and services units"[550]. Likewise, India's Minister of Commerce and Industry observed that "SEZ Schemes are important components of [India's] export promotion efforts contributing about one-third of our national exports".[551] And India's Ministry of Electronics and Information Technology recognizes the SEZ Scheme as an "export promotion scheme".[552] These statements confirm what the text of the SEZ Act and the operational characteristics of the Scheme indicate, namely, the central role of export promotion as a reason for the measures comprising the SEZ Scheme.

7.353. India points out that the SEZ Act also describes a range of considerations that must guide the Central Government of India in discharging its functions under the SEZ Act.[553] These considerations that must guide the Government include, together with the "promotion of exports of goods and services", the generation of additional economic activity, the promotion of investment from domestic and foreign sources, the creation of employment opportunities, the development of infrastructure facilities, and the maintenance of the sovereignty and integrity of India, the security of the State and friendly relations with foreign States.[554]

7.7.4.1.2 Second step: Benchmark for comparison

7.354. As a second step, we identify the benchmark for comparison, i.e. the fiscal situations that it is legitimate to compare. We recall that the challenged tax treatment consists of the customs duty treatment of the importation and exportation of goods. The fiscal situation that it is legitimate to compare, therefore, must be identified within India's regime for customs duties on the importation and exportation of goods.[555]

7.355. Section 12 of India's 1962 Customs Act provides:

> Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs

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[545] India's second written submission, para. 154. (fn omitted)

[546] First page of the SEZ Act.

[547] India argues that the NFE requirement is not meant to induce exports (India's first written submission, para. 348). We address this argument in the discussion of export contingency.

[548] India objects to giving probative value to "the subjective statements of government officials". We note however that with regard to the "objective reasons" behind the challenged tax and duty treatment, previous panels have relied on published government statements explaining the objective of the challenged measures, and press statements by government officials, as well as on the text of the relevant legislation or instrument, the operation of the scheme, and other evidence. India's second written submission, para. 156. See ibid., para. 157 and opening statement at the meeting of the Panel, para. 89; Panel Reports, *Brazil – Taxation*, paras. 7.407, 7.409, 7.410, 7.486, 7.832, 7.833, 7.841, 7.1157, 7.1159-7.1162, and 7.1210; *US – Tax Incentives*, paras. 7.62-7.63; and *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, paras. 8.875, 8.994-8.996, and 8.1035.

[549] Address by Shri Anand Sharma (Annual Supplement 2013-2014 to the Foreign Trade Policy 2009-2014, (Exhibit USA-23), para. 25).

[550] Nirmala Sitharaman, "SEZ scheme of India is quite comprehensive", *Daily News and Analysis*, (20 December 2014), (Exhibit USA-24).

[551] "Export Champions", *The Economic Times*, (12 February 2018), (Exhibit USA-4).

[552] Export Promotion Schemes, (Exhibit USA-35).

[553] Section 5 of the SEZ Act. See also India's second written submission, para. 154.

[554] Section 5 of the SEZ Act.

[555] See e.g. Panel Report, *US – Tax Incentives*, para. 7.118.

> Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.[556]

7.356. In accordance with Section 12 of the 1962 Customs Act, the First Schedule of India's 1975 Customs Tariff Act[557] sets forth the rate of *import* duty for the listed products[558], and the Second Schedule of India's 1975 Customs Tariff Act sets forth the rate of *export* duty for the listed products.[559]

7.357. We have asked both parties to identify the normative benchmark against which the exemption from customs duties on importation and exportation under the SEZ Scheme must be assessed. The parties have not identified other elements of India's tax rules as forming part of the relevant normative benchmark.[560]

7.358. We also note that the SEZ Act explicitly refers to the 1962 Customs Act and the 1975 Customs Tariff Act (and "any other law for the time being in force", which is also the wording used in the 1962 Customs Act) as laying down the duties with regard to which it sets forth "exemption[s]".[561]

7.359. Taxpayers subject to duties on importation and exportation under the 1962 Customs Act and 1975 Customs Tariff Act are importers or exporters, respectively, of goods. Taxpayers exempt from those duties under the SEZ Scheme are, equally, importers or exporters of goods. Moreover, customs duties are an indirect charge imposed on the goods themselves upon their importation or exportation, rather than a direct tax that would vary, for example, based on taxpayers' income. Therefore, for the purpose of an analysis of India's customs duties on importation and exportation, taxpayers subject to duties under the 1962 and 1975 Acts, and taxpayers exempt from those duties under the SEZ Scheme, are comparably situated.

7.360. We therefore consider that the customs duty liabilities and rates set out under the 1962 Customs Act and the 1975 Customs Tariff Act for the importation and exportation of goods are the appropriate benchmark for comparison.

7.7.4.1.3 Third step: Comparison of the applicable treatment with the benchmark

7.361. As a third step, we compare the tax treatment identified under the first step in the analysis with the benchmark treatment identified in the second step in the analysis.

7.362. As described above, the 1962 Customs Act provides that goods imported into, or exported from, India, are subject to the customs duties set forth in the 1975 Customs Tariff Act (and "any other law for the time being in force"[562]). By contrast, the SEZ Act exempts goods imported or exported by SEZ Units from those same customs duties. Therefore, under the SEZ Scheme, India foregoes revenue otherwise due in the form of customs duties on goods imported or exported by SEZ Units.

7.363. We recall our earlier finding that the promotion of exports is a key reason behind the SEZ Scheme, as well as our observation that, according to India, other reasons for the Scheme include the generation of additional economic activity, investment, and employment, and the maintenance of India's sovereignty.[563] None of these reasons explains the different tax treatment

[556] Customs Act (1962) as amended, Section 12 to Section 15, (Exhibit USA-8).

[557] Excerpt from Customs Tariff Act (1975) as amended, First Schedule, (Exhibit USA-89). See fn 508 above.

[558] United States' first written submission, para. 112; response to Panel question No. 67, para. 95.

[559] Customs Tariff Act, (Exhibit USA-31), Second Schedule; United States' first written submission, para. 114; and response to Panel question No. 67, para. 95.

[560] United States' response to Panel question No. 67, paras. 94-95; India's response to Panel question No. 66, p. 52; and comments on the United States' response to Panel question No. 67.

[561] Section 26(1)(a)-(b) of the SEZ Act. As regards customs duties on importation, see also fn 512 above.

[562] Customs Act (1962) as amended, Section 12 to Section 15, (Exhibit USA-8), Section 12.

[563] See paras. 7.350-7.353 above.

otherwise than as the foregoing of revenue, and therefore none of these reasons detracts from our finding that India is foregoing revenue otherwise due.

7.364. We therefore conclude that by exempting from customs duties the importation and exportation of goods by SEZ Units, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), and thus provides a financial contribution.

7.7.4.2 The exemption from IGST

7.7.4.2.1 First step: Applicable treatment

7.365. Turning to the exemption from IGST, we begin by identifying the challenged tax treatment. This is set out in Notification No. 15/2017, which:

> exempts all goods or services or both imported by a unit or a developer in the Special Economic Zone, from the whole of the integrated tax leviable thereon under sub-section (7) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) for authorised operations.[564]

7.366. Thus, Notification No. 15/2017 exempts SEZ Units from payment of IGST on the importation of goods.[565]

7.367. We have considered the reasons for the fiscal treatment under the SEZ Scheme in paragraphs 7.350-7.353, and we refer to that discussion, which applies equally here.

7.7.4.2.2 Second step: Benchmark for comparison

7.368. As a second step, we identify the benchmark for comparison, i.e. the fiscal situations that it is legitimate to compare. We recall that the challenged tax treatment consists of an exemption from IGST on the importation of goods, where IGST is an "integrated goods and services tax", similar to value added tax, which is levied on interstate transactions and on import transactions.[566] The fiscal situation that it is legitimate to compare, therefore, must be identified within India's regime for such taxes as it applies to the importation of goods.[567]

7.369. Section 5(1) of the IGST Act stipulates that:

> [T]here shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services … at such rates, not exceeding forty per cent, as may be notified by the Government … [p]rovided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 [concerning the levy of additional duty equal to excise duty, sales tax, local taxes and other charges] on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962.[568]

7.370. Section 3(7) of the 1975 Customs Tariff Act provides that:

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[564] Notification No. 15/2017, (Exhibit USA-27). Notification No. 15/2017 refers to the importation by an SEZ Unit or an SEZ developer. However, the United States' challenge in the present case is limited to the exemption granted to SEZ Units. (See fns 251 and 529 above).

[565] Notification No. 15/2017 "exempts … goods or services". But as we will see below, the provision derogated from, i.e. Section 3(7) of the Customs Tariff Act (1975), only refers to "articles". The United States, too, only refers to an exemption as it relates to goods: see e.g. United States' first written submission, paras. 116 and 117.

[566] Integrated Goods and Services Tax Act, (Exhibit USA-32), Section 5(1).

[567] See e.g. Panel Report, *US – Tax Incentives*, para. 7.118.

[568] Integrated Goods and Services Tax Act, (Exhibit USA-32), Section 5(1). The applicable tax rates can be found at: https://cbec-gst.gov.in/gst-goods-services-rates.html (accessed on 25 March 2019), also submitted as Indian Ministry of Finance, Department of Revenue website, Rates of Goods and Services Tax (accessed 14 March 2019), (Exhibit USA-65).

> Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding forty per cent as is leviable under section 5 of the Integrated Goods and Services Tax Act, 2017 on a like Article on its supply in India, on the value of the imported article as determined under sub-section (8) or sub-section (8A), as the case may be.[569]

7.371. Thus, taken together, Section 5(1) of the IGST Act and Section 3(7) of the 1975 Customs Tariff Act impose the applicable IGST on all goods imported into India.

7.372. Pursuant to Section 6 of the IGST Act, the Government may lay down exemptions from IGST where it "is satisfied that it is necessary in the public interest".[570] It may lay down exemptions "generally" for "goods or services or both of any specified description", "either absolutely or subject to such conditions as may be specified therein".[571] Or, "under circumstances of an exceptional nature", it may individually exempt from payment of the IGST "goods or services … on which tax is leviable".[572]

7.373. Notification No. 15/2017, which sets out the challenged tax exemption, was adopted "[i]n exercise of the powers conferred by sub-section (1) of section 6 of the Integrated Goods and Service Tax Act, 2017"[573], i.e. it was expressly worded as a derogation from the IGST liability that is otherwise set forth in the IGST Act. Further, Notification No. 15/2017 is expressly worded as an exemption from Section 3(7) of the 1975 Customs Tariff Act, i.e. the provision extending the IGST to imports.

7.374. In response to our request to parties that they identify the relevant normative benchmark, neither party has identified elements of India's tax regime other than those set out above.[574]

7.375. Taxpayers subject to IGST on imported goods under the 1962 Customs Act and 1975 Customs Tariff Act are importers of goods into India. Taxpayers exempt from IGST under the SEZ Scheme are, equally, importers of goods into India. Moreover, the IGST is an indirect tax imposed on the goods themselves (for present purposes, upon the importation of the goods), rather than a direct tax that would vary, for example, based on taxpayers' income. Therefore, taxpayers subject to IGST on importation under the 1975 Customs Tariff Act, and taxpayers exempt from IGST on importation under the SEZ Scheme, are comparably situated.

7.376. We therefore consider that the IGST liability and rates set out under the IGST Act and the 1975 Customs Tariff Act for the importation of goods are the appropriate benchmark for comparison.

7.7.4.2.3 Third step: Comparison of the applicable treatment with the benchmark

7.377. As a third step, we compare the tax treatment identified under the first step in the analysis with the benchmark treatment identified in the second step in the analysis, also taking into account the reasons behind the challenged tax treatment.

7.378. As described above, Section 3(7) of the 1975 Customs Tariff Act, extending Section 5(1) of the IGST Act to imported goods, entitles India to collect the IGST on "[a]ny article which is imported into India". By contrast, Notification No. 15/2017, expressly derogating from Section 3(7) of the 1975 Customs Tariff Act, provides that the IGST shall not be levied on goods imported by an SEZ Unit. Therefore, under the SEZ Scheme, India foregoes revenue otherwise due in the form of the IGST on imported goods.

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[569] Customs Tariff Act (1975) as amended, (Exhibit USA-87), Section 3(7). The United States initially submitted a version of the Customs Tariff Act (1975), (Exhibit USA-7) that contained an outdated version of Section 3(7). In response to a request to this effect from the Panel, the United States submitted the updated version of the Customs Tariff Act (1975), including the updated Section 3(7), as Exhibit USA-87.

[570] Integrated Goods and Services Tax Act, (Exhibit USA-32), Sections 6(1)-(2).

[571] Integrated Goods and Services Tax Act, (Exhibit USA-32), Section 6(1).

[572] Integrated Goods and Services Tax Act, (Exhibit USA-32), Section 6(2).

[573] Notification No. 15/2017, (Exhibit USA-27).

[574] United States' response to Panel question No. 67, paras. 94-95; India's response to Panel question No. 66, p. 52; and comments on the United States' response to Panel question No. 67.

7.379. We recall our earlier finding that the promotion of exports is a key reason behind the SEZ Scheme, as well as our observation that, according to India, other reasons for the Scheme include the generation of additional economic activity, investment, and employment, and the maintenance of India's sovereignty.[575] None of these reasons explains the different tax treatment otherwise than as the foregoing of revenue, and therefore none of these reasons detracts from our finding that India is foregoing revenue otherwise due.

7.380. We therefore conclude that by exempting from IGST the importation of goods by SEZ Units, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), and thus provides a financial contribution.

7.7.4.3 The deduction from corporate income tax

7.381. We now turn to the challenged deduction from the base on which income tax is levied.

7.7.4.3.1 First step: Applicable treatment

7.382. We begin by identifying the challenged tax treatment through which India allegedly foregoes revenue otherwise due.

7.383. Section 27 of the SEZ Act provides that:

> The provisions of the Income-tax Act, 1961, as in force for the time being, shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorised operations in a Special Economic Zone or Unit subject to the modifications specified in the Second Schedule.[576]

7.384. The Second Schedule of the SEZ Act modifies India's 1961 Income Tax Act in relevant part to the effect that:

> Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause (j) of section (2) of the Special Economic Zones Act, 2005, from his Unit, who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any assessment year commencing on or after the 1st day of [April, 2006, a deduction of]—
>
> (i) hundred per cent of profits and gains derived from the export, of such articles or things or from services for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the Unit begins to manufacture or produce such articles or things or provide services, as the case may be, and fifty per cent of such profits and gains for further five assessment years and thereafter[.][577]

7.385. Thus, the SEZ Act and its Second Schedule, and the Income Tax Act as accordingly amended, entitle SEZ Units to deduct from taxable income 100% of profits from exports of goods and services during the first five years of operation, and 50% for five further years.

7.386. We have considered the reasons for the fiscal treatment under the SEZ Scheme in paragraphs 7.350-7.353, and we refer to that discussion, which applies equally here.

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[575] See paras. 7.350-7.353 above.

[576] SEZ Act.

[577] SEZ Act; Income Tax Act, 1961, Sections 10A and 10AA, (Exhibit USA-29) (fn omitted). The cited language is from Section 10AA. Section 10A provided for the equivalent deduction for SEZ Units having begun production before the year preceding "the assessment year commencing on or after the 1st day of April, 2006", and which were initially located in a free trade zone or export processing zone.

7.7.4.3.2 Second step: Benchmark for comparison

7.387. As a second step, we identify the benchmark for comparison, i.e. the fiscal situations which it is legitimate to compare.

7.388. As we have seen above, the United States challenges tax treatment consisting of a deduction granted by India "in computing the total income of" an SEZ entrepreneur from an SEZ Unit, for purposes of the Income Tax Act.[578] Specifically, with regard to goods, SEZ entrepreneurs are allowed to deduct from the total income of SEZ Units all or part of the "profits and gains derived from the export of … articles or things or … services".[579]

7.389. The benchmark for comparison, therefore, must be the tax treatment of "legitimately comparable income"[580] "for taxpayers in comparable situations".[581] By way of example, *income* might not be legitimately comparable "if the measure at issue involves income earned in sales transactions, [and that income is compared with] employment income".[582] As for the comparability of *taxpayers*, again by way of example, "a domestic corporation" might not be comparably situated to a "foreign corporation".[583] Thus, in the case of income from export sales earned by SEZ Units, which are located in India, the income earned by other undertakings located in India from the exportation of goods and services provides an appropriate benchmark for comparison.

7.390. To identify the benchmark for comparison, the United States relied on Section 80A of India's 1961 Income Tax Act. This provision, titled "[d]eductions to be made in computing total income", states in relevant part:

> (1) In computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of this Chapter, the deductions specified in sections 80C to [80U].[584]

7.391. Because this provision expressly enumerates the deductions that are allowed "[i]n computing the total income of an assessee", the United States infers from it that, "as a general rule, profits are not deductible", and considers that this inability to deduct profits is the appropriate benchmark for comparison.[585]

7.392. India does not contest the United States' reliance on Section 80A.[586] However, India points out that this provision together with the deductions specified in Sections 80C to 80U show that "the Income Tax Act, 1961, allows for a range of deductions", and that "the deduction of profits is not restricted to the profits earned by enterprises engaged in SEZ / SEZ Development".[587] India points to several examples of profits that can or could be deducted from taxable income, including profits from certain undertakings in backward areas, profits from exports (which could be deducted until, and not after, 2005), profits "derived … from any business of developing a Special Economic Zone",

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[578] Second Schedule of the SEZ Act; Income Tax Act, 1961, Sections 10A and 10AA, (Exhibit USA-29), Section 10AA.

[579] Second Schedule of the SEZ Act; Income Tax Act, 1961, Sections 10A and 10AA, (Exhibit USA-29), Section 10AA.

[580] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 91.

[581] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 92. See also ibid. para. 98 ("the fiscal treatment of comparable income, in the hands of taxpayers in similar situations").

[582] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 90.

[583] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 92.

[584] Income Tax Act, 1961, Section 80A, (Exhibit USA-30) (fn omitted), cited in United States' first written submission, para. 110; and United States' responses to Panel questions No. 63, paras. 89-90 and No. 67, para. 93.

[585] United States' responses to Panel questions No. 63, para. 90 and No. 67, para. 93.

[586] As a general matter, India's position is that, because the SEZ Scheme is not export contingent, India need not address the arguments going to the existence of a subsidy. (India's first written submission, para. 329; second written submission, paras. 187-189; and comment on the United States' response to Panel question No. 67).

[587] India's comments to the United States' response to Panel question No. 63.

and profits from certain undertakings "in any of the North-Eastern States" (which could be deducted between 2007 and 2017).[588]

7.393. The Appellate Body has urged panels assessing allegations of revenue foregone "to develop an understanding of the tax structure and principles that best explains that Member's tax regime, and to provide a reasoned basis for identifying [the benchmark]".[589] We therefore review the legislation relied upon by both parties to develop an understanding of the "tax structure and principles" that are relevant to India's tax treatment of income, and in particular of income from export sales.

7.394. First, in reviewing the provisions allowing for tax deductions and enumerated in Section 80A, we note that, for a time, taxpayers resident in India could deduct a certain proportion of profits from export sales, but that no such deduction is "allowed in respect of the assessment year beginning on the 1st day of April, 2005 and any subsequent assessment year".[590]

7.395. Second, we note that, as pointed out by India, Sections 80C to 80U allow a "range"[591] of other deductions of profits from taxable income, including for example profits from certain undertakings in backward areas, from the business of developing an SEZ and, until 2017, from certain undertakings in the North-Eastern States. We do not, however, see these deductions as coalescing into some general rule according to which the deduction is the rule.[592] Rather, India appears to have selected a range of disparate situations in which it allows, indefinitely or for a finite period of time, the deduction of profits from taxable income, all the while maintaining its entitlement, outside those situations specifically provided for, to treat profits as part of taxable income.

7.396. Third, in examining the "tax structure and principles" as evidenced in the Income Tax Act, we note that where a "Central Act" provides that income tax will be charged, it must be "charged … in accordance with … the provisions … of" the Income Tax Act, "in respect of the total income of the previous year of every person".[593] For that purpose, the Income Tax Act defines the "scope of total income". It provides that, subject to the provisions of the Income Tax Act, the "total income" of residents includes "all income from whatever source derived which (a) is received … in India by or on behalf of such a person; or (b) accrues or arises … to him in India …; or (c) accrues or arises to him outside India …".[594]

7.397. Taken together, these provisions of the Income Tax Act therefore outline a system in which the definition of income is broad and encompasses profits from export sales, while at the same time India has chosen, in a range of disparate situations, to allow certain deductions from profits, including, to this day, the deduction of profits from export sales of SEZ Units.

7.398. Our review of the relevant provisions therefore confirms to us the inference drawn by the United States from Section 80A, i.e. that the benchmark treatment of income is that the income is *included* in (and not deducted from) the taxable income, and it confirms to us that this inference is

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[588] Income Tax Act, 1961, Sections 80HH, 80HHC, 80IAB, and 80IE, referred to in India's comments to the United States' response to Panel question No. 63. Instrument No. 26 in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), annex A; Exhibits USA-84 and IND-23.

[589] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 813. See para. 7.303 above.

[590] Income Tax Act, Section 80HHC, referred to in India's comments on the United States' response to Panel question No. 63. Instrument No. 26 in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), annex A; Exhibits USA-84 and IND-23.

[591] India's comments on the United States' response to Panel question No. 63.

[592] Compare Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 815 ("we note that a domestic tax system may be so replete with exceptions that the rate applicable to the general category of income in fact no longer represents the 'general rule' but, rather, the 'exception'").

[593] Income Tax Act, Section 4. Instrument No. 26 in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), annex A; Exhibits USA-84 and IND-23.

[594] Income Tax Act, Section 5. Instrument No. 26 in Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement and the statement of available evidence (Annex D-2), annex A; Exhibits USA-84 and IND-23.

also specifically valid for income from export sales by undertakings which, like SEZ Units, are situated in India.

7.399. We therefore conclude that the benchmark for comparison is that "profits and gains" from the export of goods are included in the taxable income of the undertakings to whom those profits and gains accrue.

7.7.4.3.3 Third step: Comparison of the applicable treatment with the benchmark

7.400. As a third step, we compare the tax treatment identified under the first step in the analysis with the benchmark treatment identified in the second step in the analysis.

7.401. As set out above, the SEZ Act, modifying in relevant part the Income Tax Act, provides that SEZ entrepreneurs may deduct from the taxable income of their SEZ Unit 100% of profits and gains from the export of goods during the first five years after the Unit has started "to manufacture or produce" such goods, and 50% of such profits for a further five years.[595] By contrast, such income from export sales would otherwise be included in the taxable income under the Income Tax Act.[596]

7.402. We have found that the promotion of exports is a key reason for the different tax treatment afforded under the SEZ Scheme, and we have also noted India's contention that other reasons for the Scheme include the generation of additional economic activity, investment, and employment, and the maintenance of India's sovereignty.[597] None of these reasons explains the different tax treatment otherwise than as the foregoing of revenue otherwise due, and therefore, like for the other prongs of the SEZ Scheme, consideration of the objective reasons behind the tax treatment does not detract from our finding that India is foregoing revenue otherwise due.

7.403. We therefore conclude that, by allowing SEZ entrepreneurs to deduct all or half of profits and gains from exports from the taxable income of SEZ Units during two consecutive periods of five years, India foregoes the revenue otherwise due to it in the form of tax on that income, and thus provides a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

7.7.5 Whether India foregoes revenue otherwise due under the Duty-Free Imports for Exporters Scheme

7.404. The United States argues that DFIS exempts importers from the payment of customs duties that would otherwise be due on the importation of particular goods in the absence of the measure[598], up to the value of that participant's duty-free entitlement under DFIS.[599] According to the United States, comparably situated enterprises importing the same products must pay customs duties according to India's national tariff schedule. The United States refers to the Indian customs legislation to show that, under DFIS, enterprises receive an exemption from the payment of customs duties that comparably situated enterprises in India must pay.[600] The United States contends that therefore DFIS provides exemptions from customs duty which constitute revenue foregone within the meaning of Article 1.1(a)(1)(ii).[601]

7.405. According to India, the customs duty exemption falls within the scope of footnote 1 and Annex I(i), and therefore the appropriate comparison is not between comparably situated enterprises, but rather between duties accrued and duties from which DFIS participants are exempted.[602]

[595] See paras. 7.383-7.385 above.
[596] See paras. 7.390-7.399 above.
[597] See paras. 7.350-7.353 above.
[598] United States' first written submission, paras. 152-156.
[599] United States' first written submission, para. 154.
[600] United States' first written submission, para. 155; response to Panel question No. 84, paras. 143 and 144.
[601] United States' first written submission, para. 156; second written submission, para. 169.
[602] India's first written submission, para. 391 and 392; second written submission, para. 203 (referring to Appellate Body Report, *EU – PET (Pakistan)*, para. 5.79); responses to Panel questions No. 35, p. 23-28,

7.406. In paragraph 7.310 above, however, we have already rejected India's argument in this regard. To recall, we have found that, among the nine Conditions/duty stipulations comprising DFIS, Conditions 36, 60(ii), and 61, in their entirety, and Conditions 10 and 21, for one and six items respectively, fall outside the scope of footnote 1.[603] It is therefore for these Conditions/duty stipulations that we examine whether India is providing a financial contribution by foregoing revenue that is otherwise due.

7.7.5.1 First step: Applicable treatment

7.407. As a first step, we identify the challenged tax treatment. The pairings of Conditions and duty stipulations at issue are set out in Notification No. 50/2017. This provides, in relevant part:

> In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 … and sub-section (12) of section 3, of Customs Tariff Act, 1975 … the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods [identified in Customs Notification No. 50/2017] when imported into India,-
>
> (a) from so much of the duty of customs leviable thereon under the said First Schedule [of the 1975 Customs Tariff Act] as is in excess of the amount calculated at the standard rate specified in the corresponding entry in column (4) of the said Table; …
>
> subject to any of the conditions, specified in the Annexure to this notification[.][604]

7.408. For the Line Numbers at issue, Notification No. 50/2017 indicates "Nil" as the "Standard rate" of customs duties.[605] Thus, under Notification No. 50/2017, participating enterprises are exempt from import duties subject to meeting the relevant Conditions.

7.409. Before turning to the second step in the analysis, we consider the "objective reasons" behind this duty treatment.[606] Notification No. 50/2017 does not provide any express statement of objectives. However, it ties the value of goods eligible for customs duty exemption to the value of past export performance, which indicates that the promotion of export performance underlies the duty treatment at issue, as argued by the United States. India has not identified a different objective, and has argued that DFIS was intended as a drawback of customs duties related to exported products[607], an argument which is consistent with the view that the reason behind DFIS is the promotion of exports.

7.7.5.2 Second step: Benchmark for comparison

7.410. As a second step, we identify the benchmark for comparison, i.e. the fiscal situations which it is legitimate to compare. We recall that the challenged tax treatment consists of customs duties on the importation of goods. The fiscal situation which it is legitimate to compare, therefore, must be identified within India's regime for customs duties on the importation of goods.[608]

7.411. Section 12 of India's 1962 Customs Act provides that "[e]xcept as otherwise provided … duties of customs shall be levied at such rates as may be specified under [the Customs Tariff

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No. 36, p. 28-31 and No. 83, p. 61; and comments on the United States' responses to Panel question No. 84, p. 25.

[603] See para. 7.267 above.
[604] Notification No. 50/2017, (Exhibit USA-36), p. 1.
[605] Notification No. 50/2017, (Exhibit USA-36), table, column (4).
[606] See para. 7.306 above.
[607] India's first written submission, paras. 388-390.
[608] See e.g. Panel Report, *US – Tax Incentives*, para. 7.118.

Act, 1975] … on goods imported into … India".[609] The First Schedule of India's 1975 Customs Tariff Act accordingly sets forth the rate of import duty for the listed products.

7.412. In response to questioning from the Panel, the parties have not identified other elements of India's tax rules as forming part of the relevant normative benchmark.[610]

7.413. We also note that Notification No. 50/2017, itself, refers to the First Schedule of the 1975 Customs Tariff Act as the norm it departs from.[611]

7.414. Taxpayers exempt from duties on the listed goods under DFIS are importers of those goods into India. Taxpayers subject to duties on the importation of those same goods under the 1962 Customs Act and 1975 Customs Tariff Act are, equally, importers of the same goods into India. Moreover, customs duties are an indirect charge imposed on the goods themselves upon their importation or exportation, rather than a direct tax that would vary, for example, based on taxpayers' income. Therefore, for the purpose of an analysis of India's customs duties on the importation of capital goods, taxpayers subject to duties under the 1962 and 1975 Acts, and taxpayers exempt from those duties under DFIS, are comparably situated.

7.415. We therefore consider that the customs duty liability and rates set forth in the First Schedule of the 1975 Customs Tariff Act 1975, in accordance with the 1962 Customs Act, are the appropriate benchmark for comparison.[612]

7.7.5.3 Third step: Comparison of the applicable treatment with the benchmark

7.416. We now turn to comparing the tax treatment identified under the first step in the analysis with the benchmark treatment identified in the second step in the analysis.

7.417. As seen above, the First Schedule of the 1975 Customs Tariff Act sets forth the rates of customs duty that, pursuant to the 1962 Customs Act, apply to goods imported into India. By contrast, for the Line Numbers at issue, DFIS reduce those duty rates to zero for participating enterprises (until they reach the ceiling placed on their duty-free entitlement under DFIS).

7.418. Our review of the limited evidence and arguments regarding the reasons for this difference in tax treatment[613] has disclosed nothing that would detract from our finding that India is foregoing revenue otherwise due.

7.419. We therefore conclude that, through the duty stipulations that correspond to Conditions 10, 21, 36, 60(ii), and 61, India foregoes revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), and thus provides a financial contribution.

7.8 Direct transfer of funds under Article 1.1(a)(1)(i)

7.420. This section assesses the United States' contention that the provision of scrips under MEIS is a direct transfer of funds by India, and thus a financial contribution, within the meaning of Article 1.1(a)(1)(i).[614]

7.421. India responds that MEIS scrips are merely a mechanism to remit indirect taxes already paid. According to India, therefore, they are not a direct transfer of funds but an exemption or

[609] Customs Act (1962) as amended, Section 12 to Section 15, (Exhibit USA-8).

[610] United States' response to Panel question No. 84, para. 144; India's response to Panel question No. 83, p. 61.

[611] Notification No. 50/2017, (Exhibit USA-36), p. 1.

[612] See also fn 512 above.

[613] See para. 7.409 above.

[614] United States' first written submission, paras. 56-57. The United States does not exclude that MEIS scrips could additionally be characterized as financial contributions in the form of government revenue foregone under Article 1.1(a)(1)(ii) of the SCM Agreement. (United States' responses to Panel questions No. 54, para. 85 and No. 55, para. 87; comments on India's response to Panel question No. 57, paras. 124 and 125).

remission consistent with footnote 1 read together with Annexes I(g), I(h), or I(i).[615] However, we have already found that MEIS does not meet the conditions of footnote 1 read together with Annexes I(g), I(h), and I(i).[616]

7.422. Further, India argues that the United States has not shown that MEIS scrips "can be equated to or are similar to the examples" of direct transfer of funds in Article 1.1(a)(1)(i), namely "grants, loans, and equity infusions".[617]

7.423. Below, we recall the legal standard applicable to direct transfers of funds pursuant to Article 1.1(a)(1)(i) and then examine whether the provision of MEIS scrips is a direct transfer of funds.[618]

7.8.1 The applicable legal standard under Article 1.1(a)(1)(i)

7.424. Article 1.1(a) of the SCM Agreement provides, in relevant part:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)[.]

7.425. Thus, a government practice involving a direct transfer of funds constitutes a financial contribution.

7.426. The focus of subparagraph (i), like of the other subparagraphs of Article 1.1(a)(1), is "primarily on the action taken by the government or a public body".[619] Under the first clause of this subparagraph, the action is a "direct transfer of funds", where "the term 'funds' encompasses not only 'money', but also financial resources and other financial claims more generally".[620] The phrase "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) "therefore captures conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient".[621]

7.427. Article 1.1(a)(1)(i) also provides examples of a direct transfer of funds, namely, "grants, loans, and equity infusion": the list is illustrative, and the examples provide "an indication of the type of transactions intended to be covered by the more general reference to 'direct transfer of funds'".[622]

[615] India's first written submission, paras. 231-236 and 245-278; second written submission, paras. 96-98 and 100-118; opening statement at the meeting of the Panel, paras. 65-76; responses to Panel questions No. 57, No. 60, and No. 62; and comments on the United States' responses to Panel questions No. 54 and No. 55.

[616] See para. 7.294 above.

[617] E.g. India's first written submission, para. 251.

[618] The parties do not dispute that the scrips are provided "by a government" within the meaning of Article 1.1(a)(1). As will be seen below, scrips are provided by the Government of India in accordance with the Foreign Trade Policy, which is an administrative instrument adopted by the Government. Therefore, to the extent it is established that the provision of scrips is a direct transfer of funds, we are satisfied that this financial contribution is "by a government" within the meaning of Article 1.1(a)(1).

[619] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 613.

[620] Appellate Body Reports, *Japan – DRAMs (Korea)*, para. 250; *US – Large Civil Aircraft (2nd complaint)*, para. 614.

[621] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614.

[622] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 615; *Japan – DRAMs (Korea)*, para. 251.

7.428. While "the types of financial contributions set out in Article 1.1(a)(1) are [not] the same", the subparagraphs are not mutually exclusive, i.e. it is possible for the same transaction to "fall under more than one type of financial contribution".[623]

7.8.2 Whether MEIS involves a direct transfer of funds

7.429. Pursuant to the Foreign Trade Policy, the Government of India "grant[s]" scrips, under MEIS, as a reward for exports.[624] Scrips have a value which is the result of multiplying the recipient's FOB value of exports by reward rates that vary by product exported and country of export.[625] As we now turn to discussing, a recipient of scrips may either use them to offset certain liabilities *vis-à-vis* the Government of India, or transfer them to third parties for consideration.

7.430. First, scrips may be used to pay for (a) basic and additional customs duties applying on importation under the 1975 Customs Tariff Act (with some exclusions), (b) excise duties on goods purchased domestically, and (c) certain other fees and charges owed to the Government, such as charges for failing to fulfil one's export obligations under certain other Government schemes.[626]

7.431. Second, scrips are "freely transferable".[627] There was some factual disagreement between the parties as to the meaning of "freely transferable". The United States argued this means that the scrips can be sold for cash to third party recipients, and provided evidence of online marketplaces where such transactions take place.[628] India argued that the legislation setting forth MEIS "does not state that the scrip can be sold for cash nor does it mandate that the scrip must be sold for cash", regardless of whether "in practice, the scrip(s) are or can be sold for cash".[629] We note that the Foreign Trade Policy expressly provides that "Scrips … shall be freely transferable", a point further confirmed by the evidence of marketplaces where scrips are traded for money; India failed to rebut this factual evidence. Indeed, India stated that "freely transferable" in the provision in question "means that MEIS Scrips can be transferred to third parties, for which no further permission is required from the government"[630], and further stated that the "third party [recipient] can use the scrip for any of the Specified Uses listed in Paragraph 3.02 of the Foreign Trade Policy".[631] We therefore consider it established, as a matter of fact, that scrips can be sold to third party recipients for consideration such as money.

7.432. We recall that "direct transfer of funds … captures conduct on the part of the government by which money, *financial resources*, and/or *financial claims* are made available to a recipient".[632] We consider that both because scrips can be used to pay for customs duties and other liabilities *vis-à-vis* the Government, and because they can be sold to third party recipients for consideration, they are "financial resources and/or financial claims", i.e. "funds" within the meaning of Article 1.1(a)(1)(i). Therefore, the provision of scrips under MEIS is a direct transfer of funds by the Government of India to the initial recipients of the scrips, within the meaning of Article 1.1(a)(1)(i).

7.433. India argues that MEIS scrips in fact are a mechanism to remit indirect taxes already paid, falling under footnote 1 of the SCM Agreement. However, we have already found, as a matter of

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[623] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.120.

[624] Sections 3.02 ("Duty Credit Scrips shall be granted as rewards under MEIS …") and 3.04 of the FTP.

[625] Section 3.04 of the FTP and Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B.

[626] Sections 3.02 and 3.18 of the FTP. See para. 7.161 above. As reflected there, such charges for failing to fulfil one's export obligations include the back payment of customs duties.

[627] Section 3.02 of the FTP.

[628] E.g. United States' second written submission, para. 109 and comment on India's response to Panel question No. 56, para. 121 with reference to Scripbazaar, a platform dedicated to "trad[ing] in MEIS & SEIS scrips", which advertises: "If you are interested in selling … Scripbazaar.com will have the physical scrip picked up from your address and transfer the money to your account". (Scripbazaar website (accessed 9 October 2018), (Exhibit USA-57), p. 2).

[629] E.g. India's second written submission, para. 110. See also India's responses to Panel questions No. 56 and No. 59.

[630] India's response to Panel question No. 56.

[631] India's response to Panel question No. 59.

[632] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614. (emphasis added)

fact, that MEIS is not a mechanism to remit indirect taxes already paid, and, as a matter of law, that it does not meet the conditions of footnote 1.[633]

7.434. India also argues that the United States has not established that MEIS scrips "can be equated to or are similar to the examples" in Article 1.1(a)(1)(i), namely "grants, loans, and equity infusions", and therefore has not established that they are direct transfers of funds.[634]

7.435. The examples in Article 1.1(a)(1)(i) are illustrative: they do not exhaust the category of "direct transfer of funds".[635] At the same time, they provide an indication of the types of transactions intended to be covered by it[636], and where "there are measures that have sufficient characteristics in common with one example in subparagraph (i), this commonality indicates … that the measures fall within the concept of 'direct transfer of funds'".[637]

7.436. While for a measure to be a direct transfer of funds it is not necessary for it to fall among the three examples in the first clause of subparagraph (i), we examine, in light of India's contention, the relationship between the MEIS scrips and those three examples. The first example, i.e. "grants", consists of transactions in which "money or money's worth is given to a recipient, normally without an obligation or expectation that anything will be provided to the grantor in return"[638]; in contrast, the other two examples, "loans" and "equity infusion", "are characterized by reciprocity".[639] We note that, when India grants MEIS scrips, it provides "money's worth … to a recipient". While past exports trigger the granting of scrips, there is no obligation or expectation that any form of return will be provided to the Government of India for the scrips. Further, grants can be "conditional", as MEIS scrips are.[640] Therefore, MEIS scrips have significant commonalities with grants, which further confirms that they do fall within subparagraph (i).

7.437. Finally, India suggests that MEIS scrips cannot fall under subparagraph (i) because they fall under subparagraph (ii) of Article 1.1(a)(1).[641] However, while the two subparagraphs are of course context for each other, they are not mutually exclusive.[642] Having examined the measure, including identifying its "principal characteristics"[643], we have found that MEIS scrips fall within subparagraph (i). For this finding to stand, we do not need, in addition, to exclude that aspects of the measure may fall under subparagraph (ii).

7.438. We therefore confirm our preliminary finding, in paragraph 7.432 above, that by providing MEIS scrips India provides a direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, and thus provides a financial contribution.

7.9 Benefit under Article 1.1(b) of the SCM Agreement

7.439. We now turn to examine whether the measures that we have found to be financial contributions by the Government of India also confer a "benefit" within the meaning of Article 1.1(b).

7.9.1 The applicable legal standard under Article 1.1(b)

7.440. Under Article 1.1(b) of the SCM Agreement, a financial contribution by a government is a "subsidy" if "a benefit is thereby conferred".

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[633] See para. 7.294 above.
[634] E.g. India's first written submission, para. 251.
[635] See para. 7.427 above.
[636] See para. 7.427 above.
[637] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 624.
[638] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 616.
[639] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 616.
[640] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, fn 1292.
[641] E.g. India's first written submission, paras. 253-258.
[642] See para. 7.428 above.
[643] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.120.

7.441. A benefit within the meaning of Article 1.1(b) is an "advantage"[644] to the *recipient* of the financial contribution.[645] That is, there is a benefit for purposes of this provision if "the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution".[646]

7.442. In past cases, WTO adjudicators have held that "the marketplace provides an appropriate basis for comparison … because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient on the market".[647]

7.443. Article 14 of the SCM Agreement, which addresses the "Calculation of the Amount of the Subsidy", by an investigating authority, "in Terms of the Benefit to the Recipient", provides context for the interpretation of Article 1.1(b).[648] Among other things, Article 14 confirms that the focus of the analysis is on the recipient[649], and that benefit is assessed by reference to the conditions that would exist on the market in the absence of the financial contribution.[650]

7.444. The two types of financial contribution that we have found to be established in the case before us are the foregoing of revenue otherwise due, within the meaning of Article 1.1(a)(1)(ii), and a direct transfer of funds, within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. We therefore address, in turn, certain peculiar traits of the benefit analysis for these two types of financial contribution.

7.445. Adjudicators examining cases of revenue foregone have consistently held that a finding of benefit "readily follows" from a finding that the government is foregoing revenue otherwise due.[651] The panel in *US – Large Civil Aircraft (2nd complaint)* explained that, in its view, this is because a "tax break is essentially a gift from the government, or a waiver of obligations due, and it is clear that *the market does not give such gifts*".[652] The panel in *US – Tax Incentives* similarly explained that "*the relief from taxation otherwise due is not generally available to market participants*, nor does it exist as a general condition in the marketplace".[653]

[644] Panel Report, *Canada – Aircraft*, para. 9.112; Appellate Body Report, *Canada – Aircraft*, para. 153. Also e.g. Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.159; Panel Report, *US – Tax Incentives*, para. 7.159.

[645] E.g. Appellate Body Reports, *Canada – Aircraft*, paras. 154 ("the focus … should be on the recipient and not on the granting authority") and 155-156; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.159; and Panel Report, *US – Tax Incentives*, para. 7.159.

[646] Appellate Body Report, *Canada – Aircraft*, para. 157. Also e.g. Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 5.107; Panel Report, *US – Tax Incentives*, para. 7.159.

[647] Appellate Body Report, *Canada – Aircraft*, para. 157. See also e.g. Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.164; *EC and certain member States – Large Civil Aircraft*, para. 5.107; Panel Reports, *US – Tax Incentives*, para. 7.159; and *US – Large Civil Aircraft (2nd complaint)*, para. 7.168.

[648] Appellate Body Reports, *Canada – Aircraft*, para. 155 and 158; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.163

[649] Appellate Body Report, *Canada – Aircraft*, para. 155.

[650] Appellate Body Report, *Canada – Aircraft*, para. 158. Article 14 refers, in particular, to "the usual investment practice … of private investors in the territory of [the Member concerned]", "a comparable commercial loan which the [recipient] could actually obtain on the market", "the amount that the [recipient] would pay on a comparable commercial loan", and "prevailing market conditions … in the country of provision or purchase".

[651] Panel Reports, *EU – PET (Pakistan)*, para. 7.36 ("readily follows"); *Brazil – Taxation*, paras. 7.491-7.494; *US – Tax Incentives*, paras. 7.160-7.164; *US – Large Civil Aircraft (2nd complaint)*, paras. 7.169-7.171; *US – FSC*, para. 7.103; *US – FSC (Article 21.5 – EC)*, para. 8.46; and *Canada – Autos*, para. 10.165. See also, espousing this position, United States' first written submission, para. 43; Canada's response to Panel question No. 11, paras. 21-22; and Japan's response to Panel question No. 11. Indeed, India itself, discussing *EU – PET (Pakistan)*, notes that the rationale behind it "could be, that cases of government revenue foregone result in a finding of benefit conferred as well, since *there can never be a market equivalent of government revenue foregone*, such as tax remissions, since the authority to tax is a sovereign function of states". (India's first written submission, para. 287. (emphasis added))

[652] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.170. (emphasis added)

[653] Panel Report, *US – Tax Incentives*, para. 7.162. (emphasis added)

7.446. As a result, although financial contribution and benefit are "separate *legal* elements"[654], the "same *factual* elements" may form the basis both of a finding that the government is foregoing revenue otherwise due, and of a finding of benefit.[655]

7.447. The second type of financial contribution we have found to be established in this case is a direct transfer of funds. Specifically, we have found there to be a direct transfer of funds that shares "significant commonalities with grants".[656] Similar to revenue foregone, adjudicators have repeatedly found that grants, by their nature, confer a benefit to the recipient: "they place the recipient in a better position than the recipient otherwise would have been in the marketplace"[657], because no entity acting pursuant to commercial considerations would make such unremunerated payments.[658]

7.448. Turning to the measures before us, we will assess, first, whether a benefit is conferred through the financial contributions taking the form of tax exemptions and deductions; and, second, whether a benefit is conferred through the MEIS scrips. Before doing so, we note that for the EOU/EHTP/BTP Schemes, EPCG Scheme, DFIS, and MEIS, India argues that the measures at issue fall under footnote 1, and therefore cannot be held to confer a benefit within the meaning of Article 1 of the SCM Agreement.[659] We recall however that, for these schemes, we have proceeded to the analysis of the existence of financial contribution and benefit to the extent that we have found that these schemes do not meet the conditions of footnote 1. Therefore, we reject India's footnote 1 argument in the context of the benefit analysis.

7.9.2 Whether the tax exemptions and deductions under the Export Oriented Units and Sector-Specific Schemes, Export Promotion Capital Goods Scheme, Special Economic Zones Scheme, and Duty-Free Imports for Exporters Scheme, confer a benefit

7.449. We begin with the financial contributions taking the form of revenue foregone. We have found that the following tax exemptions and deductions are financial contributions in the form of revenue foregone: (a) the exemptions from customs duties on importation under the EOU/EHTP/BTP Schemes, EPCG Scheme, SEZ Scheme, and DFIS; (b) the exemption from customs duties on exportation under the SEZ Scheme; (c) the exemption from IGST on importation under the SEZ Scheme; and (d) the deductions from taxable income under the SEZ Scheme.

7.450. The United States argues that these exemptions confer a benefit on their recipients, because recipients do not have to pay the duties and taxes they would otherwise have to pay and, therefore, are financially "better off" than in the absence of the financial contribution.[660] The United States asserts that in cases of government revenue foregone, such as these, the benefit resides in the very fact that revenue is forgone.[661]

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[654] Appellate Body Report, *Brazil – Aircraft*, para. 157. (emphasis added)

[655] Panel Report, *US – Tax Incentives*, para. 7.163 (emphasis added). See also European Union's third-party response to Panel question No. 11, para. 35. In *US – Tax Incentives*, the panel noted that this is because "the 'market conditions' that are relevant as a benchmark in this context are the competitive conditions that exist in the absence of the challenged financial contribution". (Panel Report, *US – Tax Incentives*, para. 7.162).

[656] See para. 7.436 above.

[657] Panel Report, *US – Upland Cotton*, paras. 7.1116 and 7.1118. See also Panel Reports, *EC and certain member States – Large Civil Aircraft*, para. 7.1501; *US – Large Civil Aircraft (2nd complaint)*, paras. 7.1228-7.1229 and 7.1362. See also Canada's third-party response to Panel question No. 11, para. 22 ("[i]t is simply a consequence of the nature of the financial contribution which confers a benefit *per se*").

[658] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.1229.

[659] India's first written submission, paras. 217 (EOU/EHTP/BTP Schemes), 284 (MEIS), 314 (EPCG Scheme), and 397 (DFIS); second written submission, paras. 83 (EOU/EHTP/BTP Schemes), 120-123 (MEIS), 206 (DFIS), and 194 (EPCG Scheme); and opening statement at the meeting of the Panel, paras. 58 (EOU/EHTP/BTP Schemes), 73 (MEIS), 83 (EPCG Scheme), and 112 (DFIS).

[660] United States' first written submission, paras. 44 (EOU/EHTP/BTP Schemes), 76 (EPCG Scheme), 118, 120 (SEZ Scheme), and 159 (DFIS); second written submission, paras. 97 (EOU/EHTP/BTP Schemes), 131 (EPCG Scheme), 137 (SEZ Scheme), and 174 (DFIS); and opening statement at the meeting of the Panel, paras. 11 (EOU/EHTP/BTP Schemes), 21 (EPCG Scheme), 26 (SEZ Scheme), and 29 (DFIS).

[661] United States' first written submission, para. 43 (EOU/EHTP/BTP Schemes), 75 (EPCG Scheme), 119 (SEZ Scheme), 158 (DFIS); second written submission, paras. 94 (EOU/EHTP/BTP Schemes), 127 (EPCG Scheme), and 171 (DFIS).

7.451. As others before us, we note that "relief from taxation otherwise due is not generally available to market participants, nor does it exist as a general condition in the marketplace".[662] Beginning with the exemptions from customs duties on importation, we observe that an importer of goods under the EOU/EHTP/BTP Schemes, EPCG Scheme, SEZ Scheme, or DFIS, gets to import goods free of customs duties. The market – however defined – does not offer this "gift".[663] An importer of the very same goods outside these or other exemption schemes is subject to customs duties. Thus, a recipient of the customs duty exemption under the EOU/EHTP/BTP Schemes, EPCG Scheme, SEZ Scheme, or DFIS is "'better off' than it would otherwise have been, absent that contribution".[664]

7.452. The same considerations are valid for the other exemptions from duties and indirect taxes at issue, namely: the exemption from customs duties on exportation (an exporter of goods under the SEZ Scheme gets to export the goods free of customs duties, but an exporter of the same goods outside the SEZ or similar schemes must pay customs duties on exportation); and the exemption from IGST on importation (an importer of goods under the SEZ Scheme gets to import the goods free of IGST, but importers of the same goods, outside this or similar schemes, must pay IGST). Again, the market "does not give such gifts"[665], and therefore the recipients of these tax exemptions are better off than they would be on the market in the absence of the financial contribution.

7.453. Similar considerations are also valid for the deduction from taxable income under the SEZ Scheme. To recall, SEZ entrepreneurs are allowed to deduct profits and gains from exports from the total income of their Units, to which income tax is applied. By contrast, entities outside the SEZ Scheme have to pay tax on such income. Again, this makes SEZ entrepreneurs and their Units better off than they would be in the absence of the financial contribution – i.e. better off than if they had to pay tax on their export income.

7.454. India argues that this line of reasoning wrongly conflates the notions of financial contribution and benefit.[666] Relying among others on *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, India emphasizes the need for "an appropriate understanding of 'the market' … to determine whether a benefit has been conferred".[667] In particular, with regard to the exemptions under the EOU/EHTP/BTP Schemes, EPCG Scheme, and DFIS, India argues that the United States has failed to establish the existence of a benefit because it has not provided "an appropriate analysis or definition of the market".[668]

7.455. However, the fact that a certain type of market analysis is required, for example, to ascertain whether a government purchase was made for more than adequate remuneration (as in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, which India relies on) does not mean that the same type of analysis is required in every case. Here, India foregoes revenue from certain enterprises, and this is not a gift the market gives.[669]

7.456. India further argues that the relevant market in fact consists of the "like competitors"[670] to the recipients of the financial contribution at issue, who would therefore qualify under the relevant scheme. These like competitors, if only they applied, would receive the same exemptions, and

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[662] Panel Report, *US – Tax Incentives*, para. 7.162.

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

[664] Appellate Body Report, *Canada – Aircraft*, para. 157.

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

[666] E.g. India's first written submission, para. 135. India makes the same argument for all tax exemptions under the EOU/EHTP/BTP Schemes, EPCG Scheme and DFIS. India's first written submission, paras. 216 (EOU/EHTP/BTP Schemes), 313 (EPCG Scheme), and 396 (DFIS); second written submission, paras. 82 (EOU/EHTP/BTP Schemes), 140 (EPCG Scheme), and 205 (DFIS). For the SEZ Scheme, India argues that the measure is not export contingent, and that therefore it need not address the allegations of subsidy. India's first written submission, para. 329; second written submission, paras. 187 and 189; opening statement at the meeting of the Panel, para. 105; and response to Panel question No. 64.

[667] India's first written submission, para. 136.

[668] E.g. India's first written submission, para. 218, with reference to the EOU/EHTP/BTP Schemes. To recall, India does not address the United States' allegation that the exemptions under the SEZ Scheme confer a benefit. See fn 666 above.

[669] We also recall that the challenged schemes exempt from duties or taxes the very *same* transactions, involving the very *same* goods, that would be subject to those duties or taxes outside the schemes.

[670] India's first written submission, para. 399, with reference to DFIS.

therefore "'participating enterprises' are only made 'better off' insofar as they submitted the appropriate paperwork".[671]

7.457. India is, in essence, suggesting that the relevant market should be defined as all entities potentially qualifying for an alleged subsidy scheme (and, further, that qualifying entities that fail to apply should not be considered). This cannot be the appropriate framework for analysis. As set out above, the relevant question is whether "the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution"[672], i.e. *outside* the alleged subsidy scheme. Therefore, India's suggestion that the relevant market consists of those entities that could, or do, fall *within* the challenged schemes goes against the very notion of a benchmark for ascertaining the existence of a benefit, and does not persuade us.

7.458. We therefore find that the duty and tax exemptions and deductions at issue confer a benefit on their recipients, by making them better off than they would be, in the market, absent those exemptions and deductions. And, to recall, we have already found that they are a financial contribution by the government.[673] Therefore, these duty and tax exemptions and deductions are a subsidy within the meaning of Article 1.1 of the SCM Agreement.

7.9.3 Whether MEIS scrips confer a benefit

7.459. The other category of financial contribution we have found to be established in this case is a direct transfer of funds, in the form of MEIS scrips.

7.460. The United States argues that, by providing MEIS scrips, India confers a benefit on the scrips' recipients, because recipients can use the scrips to pay for customs duties, central excise duties, and other liabilities *vis-à-vis* the Government, and can also sell the scrips for money.[674]

7.461. We have found that MEIS scrips are "money's worth"[675], which can be used to pay for a number of liabilities *vis-à-vis* the Government, and can also be sold to third parties for money.[676] Further, we have found that India provides MEIS scrips with no obligation or expectation of any form of return.[677]

7.462. Like others before us, we are of the view that "no private entity acting pursuant to commercial considerations" would provide money's worth "to another commercial entity" for no remuneration.[678]

7.463. Therefore, the provision by India of money's worth in the form of MEIS scrips makes recipients better off than they would otherwise be, absent that financial contribution, on the market.

7.464. Similar to its arguments on the tax exemptions discussed above, India argues that the United States failed to identify the relevant market, and thus failed to discharge its burden to prove benefit.[679] India relies, again, on the Appellate Body Reports in *Canada – Renewable Energy / Canada – Feed-in Tariff*.[680]

7.465. However, we reiterate that the fact that some subsidy cases require an elaborate definition of the relevant market does not mean that all do. For some types of financial contribution, an elaborate analysis and definition of the relevant market is crucial. By way of example, this may be the case of financial contributions consisting of the provision or purchase of goods (where it is

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[671] India's first written submission, para. 400, with reference to DFIS. Also India's first written submission, paras. 218-219 (EOU/EHTP/BTP Schemes); second written submission, paras. 84 (EOU/EHTP/BTP Schemes), 142 (EPCG Scheme), and 207 (DFIS).
[672] Appellate Body Report, *Canada – Aircraft*, para. 157.
[673] See section 7.7 above.
[674] United States' first written submission, para. 59; second written submission, para. 111; and opening statement at the meeting of the Panel, para. 17.
[675] See para. 7.436 above.
[676] See paras. 7.430-7.431 above.
[677] See para. 7.436 above.
[678] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.1229.
[679] India's first written submission, paras. 285-287.
[680] India's first written submission, para. 286.

necessary to assess the adequacy of remuneration), or of loans (where it is necessary to ascertain the amount the recipient would pay on a comparable commercial loan that it could obtain on the market).

7.466. In contrast to these two examples, under MEIS, India provides recipients with scrips that have a monetary value, with no obligation or expectation that recipients will provide any form of return. As we have noted, the market does not make such gifts, whichever way the market boundaries are drawn.

7.467. India also argues that the United States failed to substantiate that MEIS "as such" confers a benefit.[681] India submits that, to this end, the United States must demonstrate that MEIS *requires* the conferral of a benefit.[682] Since the applicable legal instruments do not "specif[y] that the recipient of a scrip must utilize the MEIS Scrip", and instead they "merely give[] the MEIS Scrip recipient an option to utilize the scrips … the law does not require conferral of any alleged benefit".[683]

7.468. We disagree with India. MEIS scrips have a monetary value and, on receiving them, their recipients are made better off than they would have been on the market, where no such gifts are made. That the applicable legal instruments do not oblige recipients to *realize* that monetary value does not mean that, by providing MEIS scrips, India does not confer a benefit on their recipients.

7.469. Finally, India argues that the United States failed to establish that MEIS as such confers a benefit because, if the recipient fails to provide the necessary documents upon request, it must refund the value of the scrips, with interest.[684] However, that the competent authority can reclaim the value of the scrips if recipients are unable to prove their entitlement to them does nothing to contradict the conclusion that the provision of MEIS scrips confers a benefit.

7.470. We therefore find that MEIS scrips confer a benefit on their recipients, by making them better off than they would have been, in the market, absent such an unremunerated direct transfer of funds. Thus, we find that because MEIS scrips are a financial contribution by the government[685] and confer a benefit on their recipient, they are a subsidy within the meaning of Article 1.1 of the SCM Agreement.

7.10 Export contingency under Articles 3.1(a) and 3.2 of the SCM Agreement

7.471. We now address the United States' argument that the subsidies provided under the five challenged schemes are export contingent within the meaning of Article 3.1(a) of the SCM Agreement, and that, therefore, by providing these subsidies India is acting inconsistently with Articles 3.1(a) and 3.2 of the SCM Agreement.

7.472. We begin by setting out the applicable legal standard. We then examine, in turn, whether the challenged subsidies under each of the five schemes are export contingent and therefore inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

7.10.1 The applicable legal standard under Articles 3.1(a) and 3.2

7.473. Article 3.1 of the SCM Agreement provides, in relevant part:

> … the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent, in law or in fact,[4] whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;

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[681] India's first written submission, paras. 288-291; second written submission, para. 122.
[682] India's first written submission, paras. 288-291; second written submission, para. 122.
[683] India's first written submission, para. 290.
[684] India's first written submission, para. 290. Also ibid. para. 291, with regard to transfer of the scrips to third parties.
[685] See section 7.8 above.

...

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

7.474. Article 3.1(a) thus prohibits subsidies "contingent ... upon export performance". The ordinary meaning "of 'contingent' is 'conditional' or 'dependent for its existence on something else'".[686] That is, for a subsidy to be export contingent, "the grant of the subsidy must be conditional or dependent upon export performance".[687]

7.475. Article 3.1(a) clarifies that whether export performance is the sole condition, or one of several conditions for granting the subsidy, there is export contingency for purposes of that provision. Moreover, when a certain subsidy is available on condition of export performance, the fact that the same subsidy can also be obtained under a different set of circumstances, which may or may not involve export contingency, does not prevent a finding that the subsidy is export contingent.[688]

7.476. Article 3.1(a) further provides that prohibited export contingent subsidies "includ[e] those illustrated in Annex I" to the SCM Agreement. The subsidies illustrated in items (b) to (l) of Annex I share the common feature "that the subsidy gives certain advantages to exported products and favours exported products over products destined for domestic consumption".[689]

7.477. Article 3.1(a) prohibits both subsidies that are export contingent in law and subsidies that are export contingent in fact. The difference between the two resides in the evidence establishing the existence of export contingency.[690]

7.478. Export contingency in law is demonstrated on the basis of the very words of the legal instrument constituting the measure, either because the measure expressly conditions the granting of the subsidy on export performance, or because it does so implicitly, by necessary implication from the words used in the measure.[691]

7.479. For example, in *Canada – Autos*, the challenged legal instruments did not say, in so many words, that a manufacturer's exemption from customs duties on the import of motor vehicles was conditioned on export performance. However, the necessary implication of the words used in those legal instruments was that they "operate[d], as a matter of law, in such a manner that the more motor vehicles a manufacturer export[ed], the more motor vehicles that manufacturer [was] entitled to import duty-free".[692] The panel and Appellate Body therefore found that the subsidy was contingent in law upon export performance.

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[686] Appellate Body Report, *Canada – Aircraft*, para. 166.

[687] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 111.

Further, "the relevant question ... is not whether the eligibility requirements under a subsidy may *result* in" exportation, but whether there is "a *condition requiring*" exportation. (Appellate Body Report, *US – Tax Incentives*, paras. 5.18 and 5.40 (emphasis original)). These statements were made in the context of Article 3.1(b), which prohibits subsidies that are "contingent ... upon the use of domestic over imported goods". However, the "legal standard for establishing the existence of 'contingency' under Article 3.1(b) is the same as under Article 3.1(a) of the SCM Agreement". (Appellate Body Reports, *Brazil – Taxation*, para. 5.241).

[688] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 119. See also European Union's third-party submission, para. 29 (referring to Appellate Body Report, *US – Upland Cotton*, paras. 579-580).

[689] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1053.

[690] Appellate Body Report, *Canada – Aircraft*, para. 167.

[691] Appellate Body Report, *Canada – Autos*, para. 100. See also Appellate Body Report, *Canada – Aircraft*, para. 167 ("[*d*]*e jure* export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument.").

[692] Appellate Body Report, *Canada – Autos*, para. 106.

7.480. Conversely, "[t]here is no single legal document which will demonstrate, on its face," export contingency in fact.[693] Therefore, "the existence of this relationship of contingency … must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case".[694] And "what facts should be taken into account in a particular case will depend on the circumstances of that case".[695] While "there can be no general rule as to what … kinds of facts must be taken into account"[696], relevant facts may include "the design and structure of the measure granting the subsidy", "the modalities of operation set out in such a measure", and "the relevant factual circumstances surrounding the granting of the subsidy".[697]

7.481. While the "legal standard expressed by the word 'contingent' is the same for both *de jure* or *de facto* contingency"[698], the different evidentiary basis is reflected in the way the analysis is conducted. For determining contingency in fact, "the Uruguay Round negotiators provided a standard, in footnote 4 of the SCM Agreement"[699], which "requires proof of three different substantive elements: first, the 'granting of a subsidy'"[700]; second, "tied to"; and, third, "actual or anticipated exportation or export earnings".[701] This standard shares commonalities with the analysis of export contingency in law, but also differences, such as the enquiry into "actual or anticipated exportation".

7.482. As will be seen below, we find that all the subsidies in question are export contingent in law, and we therefore do not examine the United States' alternative argument that the subsidies provided under the SEZ Scheme are export contingent in fact. As a result, we do not elaborate further, here, on the specificities of the analysis of export contingency in fact.

7.483. Turning to Article 3.2 of the SCM Agreement, this provides:

> A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

7.484. As a result, when a Member grants or maintains a subsidy that is export contingent under Article 3.1(a) of the SCM Agreement, that Member also violates Article 3.2 of the SCM Agreement.[702]

7.485. Having set out the relevant legal standard, we now turn to applying it to the subsidies at issue in this dispute.

7.10.2 Whether the subsidies granted under the Export Oriented Units and Sector-Specific Schemes are export contingent

7.486. The United States argues that the exemption from customs duties under the EOU/EHTP/BTP Schemes is export contingent in law.[703] According to the United States, this is because "India conditions the availability" to participating Units of the customs duty exemption under the scheme "upon the [Units'] promise of agreeing to export their entire production and obtaining and

[693] Appellate Body Report, *Canada – Aircraft*, para. 167.
[694] Appellate Body Report, *Canada – Aircraft*, para. 167. (emphasis original)
[695] Appellate Body Report, *Canada – Aircraft*, para. 168.
[696] Appellate Body Report, *Canada – Aircraft*, para. 169.
[697] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1046.
[698] Appellate Body Report, *Canada – Aircraft*, para. 167. See also Appellate Body Report, *Canada – Autos*, para. 107. Further, in the context of contingency under Article 3.1(b), the Appellate Body has noted that "the analysis of *de jure* and *de facto* contingency … [is] a continuum", and a panel "need not compartmentalize" the two analyses. (Appellate Body Report, *US – Tax Incentives*, para. 5.13).
[699] Appellate Body Report, *Canada – Aircraft*, para. 168. At the same time, because the standard for contingency in law and in fact are the same, except for the *evidence* supporting the finding of contingency, some of the considerations derived from the analysis of footnote 4 can also be extended, with the necessary adaptations, to export contingency in law. See Appellate Body Report, *Canada – Autos*, para. 107. This applies in particular to the analysis of "tied to".
[700] Appellate Body Report, *Canada – Aircraft*, para. 169.
[701] Appellate Body Report, *Canada – Aircraft*, para. 169. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1043-1044.
[702] See, e.g. Panel Reports, *Canada – Aircraft*, para. 9.231; *US – FSC (Article 21.5 – EC)*, paras. 8.109-8.110.
[703] United States' first written submission, paras. 44-46; second written submission, paras. 98-101; and opening statement at the meeting of the Panel, para. 14.

maintaining of a positive NFE".[704] This is "evidenced throughout government documents"[705], including in the provision for penal action if a Unit fails to maintain a positive NFE.[706]

7.487. The United States argues that, like in *Canada – Autos*, the customs duty exemption available under the challenged scheme is "simply not available to a manufacturer unless it exports"[707], and this is apparent from "the 'words of the relevant legislation, regulation, or other legal instrument'".[708]

7.488. India disagrees and argues that the United States has not established the export contingency of the challenged measures.[709] According to India, the EOU/EHTP/BTP Schemes are "an administrative system that seeks to boost the manufacturing capabilities of [the] domestic industry"[710], and are remission schemes falling under footnote 1 and the Annexes of the SCM Agreement.[711] Regarding the NFE requirement, India argues that it is not indicative of export contingency but ensures that Units act with commercial prudence and without operating at a loss.[712] And as for the United States' reliance on *Canada – Autos*, India argues that the factual pattern in the present dispute differs from that at issue in *Canada – Autos*.[713]

7.489. We turn to assess whether the United States has established the measures' export contingency, in light of the legal standard outlined above.

7.490. The challenged exemption from customs duties under the EOU/EHTP/BTP Schemes are exclusively available to Units set up under the schemes.[714] To be "set up under" the EOU/EHTP/BTP Schemes, Units must "*undertak[e] to export their entire production of goods and services (except permissible sales in the DTA)*".[715] In addition, the schemes require participating Units to *maintain a positive NFE*.[716] The HBP defines the NFE as follows:

> 6.10 Net Foreign Exchange (NFE) Earnings
>
> (a) EOU / EHTP / STP / BTP unit shall be a positive net foreign exchange earner. NFE earnings shall be calculated cumulatively in the block period as per Paragraph 6.04 of FTP, according to the formula given below. Items of manufacture for export specified in LoP / LoI alone shall be taken into account for calculation of NFE.
>
> Positive NFE = A – B> 0
>
> Where
>
> 'NFE' is Net Foreign Exchange;
>
> 'A' is FOB value of exports by EOU / EHTP / STP / BTP unit;
>
> 'B' is sum total of CIF value of all imported inputs and CIF value of all imported capital goods, and value of all payments made in foreign exchange by way of commission, royalty, fees, dividends, interest on external borrowings / high sea sales during first five

[704] United States' first written submission, para. 46.
[705] United States' first written submission, para. 46.
[706] United States' first written submission, para. 46 (referring to Section 6.05 of the FTP).
[707] United States' first written submission, para. 45 (quoting Appellate Body Report, *Canada – Autos*, para. 104).
[708] United States' first written submission, para. 45 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167).
[709] India's first written submission, paras. 221-226; second written submission, paras. 86-93; and opening statement at the meeting of the Panel, paras. 59-62.
[710] India's first written submission, para. 222.
[711] India's first written submission, para. 222; second written submission, para. 90.
[712] India's first written submission, paras. 223-225; second written submission, paras. 91-92; and opening statement at the meeting of the Panel, para. 61.
[713] India's second written submission, paras. 86-89.
[714] See paras. 7.314-7.315 above.
[715] Section 6.00(a) of the FTP.
[716] While disputing the purpose of the NFE, India does not dispute the existence or definition of the requirement in the context of the EOU/EHTP/BTP Schemes.

> year period or any other charges. It will also include payment made in Indian Rupees on high sea sales.
>
> "Inputs" mean raw materials, intermediates, components, consumables, parts and packing materials.[717]

7.491. Thus, to achieve a positive NFE under these schemes, a Unit must export more than it imports. Further, the schemes set forth provisions to monitor compliance with the NFE requirement, and envisage sanctions, including possible penal action, for a unit's failure to comply with the requirement. For example, the standard format for the letter of permission provides that an approved Unit "would be required to achieve positive … NFE … failing which it would be liable for penal action".[718]

7.492. Thus, "on the basis of the very words of the relevant legislation, regulation or other legal instrument"[719] setting forth the measure, the subsidies provided under the scheme are only available to Units (a) that undertake to export their entire production, with limited exceptions, and (b) that undertake to export more than they import, with provision for sanctions in case this undertaking is not met. Therefore, on the face of the legal instruments in which the measure is reflected, the availability of the subsidy is "dependent for its existence"[720] on exportation, within the meaning of Article 3.1(a).

7.493. India argues that the schemes, and the NFE requirement, have other objectives, different from export performance. It argues that the schemes "seek[] to boost the manufacturing capabilities of the domestic industry" and streamline the process of exemption or remission of duties[721], and that the NFE requirement aims to ensure that enterprises act prudently, do not operate at a loss, and do not import more inputs than needed.[722]

7.494. We note that India's arguments appear to be somewhat contradictory. India argues, on the one hand, that the schemes are meant to "boost the manufacturing capabilities of the domestic industry"[723] but, on the other hand, that they do not seek to ensure a certain level of exports and instead seek to ensure that participating Units do not import more inputs than needed.[724] For a scheme under which participating Units "undertake to export their entire production"[725], it is hard to see how one could "boost" manufacturing capabilities without boosting exports.

7.495. In any event, however, the relevant enquiry is whether the subsidies in question are "contingent …, whether solely or as one of several other conditions, upon export performance".[726] When a subsidy is indeed contingent upon export performance, the fact that there may be other rationales behind the scheme, or even other conditions on the grant of the subsidy, does not change the conclusion that the subsidy is prohibited under Article 3.1(a).

7.496. India has also highlighted certain factual differences between the measure challenged in *Canada – Autos*, where the adjudicators found the measures to be export contingent, and the measures before this panel.[727] Specifically, India observes that, in *Canada – Autos*: the duty exemption applied to the importation of motor vehicles, not inputs; the duty-exempt goods and the goods that had to be exported were the same "class of goods" (motor vehicles); the amount of the

[717] Section 6.10 of the HBP.

[718] Appendices and Aayat Niryat forms, (Exhibit USA-6), appendix 6D, para. (ii). Similarly, the FTP provides that failure to maintain a positive NFE may render the Unit liable to penal action and lead to cancellation of the letter of permission or of intent. (Subsection 6.05(c) of the FTP).

[719] Appellate Body Report, *Canada – Autos*, para. 100.

[720] Appellate Body Report, *Canada – Aircraft*, para. 166.

[721] India's first written submission, para. 222.

[722] India's first written submission, paras. 193 and 223-225. The United States points out that India's argument that the positive NFE requirement is a tool to protect the participating enterprises is contradicted by the provision for penal action as a sanction for failing to meet the requirement. (United States' second written submission, paras. 100-101).

[723] India's first written submission, para. 222.

[724] India's first written submission, paras. 224-225.

[725] Section 6.00(a) of the FTP.

[726] Article 3.1(a) of the SCM Agreement.

[727] India's second written submission, paras. 86-89.

exemption depended on the amount exported; and the measure operated on the basis of a ratio requirement.[728] However, none of the differences highlighted by India goes to the legal standard for export contingency. It does not matter *per se* that the duty-exempt goods and the mechanism conditioning the subsidy on export contingency are not the same in this case and in *Canada – Autos*: what matters is that the measures before us lay down requirements which do condition the subsidy on export performance.

7.497. Finally, India argues that the measures meet the conditions of footnote 1. We recall, however, that we are examining the export contingency of the challenged measures because we have found that they do not meet the conditions of footnote 1.[729]

7.498. We therefore find that the challenged subsidies under the EOU/EHTP/BTP Schemes are contingent in law upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Moreover, since through the legal instruments discussed above India grants or maintains such subsidies, India is also acting inconsistently with Article 3.2 of the SCM Agreement.

7.10.3 Whether the subsidies granted under the Export Promotion Capital Goods Scheme are export contingent

7.499. To recall, under the EPCG Scheme, India provides a subsidy in the form of an exemption from customs duties on the importation of capital goods.

7.500. The United States argues that the duty exemption under the EPCG Scheme is contingent in law upon export performance.[730] According to the United States, the scheme requires participating exporters to fulfil two cumulative export obligations and even incentivizes their early fulfilment.[731] Non-compliance with these obligations results in duty liability and sanctions.[732]

7.501. India does not respond to the United States' arguments on export contingency and contends that the United States has not established the existence of a subsidy under Article 1 of the SCM Agreement.[733] Rather, in India's view, the scheme falls under footnote 1 and thus does not qualify as a subsidy within the meaning of Article 1.[734]

7.502. With reference to the duty-exempt importation of capital goods under the EPCG Scheme, the Foreign Trade Policy provides that:

> Import 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.[735]

7.503. The Foreign Trade Policy further specifies that:

> [The export obligation] shall be fulfilled by the authorisation holder through export of goods which are manufactured by him or his supporting manufacturer … for which the EPCG authorisation has been granted.[736]

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[728] India's second written submission, para. 89.
[729] See para. 7.236 above.
[730] United States' first written submission, paras. 77-78; second written submission, para. 132; and opening statement at the meeting of the Panel, para. 23.
[731] United States' first written submission, para. 78; opening statement at the meeting of the Panel, para. 23.
[732] United States' first written submission, para. 78; opening statement at the meeting of the Panel, para. 23.
[733] India's first written submission, paras. 317-319; second written submission, paras. 144-145; see also opening statement at the meeting of the Panel, paras. 83-84.
[734] India's opening statement at the meeting of the Panel, para. 84.
[735] Section 5.01(c) of the FTP.
[736] Section 5.04(a) of the FTP.

7.504. Thus, over a six-year period, a scheme participant must achieve exports of the goods specified in the EPCG authorization equalling at least six times the duties, taxes, and cess[737] saved on capital goods under the scheme.[738]

7.505. The HBP requires the authorisation holder to fulfil half of this export obligation within the first four years[739], failing which the "holder shall … pay duties of customs … proportionate to duty saved amount on total unfulfilled [export obligation] block".[740]

7.506. In addition to this six-year export obligation, participants in the scheme must also fulfil an "average" export obligation. That is, subject to certain limited exceptions[741], a scheme participant must maintain exports of the goods specified in the EPCG authorization above the average level of export of the same or similar products during the three-year period preceding the EPCG authorization.[742]

7.507. Thus, the very words of the FTP and HBP, which provide for the EPCG Scheme, condition the availability of the subsidy on the fulfilment of obligations to export. This in itself is sufficient to make the subsidies at issue export contingent in law, within the meaning of Article 3.1(a) of the SCM Agreement.

7.508. Moreover, other aspects of the EPCG Scheme, as they also emerge from the words of the legal instruments that regulate it, further confirm the scheme's characterization as export contingent.

7.509. For example, the scheme provides an "incentive for early … fulfilment" of the export obligation: a portion of the export obligation can be "condoned" when "75% or more of [the] specific export obligation and 100% of Average Export Obligation till date" have been met in half or less the required period.[743]

7.510. Further, applicants for EPCG authorisation must provide, as part of their application, a certification by a chartered engineer of the "nexus" between the capital goods to be imported and the manufacture of products for export[744], certifying that the capital goods in question are "required" to manufacture specified "export product(s)".[745]

7.511. In sum, "the very words of the relevant legislation, regulation or other legal instrument"[746] show that the EPCG Scheme conditions the availability of the subsidy on export performance, in violation of Article 3.1(a) of the SCM Agreement. Those words even emphasize further the centrality of the export performance conditions by setting forth incentives for the early fulfilment of those conditions, sanctions for failure to fulfil them, and additional requirements to certify the nexus between the goods benefiting from duty-free treatment and the manufacture of goods for export.

7.512. We therefore find that the exemption from customs duties for the importation of capital goods under the EPCG Scheme is contingent in law upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Moreover, since through the legal instruments discussed above India grants or maintains such subsidy, India is also acting inconsistently with Article 3.2 of the SCM Agreement.

[737] See fn 221 above.
[738] Section 5.01(c) of the FTP; Section 5.14(a) of the HBP.
[739] Section 5.14(a) of the HBP.
[740] Section 5.14(c) of the HBP.
[741] Section 5.13 of the HBP.
[742] Section 5.04(b) of the FTP; Section 5.12 of the HBP; and India's responses to Panel questions Nos. 51 and 52.
[743] Section 5.09 of the FTP.
[744] Section 5.03(a) of the HBP.
[745] Appendices and Aayat Niryat Forms, (Exhibit USA-6), appendix 5A ("Format of Chartered Engineer Certificate for Nexus under EPCG Scheme").
[746] Appellate Body Report, *Canada – Autos*, para. 100.

7.10.4 Whether the subsidies granted under the Special Economic Zones Scheme are export contingent

7.513. The United States argues that the challenged subsidies under the SEZ Scheme are contingent on export performance, in law or in fact.[747] In particular, first, to qualify as SEZ Units, applicants must undertake to meet a positive NFE requirement, and this requirement is then subject to monitoring and "penal action" in case of non-compliance.[748] Second, SEZ Units are required to "export the goods manufactured".[749] Third, one of the subsidies, i.e. the deduction from total income for purposes of corporate income tax, is reserved to "export" income.[750] In addition, in the context of its argument that the subsidies under the SEZ Scheme are also export contingent in fact, the United States relies on the preamble of the SEZ Act, the description of the functions of the competent agencies in the SEZ Act, and public statements of government officials, all to the effect that the purpose of the SEZ Scheme is the promotion of exports.[751]

7.514. India disagrees with the United States and argues that the SEZ Scheme is not export-contingent, in law or fact.[752] According to India, the United States has mischaracterized the obligation to achieve a positive NFE, because SEZ Units can fulfil that requirement through domestic transactions, without making any export sales.[753] Moreover, India disagrees with how the United States has portrayed, and relied upon, the application, approval and monitoring process for SEZ Units.[754] Further, India submits that the United States failed to apply the correct legal test for *de jure* contingency.[755] With regard to *de facto* contingency, India argues in particular that the United States erred in giving probative value to statements of government officials[756] and in relying on the same type of evidence relied upon to prove *de jure* contingency.[757]

7.515. We begin by examining the United States' contention that the SEZ Scheme is contingent *in law* upon export performance.

7.516. We recall that, under the SEZ Scheme, India provides subsidies in the form of (a) an exemption from customs duties on imports and exports, (b) an exemption from IGST, and (c) a deduction from the taxable base for corporate income tax.

7.517. The exemption from customs duties is provided to "every Developer and … entrepreneur" for imports into, or exports from, "a Special Economic Zone or a Unit".[758] The exemption from IGST applies to "all goods … imported by a unit or a developer in the Special Economic Zone".[759] And the deduction from the taxable base for corporate income tax applies "in computing the total income of an assessee, being an entrepreneur … from his Unit".[760]

7.518. Thus, the three sets of exemptions are available (a) to *Units*, (b) for imports into or exports from *Units*, or (c) for income from *Units*; but on the face of the measure, the customs duty and IGST

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[747] United States' first written submission, paras. 121-138; second written submission, paras. 138-161; and opening statement at the meeting of the Panel, para. 27. See also response to Panel question No. 78, para. 124.

[748] United States' first written submission, paras. 123-126; second written submission, paras. 144-150.

[749] United States' first written submission, para. 124.

[750] United States' first written submission, para. 137; response to Panel question No. 77, para. 122.

[751] United States' first written submission, paras. 128-138; second written submission, paras. 152-161; and opening statement at the meeting of the Panel, para. 27. See also response to Panel question No. 77, paras. 122-123.

[752] India's first written submission, paras. 330-380; second written submission, paras. 161-189; opening statement at the meeting of the Panel, paras. 94-105.

[753] India's first written submission, paras. 344-351; second written submission, paras. 168-173 and 183; opening statement at the meeting of the Panel, paras. 97-99 and 104; and comments on the United States' responses to Panel questions Nos. 69, and 70-73.

[754] India's first written submission, paras. 337, 338, 342, 343, 351, and 352-355; second written submission, paras. 166, 167 and 174.

[755] India's first written submission, paras. 339-341.

[756] India's first written submission, para. 371; opening statement at the meeting of the Panel, para. 103.

[757] India's first written submission, paras. 331 and 375-376.

[758] Section 26(1) of the SEZ Act.

[759] Notification No. 15/2017, (Exhibit USA-27).

[760] Second Schedule of the SEZ Act.

exemptions appear to be also available (d) to entrepreneurs and developers for imports into, or exports from, the Special Economic Zone more generally, i.e. outside the context of Units.[761]

7.519. We recall that an entrepreneur is a person who has been authorized to set up a Unit, and a developer is a person who has been authorized to set up a Special Economic Zone.[762] India has explained that, in SEZs, the manufacturing of goods (and rendering of services) takes place in Units, and the activities of an entrepreneur are limited to setting up such Units and then manufacturing goods (and rendering services) within the Unit[763]; whereas a developer, in addition to setting up an SEZ, also "develop[s] and maintain[s] the necessary infrastructure", and would "benefit from the exemptions or deductions available under the SEZ scheme to the extent such activities are for the development or maintenance of SEZ infrastructure".[764] Thus, while some economic activity covered by the SEZ Scheme takes place outside the context of Units, the bulk of the economic activity within an SEZ is carried out through the Units, leading India to say that "[i]n general, the economic activities in a Special Economic Zone under the SEZ Scheme are undertaken through a 'Unit'".[765]

7.520. The United States has clarified that it challenges only subsidies under the SEZ Scheme that apply to *Units*.[766]

7.521. The SEZ Scheme imposes conditions on the very existence of Units, prominent among which is a requirement to "achieve Positive Net Foreign Exchange". Rule 53 of the SEZ Rules provides:

> Net Foreign Exchange Earnings – <u>The Unit shall achieve Positive Net Foreign Exchange</u> to be calculated cumulatively for a period of five years from the commencement of production according to the following formula, namely:-
>
> Positive Net Foreign Exchange = A - B >> 0
>
> Where:-
>
> A: is Free on Board value of exports … against freely convertible currency, by the Unit and the value of … supplies of their products [falling under items A(a) to A(k) of Section 53].
>
> …
>
> B: consists of sum of the following:
>
> (a) sum total of the Cost Insurance and Freight value of all imported inputs used for authorised operations … and … of all imported capital goods …;
>
> (b) value of goods obtained from other Unit or [EOU/EHTP/BTP] Unit or from bonded warehouses or … from international exhibitions held in India or precious metals …
>
> (c) the Cost Insurance Freight value of the goods and services … imported duty free or leased … or received [in specified circumstances].[767]

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[761] In contrast, the deduction from the taxable base for corporate income tax is limited to income "from [a] Unit". (para. 7.517 above).
[762] See paras. 7.147 and 7.148 above.
[763] India's responses to panel questions Nos. 74-75, p. 58.
[764] India's response to Panel question No. 75, p. 58.
[765] India's response to panel question No. 74, p. 58.
[766] United States' response to Panel question No. 74, para. 119. As set out in the opening part of para. 7.518, the connection to a Unit can reside in one of the following: the subsidy is provided to the Unit; the subsidy is provided for imports into and exports from the Unit; or the subsidy is provided as a deduction in calculating income from the Unit.
[767] Rule 53 of the SEZ Rules, (Exhibit USA-28, as amended by Exhibits USA-60 and IND-22). (underlining added)

7.522. Thus, Section 53 *requires* a Unit ("The Unit shall…") to achieve a "*Positive* Net Foreign Exchange", defined by the formula "A – B >> 0". Since A – B must be greater than 0, the first item, i.e. "A", must be greater than 0. A comprises several components. The first is the FOB value of exports by the Unit.[768] Therefore, one condition triggering the subsidies to Units is export performance: exports greater than 0.

7.523. In addition to achieving Positive NFE by exporting goods, the SEZ Rules also set forth other "supplies" by the Units that can be counted in computing "A".[769] These other supplies include, for example, the supply of capital goods to holders of a licence under the EPCG Scheme[770], the supply of goods to nuclear power projects meeting the conditions in the FTP[771], the export of services, the rendering of services within the DTA against free foreign exchange[772], and the supply of goods to other entities within the same SEZ or to other SEZs or EOU/EHTP/BTPs.[773]

7.524. The United States describes these as "a narrowly defined list of exceptions in the form of encouraged domestic sales"[774], and we agree with this description. More importantly, however, when a subsidy is available on condition of export performance, the fact that the same subsidy can also be obtained under a different set of circumstances, not involving export contingency, does not prevent a finding that the subsidy is export contingent.[775] Therefore, because achieving a positive NFE means that "A" must be greater than 0, and one component of A is exports of goods, exports of goods are a condition for purposes of Article 3.1(a).

7.525. Other elements of the legal instruments setting out the SEZ Scheme reiterate the NFE requirement. For example, Rule 18(2)(i) of the SEZ Rules provides that proposals to set up an SEZ Unit shall be approved if, among other requirements, "the proposal meets … the positive net foreign exchange earning requirement as provided in rule 53".

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[768] India points out, and the United States agrees, that Section 2(m) of the SEZ Act defines exports as including not only the "taking of goods … outside India", but also as the export of services, and the sale of goods or services to other Units or developers within the same SEZ or to other SEZs. E.g. India's response to Panel question No. 69; United States' response to Panel question No. 69. We note, however, that these same "additional" items are also included in the subparagraphs of Section 53A, discussed in paras. 7.523-7.524. We therefore consider that the discussion of Section 2(m) is subsumed in the discussion of the subparagraphs of Section 53A.

[769] There have been amendments to the list of these "supplies", which is set forth in Rule 53 of the SEZ Rules: the 2006 SEZ Rules listed items (a) to (o); this list was then substantially amended in 2018 to set forth a revised list consisting of items (a) to (k) (Exhibit USA-60); further amendments introduced in 2019 made minor modifications to the existing list of items (a) to (k) (Exhibit IND-22). See also India's responses to Panel questions No. 65 and 68. These amendments however do not have a material effect on our findings: the parties agree that, before and after the amendments, the majority of the additional "supplies" listed in the subparagraphs of item A are sales to the DTA, but see para. 7.524 below. See India's responses to Panel questions Nos. 70 and 72; United States' responses to Panel questions Nos. 70 and 71.

[770] 2019 Amendment to the SEZ Rules, (Exhibit IND-22), Rule 7, amending Rule 53A(b) of the SEZ Rules.

[771] 2019 Amendment to the SEZ Rules, (Exhibit IND-22), Rule 7, amending Rule 53A(f) of the SEZ Rules.

[772] 2019 Amendment to the SEZ Rules, (Exhibit IND-22), Rule 7, amending Rule 53A(h) of the SEZ Rules.

[773] 2019 Amendment to the SEZ Rules, (Exhibit IND-22), Rule 7, amending Rule 53A(j) of the SEZ Rules.

[774] United States' response to Panel question No. 69, para. 106.

[775] Para. 7.475 above; Appellate Body Reports, *US – FSC (Article 21.5)*, para. 119; and *US – Upland Cotton*, paras. 579-580. See also European Union's third-party submission, para. 29, noting that the Appellate Body in *US – Upland Cotton* rejected the argument made by the United States in that case that, since Step 2 payments were available to both exporters and domestic users, and the conditions applying to the latter had not been found to involve export contingency, the payments were not export contingent. The Appellate Body explained that the fact that the subsidies granted in a second set of circumstances might not be export contingent did not dissolve the export contingency arising in the first set of circumstances.

Relying on *Canada – Autos*, India argues instead that the test for export contingency in law is a "but for" test, i.e. the subsidies must be unavailable but for export performance. (India's first written submission, paras. 339-341). However, the text relied upon by India is part of the Appellate Body's description of the measure before it, and not the Appellate Body's articulation of the test for export contingency. The text of Article 3.1(a) itself makes it clear that export performance can be "one of several … conditions".

7.526. Rule 19 of the SEZ Rules provides that upon approval of a Unit, the Development Commissioner "shall issue a Letter of Approval in Form G, for setting up of the Unit". The text of Form G, which is part of the SEZ Rules, includes the following language:

> The approval is subject to the following terms and conditions:
>
> > (i) You shall export the goods manufactured / … imported / … procured for trading and services … as per the provisions of the Special Economic Zones Act, 2005, and Rules made thereunder for a period of five years from the date of commencement of production/service activities. For this purpose, you shall execute the Bond-cum-Legal Undertaking as prescribed under the Special Economic Zones Rules, 2006.
> >
> > …
> >
> > (iii) You shall achieve positive Net Foreign Exchange (NFE) as prescribed in the Special Economic Zones Rules, 2006 … failing which you shall be liable for penal action under the Foreign Trade (Development and Regulation) Act, 1992.
> >
> > …
> >
> > (xii) You shall confirm acceptance of the above terms and conditions … within forty-five days of issue of this Letter of Approval.
> >
> > (xiii) If you fail to comply with the conditions stipulated above, this Letter of Approval shall be cancelled as per the provisions of the Special Economic Zones Act, 2005 and the rules and orders made thereunder.
> >
> > (underlining added)

7.527. Thus, first, the text of Form G, which is part of the SEZ Rules and which must be accepted by an entrepreneur whose proposal to set up a Unit has been approved, further confirms the requirement to achieve positive NFE, and envisages "penal action" for failing to achieve positive NFE.[776]

7.528. Second, Form G also provides that the entrepreneur who is thus being authorized to set up the Unit "shall export … as per the provisions of the Special Economic Zones Act, 2005", for five years. As the United States pointed out, the definition of "export" in the SEZ Act, as it applies to SEZ Units for trade in goods, only includes "taking goods … out of India" and supplying goods to other SEZ Units or developers.[777] Thus, this too, amounts to a requirement for all approved Units to "export", further reinforcing the export contingency of the subsidies provided to Units under the SEZ Scheme.

7.529. Third, Form G requires its recipient to execute the prescribed "bond-cum-legal undertaking", which is also part of the SEZ Rules and is set out in Form H. Form H, to be undertaken by the SEZ Unit "unto the President of India", reiterates that the Letter of Approval "contain[s] terms and conditions for setting up and operating the unit … including the requirement of achieving positive Net Foreign Exchange Earning"[778], and further reads:

> We, the obligors shall achieve positive Net Foreign Exchange Earning and shall fulfil other conditions stipulated in the Letter of Approval and in case of failure to achieve the said positive Net Foreign Exchange Earnings, … we shall be liable for penal action under the provisions of the Foreign Trade (Development and Regulation) Act, 1992.[779]

7.530. Therefore, the applicable legal instruments provide, and reiterate, that SEZ Units must meet a positive NFE requirement, and at least one way in which this requirement is met is by exporting.

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[776] Form G, para. (iii) of the SEZ Rules.
[777] Section 2(m) of the SEZ Act. See also fn 768 above.
[778] Form H, p. 1 of the SEZ Rules.
[779] Form H, para. 8 of the SEZ Rules.

Further, we recall that the challenged subsidies are provided to Units. Therefore, the challenged subsidies under the SEZ Scheme are contingent in law upon export performance within the meaning of Article 3.1(a).

7.531. Moreover, the Letter of Approval also provides that the SEZ Unit will "export" and, again, one of the ways in which this requirement is met is by exporting goods out of India.[780] For this reason too, the challenged subsidies under the SEZ Scheme are contingent in law upon export performance within the meaning of Article 3.1(a).

7.532. In addition, as regards the third type of subsidy that we have found to be provided under the SEZ Scheme, i.e. the deduction from the taxable base for corporate income tax, the relevant provisions expressly provide for the deduction, "in computing the total income of … an entrepreneur … from his Unit", of "profits and gains derived from … *export*".[781] That is, export is, again, a condition for the grant of the subsidy. For this reason, too[782], this deduction from taxable income is contingent in law upon export performance within the meaning of Article 3.1(a).

7.533. We therefore find that the challenged subsidies under the SEZ Scheme, namely, (a) the exemption from customs duties on imports into, and exports from, Units, (b) the exemption from IGST on imports into Units, and (c) the deduction of export profits from the income of Units for purposes of corporate income tax, are contingent in law upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Further, because India grants or maintains such subsidies, it also acts inconsistently with Article 3.2 of the SCM Agreement.

7.534. The United States also argued that the challenged subsidies under the SEZ Scheme are contingent in fact upon export performance. We have found that they are contingent in law upon export performance, and we therefore do not proceed to examine whether they are contingent in fact upon export performance.[783]

7.10.5 Whether the subsidies granted under the Duty-Free Imports for Exporters Scheme are export contingent

7.535. To recall, we have found that the exemptions from customs duties under Conditions 10, 21[784], 36, 60(ii), and 61 of DFIS constitute a subsidy.

7.536. The United States argues that the DFIS exemptions from customs duties are contingent in law upon export performance.[785] According to the United States, under DFIS, participating exporters must have made exports in the previous year to obtain the exemptions, and the value of these past exports determines the amount of the duty-free entitlement.[786]

7.537. India mostly[787] does not respond to the United States' arguments on export contingency and contends that the United States has not established the existence of a subsidy under Article 1 of the SCM Agreement.[788] Rather, in India's view, DFIS falls under footnote 1 and thus does not qualify as a subsidy within the meaning of Article 1.[789] However, we recall that we are examining

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[780] See fn 768 above.

[781] Income Tax Act, 1961, Sections 10A and 10AA, (Exhibit USA-29). (emphasis added)

[782] In addition to the fact that the very existence of Units is contingent upon export performance, as discussed in the previous paragraphs with reference to all the challenged subsidies under the SEZ Scheme.

[783] See also United States' response to Panel question No. 78 ("if the Panel agrees … that the SEZ scheme is *de jure* contingent upon export performance, the Panel need not conduct a *de facto* analysis").

[784] For one and six items, respectively. See among others paras. 7.255, 7.256, 7.267, and 7.406 above.

[785] United States' first written submission, paras. 160-161; second written submission, para. 175; opening statement at the meeting of the Panel, para. 30.

[786] United States' first written submission, para. 161; opening statement at the meeting of the Panel, para. 30.

[787] See para. 7.541 below.

[788] India's first written submission, paras. 402-404; second written submission, paras. 209-210; and opening statement at the meeting of the Panel, paras. 113-114.

[789] India's opening statement at the meeting of the Panel, para. 113.

Conditions 10, 21, 36, 60(ii), and 61 of DFIS to the extent that we have found them not to fall under footnote 1.[790]

7.538. Each of the duty exemptions at issue is subject to a "Condition" under the legal instrument setting forth the measure, i.e. Notification No. 50/2017. In each case, the Condition includes a requirement that the total value of the goods imported under the exemption not exceed a certain percentage of the FOB value of exports of the specified product in the preceding year, ranging from 1% to 25%.[791]

7.539. Thus, first, on the face of the measure itself, the exemption is not available without exportation: as the United States puts it, "[t]o receive the import duty exemption, an enterprise must have made exports in the past year".[792] Second, again on the face of the measure itself, the extent of the exemption (i.e. the total value of the goods that can be imported under the exemption) depends on the value of exports of the specified products during the previous year. That is, like in *Canada – Autos*, the more the subsidy recipient exports, the more it is entitled to import under the duty exemption.[793]

7.540. In both these ways, the import duty exemptions under DFIS are contingent upon export performance, as established on the basis of the very words of the legal instrument that provides for DFIS. In other words, they are contingent in law upon export performance.

7.541. India argues that insofar as the goods imported free of duty "are … for research and development purposes … the duty exemption is not export contingent".[794] This argument applies to Condition 61, which requires, among others, that the goods be "imported for Research and Development purpose".[795] However, as we have just found, Condition 61 both requires past exports as a condition of the import duty exemption, and ties the extent of the duty-free entitlement to the value of those past exports.[796] That the goods imported with the benefit of this duty-free entitlement are to be used for research and development does not make the duty exemption any less export contingent.

7.542. We therefore find that the exemptions from customs duties under Conditions 10, 21[797], 36, 60(ii), and 61 of DFIS are subsidies that are contingent in law upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Moreover, since India grants or maintains such subsidies, India is also acting inconsistently with Article 3.2 of the SCM Agreement.

7.10.6 Whether the subsidies granted under the Merchandise Exports from India Scheme are export contingent

7.543. To recall, under MEIS, India provides a subsidy in the form of MEIS scrips.

7.544. The United States argues that MEIS scrips are contingent upon export performance.[798] Specifically, citing the Foreign Trade Policy, the United States argues that under MEIS, a "program participant receives scrips conditioned and tied to the value it exports, where the exports are sold,

[790] See para. 7.267 above.

[791] Notification No. 50/2017, (Exhibit USA-36). See also Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 2.104-2.107.

[792] United States' first written submission, para. 161.

[793] Appellate Body Report, *Canada – Autos*, para. 106.

[794] India's response to Panel question No. 80.

[795] The argument was also applicable to Condition 60(i). However, the United States has clarified that its challenge does not extend to this Condition. See fn 266 above.

[796] In the case of Condition 61, the requirement is worded as follows: "If, … (b) the total value of goods imported does not exceed one % of the FOB value of exports made during the preceding financial year…". (Notification No. 50/2017 (Exhibit USA-36), p. 68).

[797] For one and six items, respectively. See among others paras. 7.255, 7.256, 7.267, and 7.406 above.

[798] United States' first written submission, paras. 60-61; second written submission, para. 114; and opening statement at the meeting of the Panel, para. 18.

and of what product".[799] According to the United States, "[f]rom approval to award to monitoring, the amount of scrips hinges on export performance".[800]

7.545. India does not respond to the United States' arguments on export contingency and submits that the question of export contingency is moot because MEIS falls under footnote 1 and Annexes I(g) and I(h).[801]

7.546. The Foreign Trade Policy provides that MEIS scrips "shall be granted as rewards under MEIS".[802] The set of conditions giving rise to "entitlement under MEIS" is described in Section 3.04 of the Foreign Trade Policy.[803] This provision reads:

> 3.04 Entitlement under MEIS
>
> Exports of notified goods/products with ITC[HS] code, to notified markets as listed in Appendix 3B, shall be rewarded under MEIS. Appendix 3B also lists the rate(s) of rewards on various notified products [ITC (HS) code wise]. The basis of calculation of reward would be on realised FOB value of exports in free foreign exchange, or on FOB value of exports as given in the Shipping Bills in freely convertible foreign currencies, whichever is less, unless otherwise specified.

7.547. Thus, the condition giving rise to "entitlement under MEIS" is the "*export* of notified goods/products … to notified markets"; the "basis of calculation of reward" is the "FOB *value of exports*"; and the "rate" of entitlement depends on the product exported and the country it is exported to, as further specified in Appendix 3B.[804]

7.548. Appendix 3B, in turn, sets out a "list of Countries and ITC (HS) code wise list of products with reward rates under the Merchandise Exports from India Scheme (MEIS)".[805] Appendix 3B groups export destination countries into three "country groups".[806] Appendix 3B then lists, over 332 pages, the "MEIS- Reward Rate" for each covered product; specifically, for each covered product, it lists three rates, the choice between the three being determined by the country to which the exports giving rise to the reward were made.[807]

7.549. India has not rebutted any of this evidence of export contingency. Instead, India argues that MEIS falls under footnote 1 of the SCM Agreement, and that every measure falling under footnote 1, by definition, requires the export of products.[808] We note that while it is correct that every measure falling under footnote 1 requires the export of products, we are undertaking the analysis of export contingency because we have found that MEIS does not fall under footnote 1.[809]

7.550. Therefore, we find that "on the basis of the very words of the relevant legislation, regulation or other legal instrument"[810], the fact of exporting is both the triggering condition for the award of MEIS duty credit scrips, and the basis on which the value of the scrips is calculated. As set out above, under the legal instruments regulating MEIS, that value is based on (a) the FOB value of

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[799] United States' first written submission, para. 61.

[800] United States' first written submission, para. 61. See also United States' second written submission, para. 114.

[801] India's first written submission, paras. 292-295; second written submission, para. 124; and opening statement at the meeting of the Panel, para. 76.

[802] Section 3.02 of the FTP.

[803] See also United States' first written submission, paras. 51-52 and 61.

[804] Section 3.04 of the FTP. (emphasis added)

[805] Public Notice 2/2015-2020, (Exhibit USA-11), cover page.

[806] Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B, table 1.

[807] Public Notice 2/2015-2020, (Exhibit USA-11), Appendix 3B, table 2. The United States also points out that "India controls how the product exported and the destination market for that product determine the rate of receiving scrips", and in particular "reserves the right" to modify the goods or destination markets giving rise to rewards, and to modify the rates of reward. (United States' first written submission, para. 54; Section 3.13 of the FTP). Further, the United States also refers to a number of statements of Indian government agencies to the effect that MEIS seeks to promote the export of goods covered by the scheme. (United States' first written submission, para. 50).

[808] India's first written submission, paras. 292-294.

[809] See para. 7.294 above.

[810] Appellate Body Report, *Canada – Autos*, para. 100.

exports of the recipient of the scrips, and (b) a rate determined by the type of goods exported and the destination country. That is, MEIS scrips are export contingent in law.

7.551. We therefore find that the provision of duty credit scrips under MEIS is contingent in law upon export performance, and therefore prohibited by Article 3.1(a) of the SCM Agreement. Moreover, since through the legal instruments discussed above India grants or maintains such subsidies, India is also acting inconsistently with Article 3.2 of the SCM Agreement.

7.11 The Panel's duty under Article 12.11 of the DSU

7.552. Article 12.11 of the DSU requires that panels, in cases in which "one or more of the parties is a developing country Member",

> explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.553. The "relevant provisions on differential and more-favourable treatment ... raised by" India in this dispute are Article 12.10 of the DSU and Article 27 of the SCM Agreement.

7.554. We begin with Article 12.10 of the DSU. Pursuant to this provision, "in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation".

7.555. In these Panel proceedings, we took account of India's status as a developing country Member, under Article 12.10, in adopting and reviewing the Working Procedures and timetable. Although established under the fast-track procedures contemplated in Article 4 of the SCM Agreement, we allowed four weeks for India to prepare its first written submission following the United States' first written submission, and four weeks for India to prepare its second written submission following the United States' second written submission. The Panel's timetable also provided for more than two months between the filing of submissions and the substantive meeting with the parties.

7.556. In addition, after the substantive meeting with the parties, India requested us to double the time for responding to our questions. In light of Article 12.10 of the DSU, we acceded to that request for all but two of our questions.

7.557. We also considered India's developing country Member status and the requirements of Article 12.10 when reconciling competing considerations in our decision to hold a single substantive meeting, although we ultimately did not accede to India's request that we not limit ourselves to a single meeting.[811]

7.558. We now turn to Article 27 of the SCM Agreement. The question whether the special and differential treatment provisions of Article 27 of the SCM Agreement exclude India from the scope of application of Articles 3 and 4 of the SCM Agreement has been a key issue in this dispute.

7.559. India argued, and the United States disputed, that Article 27.2(b) of the SCM Agreement exempted India from the prohibition of export subsidies set forth in Article 3.1(a) and, by virtue of Article 27.7, from the applicability of Article 4. In resolving this dispute, we therefore called upon to interpret the meaning of the special and differential treatment provision of Article 27.2(b) of the SCM Agreement. In doing so, we also took into account other relevant special and differential treatment provisions included in Article 27 and Annex VII of the SCM Agreement. Our analysis in

[811] Paras. 1.9-1.15 of this Report reflect the procedural background regarding the single meeting issue. Our communications dated 22 January 2019 and 16 April 2019 to the parties set out the reasoning for our decision (Communication dated 22 January 2019 from the Panel to the parties concerning the issues of a single substantive meeting and a partially open meeting (Annex D-1), paras. 2.1-2.21, and in particular paras. 2.13, 2.15 and 2.20; Communication dated 16 April 2019 from the Panel to the parties concerning the Panel's Working Procedures and Timetable, (Annex D-3)).

section 7.3 of this Report reflects our consideration of the relevant provisions on special and differential treatment.

7.560. India also requested us to rule at preliminary stage that, as a result of Article 27 of the SCM Agreement, the procedures of Article 4 of the SCM Agreement were not applicable to this dispute. We therefore considered India's request at preliminary stage. At the same time, India also requested us not to rule at preliminary stage on the parties' interpretive disagreement on Article 27 itself, and to do so instead through the full panel proceedings, because India considered this to be "a legal issue that goes to the essence of the dispute".[812] We explained, in a communication to the parties at preliminary stage, that we could not rule on India's preliminary request on the applicability of Article 4 of the SCM Agreement without resolving the parties' interpretive disagreement under Article 27.[813]

8 CONCLUSIONS

8.1. For the reasons set out in this Report, we conclude that:

a. the exemptions from customs duties on importation under the EOU/EHTP/BTP Schemes are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement;

b. the exemptions from customs duties on importation under the EPCG Scheme are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement;

c. the exemptions from customs duties on importation and exportation, the exemption from IGST on importation, and the deductions from taxable income, all provided under the SEZ Scheme, are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement;

d. the exemptions from customs duties on importation under Conditions 10, 21, 36, 60(ii) and 61 of DFIS are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement; and

e. the duty credit scrips awarded under MEIS are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

8.2. Further, we reject the United States' claims that the exemption from central excise duty on domestically procured goods under the EOU/EHTP/BTP Schemes and the exemptions from customs duties on importation under Conditions 28, 32, 33, and 101 of DFIS are subsidies contingent upon export performance, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

8.3. Pursuant to Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits. We conclude that, to the extent the measures at issue are inconsistent with the SCM Agreement, India has nullified or impaired benefits accruing to the United States under this agreement.

9 RECOMMENDATIONS

9.1. Pursuant to Article 4.7 of the SCM Agreement, if the measures in question are found to be prohibited subsidies, the panel must "recommend that the subsidizing Member withdraw the subsid[ies] without delay". Accordingly, we recommend that India withdraw, without delay, the subsidies we have found to be inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

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[812] India's first written submission, para. 79.

[813] Communication dated 22 January 2019 from the Panel to the parties concerning the Panel's terms of reference, the applicability of Article 4 of the SCM Agreement, and the statement of available evidence, (Annex D-2), paras. 3.1-3.13.

9.2. Article 4.7 further requires a panel to "specify in its recommendation the time-period within which the measure must be withdrawn".

9.3. We recall that Article 4.7 is a "special or additional rule or procedure", which prevails over the rules and procedures of the DSU to the extent they conflict.[814] Article 4.7 departs, among others, from Article 21.3 of the DSU: in particular, "in contrast to Article 21.3(c) of the DSU, the use of the term 'without delay' in Article 4.7 *constrains the latitude* available to a panel in specifying the time period under that provision".[815]

9.4. At the same time, Article 4.7 itself does not prescribe "a single standard or time period applicable in all cases".[816] A panel must determine what would constitute withdrawal "without delay" taking into account the relevant facts and circumstances of the case[817], i.e. "typically … the nature of the measure(s) to be revoked or modified and the domestic procedures available for such revocation or modification".[818]

9.5. On this basis, many panels called upon to determine the appropriate time period under Article 4.7 have considered that, for the measures before them, this time period was 90 days.[819]

9.6. Other panels have considered that a different time period was appropriate for the measures before them. In *US – Upland Cotton*, the panel recommended withdrawal of the measures either within six months from adoption of the panel report, or by 1 July 2005 (which was a little less than ten months from the date of circulation of the panel report), whichever was earlier.[820]

9.7. In *US – FSC*, the panel took note that withdrawal of the prohibited subsidy required legislative action, and also that the measures were part of the respondent's tax legislation, which was revised every year with effect from the beginning of each fiscal year.[821] On that basis, the panel considered that withdrawal would be "without delay" if it took place no later than the start of the fiscal year that would follow completion of the appeal process.[822] This was a year from the expected circulation of the panel report, and about half a year from the time at which the panel expected adoption of the report in case of an appeal.[823]

9.8. Turning to the case before us, the United States has requested us to specify that the inconsistent measures must be withdrawn within 90 days from the DSB's adoption of the recommendations and rulings in this dispute.[824]

9.9. On the basis of our factual findings, above, we note that withdrawal of the prohibited subsidies under the EOU/EHTP/BTP Schemes, EPCG Scheme, and MEIS, appears to require, at least, amendments to the FTP. According to its preamble, the FTP is adopted by "the Central Government", in the "exercise of powers conferred by Section 5 of the Foreign Trade (Development & Regulation)

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[814] Article 1.2 and Appendix 2 of the DSU. See also e.g. Appellate Body Reports, *Brazil – Taxation*, para. 5.445.

[815] Appellate Body Reports, *Brazil – Taxation*, para. 5.447. (emphasis added)

[816] Appellate Body Reports, *Brazil – Taxation*, para. 5.446.

[817] Appellate Body Reports, *Brazil – Taxation*, para. 5.454.

[818] Appellate Body Reports, *Brazil – Taxation*, paras. 6.43 and 5.446.

[819] E.g. Panel Reports, *Korea – Commercial Vessels*, para. 8.700; *Canada – Aircraft Credits and Guarantees*, para. 8.4; *Canada – Autos*, para. 11.7; *Australia – Automotive Leather II*, para. 10.7; *Brazil – Aircraft*, para. 8.5; and *US – Tax Incentives*, para. 8.6.

[820] Panel Report, *US – Upland Cotton*, paras. 8.3(b) and 8.3(c).

[821] Panel Report, *US – FSC*, para. 8.8. See also ibid. para. 4.1362.

[822] The complainant, while accepting such a timeframe in case of an appeal, had asked the panel to state as an alternative timeframe, in case of no appeal, the start of the fiscal year following adoption of the panel report. (Panel Report, *US – FSC*, para. 4.1362).

[823] Panel Report, *US – FSC*, para. 8.8 ("this Report is not scheduled for circulation to Members until September 1999 (and, if appealed, might not be adopted until as late as early spring 2000)"). The panel report was actually circulated on 8 October 1999.

[824] United States' first written submission, para. 164; second written submission, para. 179. India set out its arguments on the time period for withdrawal in its written request for review of the Interim Report and in its oral statements at the Panel's interim review meeting with the parties (India's request for review, paras. 88-93; India's opening statement at the interim review meeting of the Panel with the parties, para. 43; India's closing statement at the interim review meeting of the Panel with the parties, paras. 9). The United States commented on India's interim review arguments in this regard in United States' comments on India's request for review, paras. 59-65. See also Annex A-2, section 9.2.

Act, 1992".[825] Thus, on the face of the FTP, it appears that it is adopted, and that therefore it can be amended, by the Government on the basis of authority already conferred by India's legislature. In addition, withdrawal of these prohibited subsidies may require amendments to certain other subordinated instruments, such as the HBP, which, too, are administrative measures. India's interim review comments confirm our understanding.[826]

9.10. India has also observed that modifying the FTP requires "consultations with various stakeholders", including at central and state government level, and "an express approval from India's cabinet"[827]; that "the next review of the FTP is scheduled for April 2020"[828]; and that modifications to the FTP "may have to be laid before the Indian Parliament for a period of 30 days".[829]

9.11. We consider that adoption by the Government (as opposed to the legislature) of amendments to the FTP and related administrative measures, in the exercise of powers already conferred upon the Government by India's legislature, can be achieved within 90 days, also taking into account the consultation of stakeholders. As for the fact that the next review of the FTP is scheduled to come into effect in April 2020, we consider that this may further facilitate withdrawal of the prohibited subsidies in question. We also consider however that the possible need to lay the amendments to the FTP before Parliament for 30 days requires that we include these 30 days in the time period within which the prohibited subsidies under the EOU/EHTP/BTP Schemes, EPCG Scheme, and MEIS, must be withdrawn. For these prohibited subsidies, therefore, we consider that withdrawal "without delay" would be withdrawal within 120 days from adoption of the Report.

9.12. We therefore recommend that India withdraw the prohibited subsidies under the EOU/EHTP/BTP Schemes, EPCG Scheme, and MEIS, within 120 days from adoption of the Report.

9.13. Turning to the prohibited subsidies under DFIS, on the basis of our factual findings, we note that their withdrawal appears to require amendments to Notification No. 50/2017. According to its terms, Notification No. 50/2017 is adopted by the "Central Government", in the "exercise of powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and sub-section (12) of section 3, of Customs Tariff Act, 1975 (51 of 1975)".[830] Thus, similar to our observations in the preceding paragraphs, it appears from its face that Notification No. 50/2017 was adopted and can be amended by the Government, on the basis of authority already conferred by India's legislature. Thus, for the prohibited subsidies under DFIS, we consider that withdrawal "without delay" would be withdrawal within 90 days from adoption of the Report.[831]

9.14. We therefore recommend that India withdraw the prohibited subsidies under DFIS within 90 days from adoption of the Report.

9.15. Turning to the SEZ Scheme, based on our factual findings, it appears that withdrawal of the measures we have found to constitute prohibited subsidies would require, at least, amendments to the SEZ Act (for the exemptions from customs duties on importation and exportation, and the deduction from taxable income), the Income Tax Act (for the deduction from taxable income), and Notification No. 15/2017 (for the exemption from IGST). While Notification No. 15/2017, like the measures we have reviewed in the previous paragraphs, is adopted by the Government in the "exercise of the powers conferred" by the legislature, the SEZ Act and Income Tax Act are, themselves, legislative acts. Their amendment, therefore, appears to require action by India's Parliament. Withdrawal of the measure may additionally require amendments to certain other subordinated acts, such as the SEZ Rules, which were adopted by the Government in the exercise

[825] Preamble of the FTP.
[826] India's request for review, paras. 89-91.
[827] India's request for review, para. 90.
[828] India's request for review, para. 91.
[829] India's request for review, para. 91.
[830] Notification No. 50/2017, (Exhibit USA-36), p. 1.
[831] In their comments on the Interim Report, both parties appeared to accept this assessment. India's request for review, para. 93; United States' comments on India's request for review, para. 65.

of powers conferred by the SEZ Act.[832] India's interim review comments confirm our understanding regarding the SEZ Scheme.[833]

9.16. Because withdrawal of the prohibited subsidies under the SEZ Scheme thus appears to require amendments to legislative acts of India's Parliament, we do not consider it "practicable"[834] to envisage withdrawal within 90 days. Instead, we consider that withdrawal "without delay" would be withdrawal within 180 days from adoption of the Report.

9.17. During the interim review, India commented that modifications to tax legislation are "*mostly* made through a general budget", and that such modifications "*can* be implemented at the start of the next fiscal year".[835] On this basis, while India's comments concede that 180 days suffice as a minimum period for withdrawal[836], India asked that, *after* expiry of 180 days from adoption, the time period for withdrawal *additionally* include any amount of time running until the beginning of India's following fiscal year.[837] Depending on the date of adoption of the Report, this could result in a time for withdrawal ranging from 180 to 544 days.[838]

9.18. Given the degree of uncertainty and potential delay that this proposed formula would introduce, and given that India's own comments manifest that it is not strictly necessary to implement withdrawal as part of India's general budget and with effect from the start of a new fiscal year[839], we consider that acceding to India's request would be incompatible with the requirement of Article 4.7 that we recommend withdrawal "without delay".

9.19. Therefore, we recommend that India withdraw the prohibited subsidies under the SEZ Scheme within 180 days from the date of adoption of the Report.

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[832] Preamble of the SEZ Rules.
[833] India's request for review, para. 92.
[834] Panel Report, *US – FSC*, para. 8.8.
[835] India's request for review, para. 92. (emphasis added)
[836] Annex A-2, para. 9.11, with reference to India's request for review, para. 93.
[837] India's request for review, para. 93. India indicated that its fiscal year starts on 1 April.
[838] Annex A-2, para. 9.8.
[839] Annex A-2, para. 9.11, with reference to India's request for review, para. 92.