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1 ANNEX 3

1.1 Text of Annex 3

Annex 3

Domestic Support: Calculation of Aggregate Measurement of Support

1. Subject to the provisions of Article 6, an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment ("other non-exempt policies"). Support which is non-product specific shall be totalled into one non-product-specific AMS in total monetary terms.
2. Subsidies under paragraph 1 shall include both budgetary outlays and revenue foregone by governments or their agents.
3. Support at both the national and sub-national level shall be included.
4. Specific agricultural levies or fees paid by producers shall be deducted from the AMS.
5. The AMS calculated as outlined below for the base period shall constitute the base level for the implementation of the reduction commitment on domestic support.
6. For each basic agricultural product, a specific AMS shall be established, expressed in total monetary value terms.
7. The AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products.

8. Market price support: market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.

9. The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary.

10. Non-exempt direct payments: non-exempt direct payments which are dependent on a price gap shall be calculated either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays.

11. The fixed reference price shall be based on the years 1986 to 1988 and shall generally be the actual price used for determining payment rates.

12. Non-exempt direct payments which are based on factors other than price shall be measured using budgetary outlays.

13. Other non-exempt measures, including input subsidies and other measures such as marketing-cost reduction measures: the value of such measures shall be measured using government budgetary outlays or, where the use of budgetary outlays does not reflect the full extent of the subsidy concerned, the basis for calculating the subsidy shall be the gap between the price of the subsidized good or service and a representative market price for a similar good or service multiplied by the quantity of the good or service.

1.2 General

1. The Panel in *India – Sugar and Sugarcane* pointed to the logic underlying the calculation of AMS under the Agreement on Agriculture, as follows:

"In our view, the rules for calculating AMS, as set out in the Agreement on Agriculture and outlined above, contain a clear logic: any measure by a Member that provides support to its domestic agricultural producers must be included in the calculation of that Member's AMS *unless* the measure is shown to be exempted or otherwise excluded pursuant to a provision of the Agreement on Agriculture."¹

2. The Panel in *Korea – Various Measures on Beef*, in a finding later reversed by the Appellate Body,² agreed with the complainants that Korea had provided domestic support to its beef industry in excess of its commitment levels for 1997 and 1998. In its notifications, Korea had determined that its Current AMS for beef was below the *de minimis* threshold as set out in Article 6.4; as a result, Korea argued, this domestic support item did not have to be included in the calculation of its Current Total AMS. The Panel found that Korea's calculations in this respect were in error. Korea argued that its calculation was correct, because it was based on the "constituent data and methodology" used in its Schedule, in accordance with Articles 1(a)(ii) and 1(h)(ii) of the Agreement on Agriculture. The Appellate Body, with respect to the calculation of the Current AMS, first recalled the wording of Article 1(a)(ii) of the Agreement on Agriculture which contains the definition of the term "Current AMS", stating:

"To determine whether Korea's Current AMS for beef exceeds 10 per cent of total value of beef production, we refer again to Article 1(a)(ii) of the *Agreement on Agriculture*, which defines Current AMS. Under this provision, Current AMS is to be

calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the

¹ Panel Report, *India – Sugar and Sugarcane*, para. 7.26.

² See Appellate Body Report, *Korea – Various Measures on Beef*, paras. 126-127 and 129.

tables of supporting material incorporated by reference in Part IV of the Member's Schedule; ... (emphasis added)

Article 1(a)(ii) contains two express requirements for calculating Current AMS. First, Current AMS is to be 'calculated *in accordance with* the provisions of Annex 3 of this Agreement'. The ordinary meaning of 'accordance' is 'agreement, conformity, harmony'. Thus, Current AMS must be calculated in 'conformity' with the provisions of Annex 3. Second, Article 1(a)(ii) provides that the calculation of Current AMS is to be made while 'taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule.' 'Take into account' is defined as 'take into consideration, notice'. Thus, when Current AMS is calculated, the 'constituent data and methodology' in a Member's Schedule must be 'taken into account', that is, it must be 'considered'.³

3. The Appellate Body then held that Article 1(a)(ii) accorded "higher priority" to the provisions of Annex 3 than to "constituent data and methodology" contained in a Member's Schedule, but as Korea had no specific "constituent data and methodology" for beef, its Current AMS for beef was to be calculated in accordance with the provisions of Annex 3:

"Looking at the wording of Article 1(a)(ii) itself, it seems to us that this provision attributes higher priority to 'the provisions of Annex 3' than to the 'constituent data and methodology'. From the viewpoint of ordinary meaning, the term 'in accordance with' reflects a more rigorous standard than the term 'taking into account'.

We note, however, that the Panel did not base its reasoning on this apparent hierarchy as between 'the provisions of Annex 3' and the 'constituent data and methodology'.⁴ Instead, the Panel considered that where no support was included in the base period calculation for a given product, there is no 'constituent data or methodology' to refer to, so that the only means available for calculating domestic support is that provided in Annex 3. As beef had not been included in Supporting Table 6 of Korea's Schedule LX, Part IV, Section I, the Panel concluded that Annex 3 alone is applicable for the purposes of calculating current non-exempt support in respect of Korean beef.

In the circumstances of the present case, it is not necessary to decide how a conflict between 'the provisions of Annex 3' and the 'constituent data and methodology' used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule' would have to be resolved in principle. As the Panel has found, in this case, there simply are no constituent data and methodology for beef.⁵ Assuming *arguendo* that one would be justified – in spite of the wording of Article 1(a)(ii) – to give priority to constituent data and methodology used in the tables of supporting material over the guidance of Annex 3, for products entering into the calculation of the Base Total AMS, such a step would seem to us to be unwarranted in calculating Current AMS for a product which did *not* enter into the Base Total AMS calculation. We do not believe that the *Agreement on Agriculture* would sustain such an extrapolation. We, therefore, agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with the provisions of Annex 3, and with these provisions alone."⁶

4. In *Korea – Various Measures on Beef*, the Panel also held that Korea had miscalculated its Current AMS for beef on the basis of a fixed external reference price for the period 1989-1991, rather than the period 1986-88, as set forth in paragraph 9 of Annex 3. Korea argued that its use of the period 1989-1991 was justified, because this period was referred to in the constituent data

³ Appellate Body Report, *Korea – Various Measures on Beef*, para. 111.

⁴ (footnote original) On the contrary, the Panel opines that the "constituent data and methodology" has an important role to play in ensuring that the calculation of support to any given product is calculated in subsequent years consistently with support calculated in the base period. Panel Report, para. 811.

⁵ (footnote original) In other words, there is no *data* (product) in respect of which the *methodology* of Schedule LX of Korea (that is, the use of figures for the years 1989-1991) could be applied, in so far as beef is concerned.

⁶ Appellate Body Report, *Korea – Various Measures on Beef*, paras. 112-114.

and methodology (used with respect to products other than beef) contained in a table of supporting material incorporated in its Schedule. The Appellate Body agreed with the Panel and recalled its findings referenced in paragraph 3 above:

"The Panel found that in both 1997 and 1998 Korea miscalculated its fixed external reference price, contrary to Article 6 and paragraph 9 of Annex 3, by using a fixed external reference price based on data for 1989-1991. Korea justifies this choice by invoking the 'constituent data and methodology' used in its Supporting Table 6 for all products other than rice, i.e., for barley, soybean, maize (corn) and rape seeds. In Supporting Table 6, all these products use the period 1989-1991 for the fixed external reference price.

We have already explained above that we share the Panel's view with respect to Korea's argument on 'constituent data and methodology' used in the table of supporting material. We agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with Annex 3. According to Annex 3, '[t]he fixed external reference price shall be based on the years 1986 to 1988'. We, therefore, also agree with the Panel that in calculating the product specific AMS for beef for the years 1997 and 1998, Korea should have used an external reference price based on data for 1986-1988, instead of data for 1989-1991."⁷

5. In a finding not challenged on appeal, the Panel in *US – Upland Cotton* sought guidance in the guidelines for calculating Aggregate Measure of Support (AMS) set out in Annex 3 to calculate the support granted or decided under Article 13(b)(ii). Ultimately, in the circumstances of the dispute, it was not necessary for the Panel to choose between price gap or budgetary outlay methodologies to calculate direct payments dependent on a price gap.⁸

6. The Panel in *China – Agricultural Producers* underlined the similarities in the calculation processes of Base Total AMS and Current Total AMS, and stated that such similarities should be taken into account in making calculations:

"In conclusion, we find that while Article 1 does not contain guidance on how to calculate the Base Total AMS, Paragraph 5 of Annex 3 does set out important rules in this regard. Importantly, Paragraphs 6-13 of Annex 3 are also applicable to the calculation of the Current Total AMS. This implies that as per the Agreement on Agriculture, the calculation processes of both the Base Total and current AMS are similar. This similarity gives strong support to the notion that there must be consistency in the way these measurements of domestic support are calculated. Importantly, we are of the view that failing to recognize that the Agreement on Agriculture provides for a similar calculation process for both types of measurements might end up in a comparison between apples and oranges, as China suggests."⁹

1.3 Paragraph 7

7. With respect to the issue of whether paragraph 7 of Annex 3 of the Agreement on Agriculture is a specific provision dealing specifically with the same matter as Article 3.1(b) of the SCM Agreement and in particular, whether Article 3.1(b) of the SCM Agreement applies to agricultural products, see the Section on Article 3.1(b) of the SCM Agreement.

1.3.1 "point of first sale"

8. The Panel in *China – Agricultural Producers* clarified the meaning of "point of first sale" as follows:

"We believe that the relevant point of first sale of the basic agricultural product would be the point at which Chinese *producers* of rice in the relevant provinces sell their product to the government or its relevant purchasing entities. This is because, as

⁷ Appellate Body Report, *Korea – Various Measures on Beef*, paras. 117-118.

⁸ Panel Report, *US – Upland Cotton*, paras. 7.552 and 7.554.

⁹ Panel Report, *China – Agricultural Producers*, para. 7.233. See also *ibid.* paras. 7.243-7.244 and 7.251.

outlined in Paragraph 7 of Annex 3, the calculation of AMS is aimed at assessing measures which benefit producers of basic agricultural products. In other words, it is the point at which the measure acts to benefit the producers that is relevant here (that is, the point at which the rice producers sell their rice at the AAP). In addition, the plain meaning of 'point of first sale' indicates that AMS is to be calculated in relation to the first instance the commodity is sold. The price at the point of first sale for rice would be the 'farm-gate', 'paddy' or 'unmilled' price of both Indica and Japonica rice."¹⁰

1.4 Paragraph 8

1.4.1 General

9. In *China – GOES*, the Panel used the concept of "market price support" as included in paragraph 8 of Annex 3 of the Agreement on Agriculture as relevant context for interpreting the term "price support" under Article 1.1(a)(2) of the SCM Agreement:

"Annex 3 of that Agreement provides that 'market price support' is calculated as the difference between an external reference price and the 'applied administered price'. This indicates, at least for the type of price support contemplated in Annex 3 of the *Agreement on Agriculture*, that a direct form of government control over domestic prices is required, in the form of a fixed, administered price, rather than a movement in prices being an indirect effect of another form of government intervention."¹¹

1.4.2 Meaning of "market price support"

10. In *India – Sugar and Sugarcane*, India, the respondent, argued that "market price support" referred to in paragraph 1 of Annex 3 represents a subsidy, mainly based on the phrase "any other subsidy" in that paragraph. India further noted that "a subsidy can only exist where there is a budgetary outlay or revenue foregone by governments or their agents." As the challenged measures did not involve government's purchases of, or payments for, sugarcane, India asserted that such measures did not represent "market price support" within the meaning of Annex 3, and should not be included in the calculation of India's AMS to sugarcane producers.¹²

11. The Panel disagreed with India's point of view. The Panel started out by noting that the concept of "market price support" did not reveal the limitation pointed to by India:

"Thus, the concept of market price support, on its face, appears to refer to *any* government measures that set and maintain prices at a certain level, independent of the supply and demand dynamics in the market. This would appear to include measures that set or maintain mandatory minimum prices payable by private entities."¹³

12. According to the Panel, a mandatory minimum price scheme may provide support to producers regardless of whether it is provided by the government:

"We further understand that a mandatory minimum price for agricultural products, that is independent of supply and demand in the market, could indeed provide some measure of support to producers of agricultural products, regardless of whether the price is payable by private entities or the government. Conceptually, therefore, a mandatory minimum price set by the government but payable by private entities would seem to constitute 'domestic support' to agricultural producers and would therefore have to be included in the calculation of a Member's AMS."¹⁴

13. India's argument rested on two pillars:

¹⁰ Panel Report, *China – Agricultural Producers*, para. 7.341.

¹¹ Panel Report, *China – GOES*, para. 7.87.

¹² Panel Report, *India – Sugar and Sugarcane*, para. 7.38.

¹³ Panel Report, *India – Sugar and Sugarcane*, para. 7.41.

¹⁴ Panel Report, *India – Sugar and Sugarcane*, para. 7.42.

"We understand India's position to be that such measures are excluded from the calculation of a Member's AMS by virtue of paragraph 1 of Annex 3, read in light of paragraph 2. In India's view, these provisions establish that only measures in the form of *subsidies* (by which India means measures entailing government expenditure or revenue foregone) can be taken into account in calculating AMS. India's argument rests on two pillars: (i) pursuant to paragraph 1 of Annex 3, 'market price support' must be in the form of a 'subsidy'; and (ii) 'subsidies', as defined in paragraph 2 of Annex 3, must entail some form of government expenditure or revenue foregone."¹⁵

14. The Panel disagreed with both pillars of India's argument. First, the Panel found that India's arguments did not have a textual basis in the Agreement:

"Based on the text of paragraph 1, we consider that a number of the interpretations put forward by the parties are plausible. We recognize that the phrase 'any other subsidy' in paragraph 1 can be understood to suggest that all three types of measures (market price support, non-exempt direct payments, and other non-exempt policies) are 'subsidies'. At the same time, it is equally plausible that the phrase 'any other subsidy' merely identifies the 'non-exempt direct payments' and 'other non-exempt policies' as subsidies. Based on its text and syntax, we consider that paragraph 1 does not clarify whether market price support is a 'subsidy'.

Proceeding to the second pillar of India's argument, concerning paragraph 2 of Annex 3, we note that this paragraph states that '[s]ubsidies under paragraph 1 shall include both budgetary outlays and revenue foregone by governments or their agents.' India submits that the words 'include both' limit the defined universe of subsidies to budgetary outlays and revenue foregone. India argues that otherwise the term 'both' would be redundant. Alternatively, assuming that paragraph 2 contains a non-exhaustive list, India argues that subsidies as defined in paragraph 2 should at least have the same 'characteristics of governmental expenditure or expense from a public account', because an unlisted type of subsidy must share a 'commonality' with the subsidies specifically listed in paragraph 2. The complainants submit that the term 'shall include' merely indicates that subsidies *include*, but are not *limited to*, budgetary outlays and revenue foregone. They point to the ordinary meaning of the term 'include' and submit that the word 'both' is not redundant, but rather emphasizes the inclusion of the measures specifically identified. In addition, Brazil and Guatemala see no basis to presume that other types of subsidies must share a commonality in the form of government expenditure.'

In our view, a textual analysis of paragraph 2 is inconclusive. On the one hand, we agree with India that there are instances of usage where the words 'includes both' can be understood to mean 'limited to'. On the other hand, we also agree with the complainants that the word 'both' can function as a signifier of emphasis rather than exclusion, such that the phrase 'includes both' is not necessarily synonymous with 'includes only'. In our view, the significance of the word 'both', where it follows the words 'include' or 'includes', depends on whether the universe of things being described is limited to the things identified in the sentence. In the present proceedings, the very issue we are asked to resolve is whether the two listed items in paragraph 2 represent the complete universe of subsidies (within the meaning of the Agreement on Agriculture). Thus, by relying on the word 'both' to define the universe of 'subsidies', India's argument seems to put the cart before the horse. We therefore do not consider that, on its face, paragraph 2 limits the scope of subsidies to 'budgetary outlays' and 'revenue foregone'.¹⁶

15. The Panel in *India – Sugar and Sugarcane* also disagreed with India's argument that there must be a commonality between the concept of "subsidy" on the one hand and the concepts of "budgetary outlays" and "revenue foregone", on the other:

"We are also unpersuaded by India's argument that, even if paragraph 2 is merely indicative, it nevertheless necessarily means that 'subsidies' must share a

¹⁵ Panel Report, *India – Sugar and Sugarcane*, para. 7.43.

¹⁶ Panel Report, *India – Sugar and Sugarcane*, paras. 7.45-7.47.

commonality with 'budgetary outlays' and 'revenue foregone' in the form of 'government expenditure'. If the drafters had intended for such a limitation to appear, they would probably have set it forth explicitly. We note India's contextual argument that '[t]he usage of the phrases 'by virtue of governmental action' and 'whether or not a charge on the public account is involved' in [Article 9.1(c) of the Agreement on Agriculture] ... and the deliberate omission of such wide language in [paragraph 2 of Annex 3] clearly establishes that paragraph 2 of Annex 3 does not include private expenditures.' We note, however, that Article 9.1(c) refers *exclusively* to 'payments ... that are financed by virtue of governmental action'. We are therefore not convinced that this language is as 'wide' as India assumes. Furthermore, the language of Article 9.1(c) does not, in our view, clarify whether the subsidies referred to in paragraph 2 of Annex 3 must exclusively be in the form of government expenditure or revenue foregone."¹⁷

16. The Panel in *India – Sugar and Sugarcane* then turned to paragraph 8 of Annex 3, and found that India's argument is inconsistent with this paragraph which contains the definition of, and the calculation methodology for, market price support:

"We therefore find that, by defining market price support, paragraph 8 describes the circumstances in which market price support can be said to exist. Paragraph 8 refers to situations where an AAP differs from the FERP, and there is a quantity of production eligible to receive that AAP. We note that the word 'applied' means 'put to practical use'. The word 'administered' can mean 'managed, controlled, effected, kept running'. More specifically in the economic sense, and in particular in relation to a price or interest rate, 'administered' is defined as 'determined not by market forces but by administrative action (as of a large company or a government)'. The 'applied administered price' therefore refers to a price for agricultural products that is determined by the administrative action of the government and not by market forces. It follows that if an AAP that differs from the FERP can be shown to exist, then market price support can be said to exist, within the meaning of the Agreement on Agriculture, provided that there is domestic production that is eligible to receive that AAP. Under this interpretation of the Agreement on Agriculture, market price support could potentially exist in situations where the government does not purchase the relevant product.

We further observe that the application of the methodology set out in paragraph 8 entails a relatively complex process of determining the amounts of each component (i.e. AAP, FERP, and QEP) and applying the formula. We note that the quantity of production 'eligible' to receive the AAP is not necessarily the same as the quantity of production that actually receives that price. Furthermore, under the second sentence of paragraph 8, 'budgetary payments' made to maintain the gap between the AAP and the FERP are not to be taken into account in quantifying the amount of market price support that a Member provides. It is therefore clear to us that paragraph 8 sets out a methodology for calculating market price support that is divorced from any expenditure incurred by the government in maintaining that market price support, let alone requires that the government should pay the AAP.

We find India's interpretation of the scope of market price support to be difficult to reconcile with the definition of, and methodology for calculating, market price support, as set out in paragraph 8. As a matter of first impression, the very distinction between 'budgetary payments made to maintain the [price] gap' and the calculation of the amount of the market price support suggests the possibility that market price support could be maintained through means other than government expenditure. Moreover, it would be inconsistent, in our view, if the drafters of the Agreement on Agriculture had required that market price support only exist in situations of government expenditure/revenue foregone, yet stipulated a methodology for quantifying market price support that not only does not rely on the amounts of that government expenditure/revenue foregone, but specifically excludes such amounts from the

¹⁷ Panel Report, *India – Sugar and Sugarcane*, para. 7.48.

calculation and sets forth a relatively complex process of identifying and quantifying various components for purposes of applying a formula."¹⁸

17. The Panel in *India – Sugar and Sugarcane* found support in the text of paragraphs 10-12 of Annex 3 for its interpretation of "market price support":

"We further note that the calculation methodologies set out in Annex 3 for quantifying 'non-exempt direct payments' and 'other non-exempt policies' specifically indicate that such measures can be quantified using 'budgetary outlays'.¹⁹ Thus, in the case of quantifying non-exempt direct payments or other non-exempt measures, the Agreement on Agriculture establishes that budgetary outlays, among other approaches, may be used in the first instance²⁰ without necessarily assessing the practicability of any alternative methodologies. It stands to reason that if market price support only came into existence in situations where a government purchases the agricultural product (i.e. through government expenditure or revenue foregone), then the Agreement on Agriculture would similarly set out a hierarchically equivalent calculation methodology based on budgetary outlays rather than first requiring the application of a methodology based on an AAP, FERP, and QEP.²¹ The fact that it does not do so strongly suggests that market price support can exist even in the absence of government expenditure or revenue foregone."²²

18. The Panel in *India – Sugar and Sugarcane* found support in Article 6.2, as well as the preamble, of the Agreement on Agriculture, for its interpretation of "market price support":

"Having exhausted our review of references to market price support in the Agreement on Agriculture, we turn to other relevant context for interpreting the scope of this concept. We note, in this respect, that Article 6.2 of the Agreement on Agriculture excludes from Members' reduction commitments 'government measures of assistance, whether direct or indirect, to encourage agricultural and rural development'. The explicit exclusion of such measures suggests that, in the absence of that exclusion, such measures would have been subject to reduction commitments. In our view, this demonstrates that a potentially broad scope of measures, both direct and indirect, constitute 'domestic support' measures subject to reduction commitments, for purposes of the Agreement on Agriculture.

We also note that the preamble to the Agreement on Agriculture indicates that one of its long-term objectives is to correct and prevent distortions in agricultural markets, including through substantial progressive reductions in agricultural support and protection. It is, *inter alia*, for this reason that Members have undertaken certain domestic support commitments, as reflected in Article 7 of the Agreement on Agriculture. To the extent that a government applies an administered price for an agricultural product, different from the market price, this would appear to be a distortion of the market regardless of whether the government pays that price itself or

¹⁸ Panel Report, *India – Sugar and Sugarcane*, paras. 7.52-7-54.

¹⁹ (footnote original) Paragraphs 10-12 of Annex 3 to the Agreement on Agriculture concern the calculation of non-exempt direct payments, and indicate that "non-exempt direct payments which are dependent on a price gap shall be calculated either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays" and "[n]on-exempt direct payments which are based on factors other than price shall be measured using budgetary outlays". (emphasis added) Paragraph 13 of Annex 3, concerning other non-exempt measures, indicates that "the value of such measures shall be measured using government budgetary outlays or, where the use of budgetary outlays does not reflect the full extent of the subsidy concerned, the basis for calculating the subsidy shall be the gap between the price of the subsidized good or service and a representative market price for a similar good or service multiplied by the quantity of the good or service". (emphasis added)

²⁰ (footnote original) Paragraphs 10-13 of Annex 3 of the Agreement on Agriculture indicate that, for purposes of quantifying either of these types of measures, other methodological approaches are hierarchically equivalent to a budgetary outlay approach.

²¹ (footnote original) Under paragraphs 1 and 2 of Annex 4, a budgetary outlay methodology for calculating market price support is contemplated only in the event that it is not practicable to apply the methodology in paragraph 8 of Annex 3 and it is not practicable to calculate the amount of market price support using just the AAP and QEP.

²² Panel Report, *India – Sugar and Sugarcane*, para. 7.55.

mandates others to do so. Moreover, it stands to reason that if Members had wished to exclude a subset of market distortions (such as distortions in the form of mandatory minimum prices set by the government but payable by private entities) from the scope of Members' reduction commitments, they would probably have done so explicitly, as they did with other types of exclusions. We therefore understand that it is consistent with the object and purpose of the Agreement on Agriculture to interpret market price support as covering measures that entail price support in the form of mandatory minimum prices payable by private entities. Furthermore, limiting the scope of market price support to measures entailing purchases of the relevant product by the government would seem to undermine this important objective of the Agreement on Agriculture, as well as the object and purpose of those provisions (such as Article 7.2(b)) governing Members' domestic support commitments."²³

19. The Panel in *India – Sugar and Sugarcane* summarized its detailed assessment of the concept of "market price support", as follows:

" To summarize our analysis above, we recall that the plain meaning of 'market price support' seems to include mandatory minimum prices fixed by the government but payable by private entities. When applied to agricultural products, such measures would also appear to constitute 'domestic support measures' within the meaning of the Agreement on Agriculture. We have addressed India's arguments that such measures are excluded from the calculation of a Member's AMS through paragraphs 1 and 2 of Annex 3. In our view, these paragraphs do not, on their face, impose any such limitation. While noting the ambiguities in the texts of those paragraphs, we in any event consider that paragraph 8 of Annex 3 defines market price support, and does so in a way that suggests that mandatory minimum prices fixed by the government but payable by private entities could indeed constitute market price support within the meaning of the Agreement on Agriculture. We also note that India's interpretation of market price support would render the calculation methodology set out in paragraph 8 absurd. Finally, we note that Article 6.2 of the Agreement on Agriculture suggests a broad scope of measures that can constitute domestic support, and we consider that limiting the scope of market price support to measures requiring governmental purchase of the agricultural product would seem to undermine the object and purpose of the Agreement on Agriculture.

On the basis of the foregoing, we find that market price support, within the meaning of the Agreement on Agriculture, does not require that the government purchase (i.e. through government expenditure or revenue foregone) the relevant agricultural product. We also find that market price support is defined in paragraph 8 of Annex 3, and can be said to exist when an AAP for a basic agricultural product differs from the FERP, provided that there is domestic production that is eligible to receive that AAP. In coming to this conclusion, we do not consider it necessary to resolve the textual ambiguities of paragraphs 1 and 2 of Annex 3. In our view, regardless of these ambiguities, the Agreement on Agriculture is clear that market price support does not require government procurement of or payment for the relevant agricultural product. It is therefore unnecessary for us to express a view on whether paragraph 1 defines market price support as a subsidy or whether paragraph 2 extends the scope of subsidies beyond measures requiring government expenditure."²⁴

20. Finally, the Panel in *India – Sugar and Sugarcane* noted that its interpretation of the concept of "market price support" was also in line with India's own interpretation, as reflected in India's Schedule:

"We also wish to note that our foregoing interpretation is consistent with the interpretation relied upon by India itself in concluding its Schedule. Specifically, India's Schedule contains calculations of market price support for the years 1986-88 on the basis of a measure that fixed a minimum price for sugarcane that was payable by private entities, and not the government. India argues that, '[i]f a Member's Schedule is relied upon to interpret the meaning of 'market price support'..., this will

²³ Panel Report, *India – Sugar and Sugarcane*, paras. 7.56-7.57.

²⁴ Panel Report, *India – Sugar and Sugarcane*, paras. 7.58-7.59.

lead to a situation where there will be multiple meanings of the same terminology under the [Agreement on Agriculture] depending upon the Schedule of a Member.' India also refers to a statement by the Appellate Body that '[t]he Schedule of one Member, and even the scheduling practice of a number of Members, is not relevant in interpreting the meaning of a treaty provision, unless that practice amounts to 'subsequent practice in the application of the treaty' within the meaning of Article 31(3)(b) of the Vienna Convention.' We observe that Members' Schedules have, in the past, been used by panels and the Appellate Body to interpret Members' substantive obligations, on the basis that the Schedules constitute part of the covered agreements. We also note that neither India nor any other party has pointed to any Schedule that evinces an alternative interpretation of market price support. We do not consider it necessary to address, as a general matter, the relevance of Members' Schedules in interpreting the covered agreements. It suffices, for our purposes, to note that India's Schedule was concluded on the basis of the same interpretation as our own, and there is no indication that any Member's Schedule contradicts that interpretation."²⁵

1.4.3 Budgetary payments made to maintain the price gap

21. The Panel in *India – Sugar and Sugarcane* interpreted the implication for inclusion of the phrase "budgetary payments made to maintain the price gap" in paragraph 8 of Annex 3, as follows:

"We recall that, under the methodology set out in paragraph 8 of Annex 3 of the Agreement on Agriculture, '[b]udgetary payments made to maintain [the gap between the FERP and the AAP], such as buying-in or storage costs, shall not be included in the AMS.' The inclusion of this language in paragraph 8 indicates that: (i) certain measures may be adopted by Members to maintain the gap between the AAP and the FERP (for example, buying-in or storage costs, or other measures to facilitate, or enable, the operation of the AAP); and (ii) such measures should not be taken into account when quantifying the amount of market price support provided by the Member, to the extent that the application of the methodology articulated in the first sentence of paragraph 8 is practicable."²⁶

22. In *India – Sugar and Sugarcane*, the complainants identified certain payments that, in their view, were payments made to maintain the price gap, and refrained from including them in the calculation of India's AMS. Nonetheless, the complainants asked the Panel to find that such payments represented "measures through which India is providing market price support above *de minimis*".²⁷ The Panel declined this request:

" We recall that the assessment of whether India is acting inconsistently with Article 7.2(b) entails a comparison between the amount of domestic support for sugarcane producers that India is permitted to provide, and the amount of domestic support to sugarcane producers that India actually provides. In determining the amount of domestic support actually provided by India, the rules in the Agreement on Agriculture make clear that market price support should be included in the calculation, but budgetary payments made to maintain that market price support (i.e. to maintain the gap between the AAP and FERP) should not be taken into account. Consequently, in examining whether India is acting inconsistently with Article 7.2(b), it is not necessary for us to make the findings requested by Australia.

To the extent that Australia is concerned that our findings with regard to Article 7.2(b) might be read as not covering *all* relevant measures through which India maintains market price support, we wish to emphasize that, for India to be in compliance with Article 7.2(b), the total amount of non-exempt product-specific domestic support provided to sugarcane producers must not exceed 10% of the total value of sugarcane production in a given season. If India were to eliminate aspects of its market price support regime while continuing to provide budgetary payments that previously

²⁵ Panel Report, *India – Sugar and Sugarcane*, para. 7.60.

²⁶ Panel Report, *India – Sugar and Sugarcane*, para. 7.69.

²⁷ Panel Report, *India – Sugar and Sugarcane*, para. 7.70.

maintained the gap between the FERP and the AAP, it might well be that such budgetary payments would, in the absence of a mandatory minimum price, constitute domestic support to sugarcane producers that would be included in the calculation of India's AMS to sugarcane producers. We do not, however, consider it necessary in the present proceedings to identify measures which, it is uncontested, should not be taken into account in calculating India's AMS to sugarcane producers during the sugar seasons 2014-15 to 2018-19."²⁸

1.4.4 "applied administered price" (APP)

23. The Panel in *China – Agricultural Producers* defined the APP as "the price set by the government at which specified entities will purchase certain basic agricultural products."²⁹

1.4.5 "to receive the applied administered price" (AAP)

24. The Panel in *China – Agricultural Producers* found that "the quantity of production eligible to receive the AAP refers to the amount of production of a product which is fit, or able to benefit from the price support provided through the AAP."³⁰

1.4.6 "quantity of production eligible" (QEP)

25. In *Korea – Various Measures on Beef*, the Appellate Body agreed with the Panel that in determining its market price support for beef, Korea had used the quantity of cattle actually purchased, in contravention of paragraph 8 of Annex 3. The Appellate Body stated:

"We share the Panel's view that the words 'production *eligible* to receive the applied administered price' in paragraph 8 of Annex 3 have a different meaning in ordinary usage from 'production *actually purchased*'. The ordinary meaning of 'eligible' is 'fit or *entitled* to be chosen'. Thus, 'production eligible' refers to production that is 'fit or entitled' to be purchased rather than production that was actually purchased. In establishing its program for future market price support, a government is able to define and to limit 'eligible' production. Production actually purchased may often be less than eligible production."³¹

26. The Panel in *China – Agricultural Producers* stated that the quantity of production eligible should be determined as follows:

"We agree with China that a panel must consider the CDM in a Member's supporting tables when calculating the AMS. This, however, does not mean that any reference to eligible production contained in the tables of supporting material should necessarily be regarded as the definition of 'quantity of production eligible' within the meaning of Paragraph 8 of Annex 3. As noted above, the QEP is informed by the operation of the challenged measures, which would be reflected in the calculation of the AMS. To us, this understanding of the QEP is consistent with Articles 1(a)(ii) and 1(h)(ii) of the Agreement on Agriculture. Contrary to what China appears to be suggesting, the language of these provisions, requiring that AMS be calculated either taking into account, or in accordance with, the CDM, does not imply that all components of the calculation are necessarily determined by the CDM contained in the tables of supporting material."³²

1.5 Paragraph 9

1.5.1 "base period"

27. The Panel in *China – Agricultural Producers* clarified the meaning of "base period" as follows:

²⁸ Panel Report, *India – Sugar and Sugarcane*, paras. 7.72-7.73.

²⁹ Panel Report, *China – Agricultural Producers*, para. 7.177.

³⁰ Panel Report, *China – Agricultural Producers*, para. 7.283.

³¹ Appellate Body Report, *Korea – Various Measures on Beef*, para. 120.

³² Panel Report, *China – Agricultural Producers*, para. 7.288. See also *ibid.* paras. 7.295-7.296.

"We recall that the text of Paragraph 9 of Annex 3 explicitly refers to a particular time period. However, these elements need to be interpreted in the context provided by other provisions of the Agreement on Agriculture. Paragraph 5 of Annex 3, indicating that the Base Total AMS should be calculated using the guidance of Paragraphs 6-13, is of particular relevance here. As we noted in section 7.4.5.2.2 above, we came to the factual conclusion that none of the 36 Members that have acceded to the WTO since 1995 have used a period of 1986-88, with three exceptions. This is important because, as per Paragraph 5 of Annex 3, Paragraph 9 is meant to provide guidance for the calculation of the FERP for the purposes of determining Base Total AMS. However, and even in the face of this explicit guidance in Paragraph 5, the Base Total AMS of the referred Members did not use the time-period set out in Paragraph 9. The context provided by Paragraph 5, in conjunction with the above considerations, suggests that the time-period mentioned in this provision does not necessarily accommodate or envisage situations such as China's in this case, where the FERP used for the Base Total AMS was not anchored in the 1986-1988 period.

In addition, we note that the fact that the time-period set out in Paragraph 9 has not been used in the tables of supporting material of non-original Members provides useful context, on its own, for the interpretation of Paragraph 9. This is a consequence of the fact that the Base Total AMS, and most of the calculations necessary to produce it, are contained in the Members' tables of supporting material."³³

1.5.2 "fixed external reference price" (FERP)

28. The Panel in *China – Agricultural Producers* pointed out that the same time period should be used to calculate Current Total AMS and Base Total AMS:

"Indeed, we note that of the three components of the MPS formula, the only one that does not measure a contemporaneous feature of the market is the FERP, as it is an *external reference price* that is anchored in a specific time-period. In other words, while the AAP and the QEP are variables that may evolve depending on the regulatory framework and the time-period for which the AMS is being measured, the FERP is the only part of the MPS formula that will remain the same, regardless of the period for which the domestic support is being measured. In this way, the FERP is more akin to a constant than to a variable.

Recognizing that the FERP will not change regardless of the year takes us to the source of a material incongruence that may arise when comparing Base Total and Current Total AMS in the process of assessing a Member's compliance with its domestic support commitments. Simply put, using one time-period for the FERP used in the Base Total AMS and another for the Current Total AMS would yield two different results in the MPS formula that would be entirely uncorrelated to changes in the actual provision of domestic support by a Member. There would thus be different results in these two measurements, even if the values for the AAP and the QEP were the same.

...

The above leads us to conclude that allowing the use of a different time-period in the FERP used to calculate Current Total AMS, as compared to the one used for the Base Total AMS would potentially entail an apples-to-oranges comparison, which would go very much against the broad correspondence that should exist in the calculation process of both measurements."³⁴

1.5.3 "average f.o.b. unit"

29. With regard to the reference to the average f.o.b. unit, in Paragraph 9 of Annex 3, the Panel in *China – Agricultural Producers* considered that:

³³ Panel Report, *China – Agricultural Producers*, paras. 7.262-7.263.

³⁴ Panel Report, *China – Agricultural Producers*, paras. 7.268-7.269 and 7.271.

"[T]he reference in Paragraph 9 of Annex 3 to 'the average f.o.b. unit value for the basic agricultural product concerned ...' requires that the AAP and the FERP must both be for the 'basic agricultural product'. This reasoning is reinforced by Paragraph 7, discussed further below, which states that AMS 'shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned'."³⁵

1.6 Paragraph 10

30. In *India – Sugar and Sugarcane*, the Panel applied the budgetary outlay method in calculating the amount of "non-exempt direct payments":

"With respect to the precise calculation methodologies for 'non-exempt direct payments' and 'other non-exempt policies', the complainants assert that the Panel may use the 'budgetary outlay' approach pursuant to paragraphs 10 to 13 of Annex 3 of the Agreement on Agriculture. In the complainants' view, this approach is appropriate for the calculation of either form of domestic support. India does not contest the use of the 'budgetary outlay' approach to quantify the alleged State-level support."³⁶

1.7 Paragraph 13

31. In *India – Sugar and Sugarcane*, the Panel applied the budgetary outlay method in calculating the amount of "other non-exempt policies":

"With respect to the precise calculation methodologies for 'non-exempt direct payments' and 'other non-exempt policies', the complainants assert that the Panel may use the 'budgetary outlay' approach pursuant to paragraphs 10 to 13 of Annex 3 of the Agreement on Agriculture. In the complainants' view, this approach is appropriate for the calculation of either form of domestic support. India does not contest the use of the 'budgetary outlay' approach to quantify the alleged State-level support."³⁷

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³⁵ Panel Report, *China – Agricultural Producers*, para. 7.332.

³⁶ Panel Report, *India – Sugar and Sugarcane*, para. 7.79.

³⁷ Panel Report, *India – Sugar and Sugarcane*, para. 7.79.