WORLD TRADE ORGANIZATION

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INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

REPORTS OF THE PANELS

Addendum

This *addendum* contains Annexes A to E to the Reports of the Panels to be found in documents WT/DS579/R, WT/DS580/R, and WT/DS581/R.

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WORKING PROCEDURES OF THE PANEL[1]

Adopted on 5 December 2019

General

1. (1) In these proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) Pursuant to Article 9.3 of the DSU, the timetables in DS579, DS580, and DS581 are harmonized. The Panel shall, to the greatest possible extent, conduct a single panel process, with a single record, resulting in separate reports contained in a single document, taking into account the rights of all Members concerned and in such a manner that the rights that parties or third parties would otherwise have enjoyed are in no way impaired.

(3) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties. Any request for additional confidentiality procedures shall be made at the earliest possible opportunity, and no later than 10 working days prior to the submission of any information that the requesting party would seek to designate as confidential pursuant to such additional confidentiality procedures.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Subject to the ordinary rules concerning burden of proof, a party wishing to incorporate by reference or rely upon arguments and/or evidence submitted by another party or third party may do so provided that it clearly identifies the specific arguments and/or evidence it refers to and their source.

(4) If India wishes to file a single version of any written communication to the Panel, including written submissions, any preliminary submissions and written answers to questions,

[1] The Panels established in DS579, DS580, and DS581 are referred to collectively in these Working Procedures as "the Panel".

for more or all of the three disputes, it may do so provided that it clearly identifies whether arguments and/or evidence pertain to one, more, or all of the three disputes.

(5) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel. Each third party is encouraged to submit a single submission, clearly identifying the dispute(s) to which its views relate.

(6) In the interest of full transparency and harmonization of the timetable in DS579, DS580, and DS581, a complainant's first written submission in one dispute shall be deemed to be an exercise of its third-party rights in the other two disputes. Arguments presented as a third party only shall be clearly identified as such in the complainant's first written submission.

(7) The Panel may invite the parties or third parties to make additional submissions during the proceedings, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

(8) In the interest of full transparency and harmonization of the timetable in DS579, DS580, and DS581, each party shall make its written communications to the Panel, including written submissions, any preliminary submissions and written answers to questions available to the parties in the other disputes at the time that they are submitted to the Panel.

Preliminary rulings

4. (1) If India considers that the Panel should make a ruling before the issuance of the Reports that certain measures or claims in one or more of the panel requests or one or more of the complainants' first written submissions are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

   a. India shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. The complainant or complainants shall respond to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

   b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Reports to the parties.

   c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Reports, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Reports.

   d. Any request for such a preliminary ruling by India before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

   (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceedings, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence

necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other parties an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the disputes and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the disputes, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Brazil should be numbered BRA-1, BRA-2, etc. Exhibits submitted by Australia should be numbered AUS-1, AUS-2, etc. Exhibits submitted by Guatemala should be numbered GTM-1, GTM-2, etc. Exhibits submitted by India should be numbered IND-1, IND-2, etc. If, for instance, the last exhibit in connection with the first submission was numbered BRA-5, the first exhibit in connection with the next submission thus would be numbered BRA-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) To avoid duplication of exhibits, the parties may submit joint exhibits by numbering them accordingly, for example as JE-1, JE-2, etc. Each party may also cross-refer to an exhibit submitted by another party by using the number attributed to the exhibit by the party who initially submitted it.

(3) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(4) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(5) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date at which it was accessed.

(6) Any publicly available WTO document that is relied on by either party need not be submitted as an exhibit, provided that the party indicates the document's official WTO document symbol. Such publicly available WTO documents shall be deemed to form part of the official record.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. In the interest of full transparency and harmonization of the timetable in DS579, DS580, and DS581, the Panel shall make any written questions it sends to one or more parties in any of the disputes available to the parties in the other disputes at the same time.

c. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. In the interest of full transparency and harmonization of the timetable in DS579, DS580, and DS581, the parties agree that the substantive meetings referred to in paragraphs 15 and 16 shall take place in the presence of the parties to all three disputes.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite each complainant to make an opening statement to present its case first, in the order in which the disputes were filed. Subsequently, the Panel shall invite India to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each complainant is invited to limit the duration of its opening statement to not more than 60 minutes and India is invited to limit the duration of its opening statement to not more than 90 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other parties.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other parties questions. Each complainant should endeavour to make comments or ask the other parties questions concerning only matters raised in its own dispute. India should endeavour to make comments on a complainant's statement or ask a complainant questions concerning only matters raised in the dispute brought by that complainant.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the complainants presenting their statements first, in the order in which the disputes were filed. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other parties to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that India shall be given the opportunity to present its opening statement first. If India chooses not to avail itself of that right, it shall inform the Panel and the other parties no later than 5.00 pm (Geneva time) three working days before the meeting. In that case, the complainants shall present their opening statements first, in the order in which the disputes were filed, followed by India. The party or parties that presented the opening statement(s) first shall present the closing statement(s) first.

Third-party session

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties and third parties.

20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the Working Procedures and timetable for the proceedings, to allow sufficient time to ensure availability of interpreters.

21. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its oral statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

   i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

   ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

   iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

   iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel Reports shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the Reports. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit an integrated executive summary summarizing the facts and arguments as presented to the Panel in its written submissions and oral statements, and may also include a summary of its responses to the questions following each meeting with the Panel. The timing of the submission of this integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. The integrated executive summary shall be limited to 30 pages for the complainants and 40 pages for India.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission

and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments unless that third party submits a separate executive summary or otherwise indicates that it does not wish for the submission/statement to serve as its executive summary.

Interim review

27. Following issuance of the Interim Reports, each party may submit a written request to review precise aspects of the Interim Reports and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. Each party may submit written comments on the other parties' written requests for review. Such written comments shall be limited to the other parties' written request for review and shall be submitted in accordance with the timetable adopted by the Panel.

Interim and Final Reports

29. The Interim Reports, as well as the Final Reports before their official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceedings:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).

b. Each party and third party shall submit 1 paper copy of its submissions and 1 paper copy of its exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format (email or on a CD-ROM, DVD or USB key). In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.

c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper copies, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceedings. The electronic version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the disputes. If it is not possible to attach all the exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the exhibits on USB keys, CD-ROMs or DVDs.

d. In addition, each party and third party is invited to submit all documents through the WTO e-filing system within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the e-filing system, they are invited to contact the DS Registry at DSRegistry@wto.org.

e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has requested a paper copy at least five working days before their filing. Each party and third party shall confirm, in writing, that copies

have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other parties (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with paper copies of the Interim Reports and the Final Reports.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES FOR THE PANEL'S FIRST SUBSTANTIVE MEETING TO BE HELD BY REMOTE MEANS

Adopted on 2 November 2020

General

1. These Additional Working Procedures describe the manner in which the Panel's first substantive meeting with the parties and third parties will be held by remote means.

2. The format of the first substantive meeting is without prejudice to how the Panel decides to conduct its second substantive meeting with the parties.

Definitions

3. For the purposes of these Additional Working Procedures:

   "Participant" means any registered person attending the meeting with the Panel by remote means.

   "Platform" means the software or system through which participants attend the meeting with the Panel.

   "Host" means the designated person within the WTO Secretariat responsible for the management of the platform.

Equipment and technical requirements

4. Each party and third party shall ensure that all participants of its delegation join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.

Technical support

5. (1) Each party and third party shall be responsible for providing technical support to the participants of its delegation.

   (2) The host will assist participants in accessing and using the platform in preparation of, and during, the meeting with the Panel.

Pre-meeting

Registration

6. Each party and third party shall provide to the Panel the list of the members of its delegation, on a dedicated form to be provided by the WTO Secretariat, no later than 5:00 p.m. (Geneva time) 10 working days before the meeting with the Panel. When submitting their lists, third parties shall also indicate whether they intend to make an oral statement at the meeting.

Advance testing

7. Before the meeting with the Panel, the WTO Secretariat will hold two testing sessions: (i) an individual test with the participants of each party and third party; and (ii) a joint test with all participants in the meeting and the panelists. Such testing sessions will seek to reflect, as far as possible, the conditions of the meeting.

Confidentiality and security

8. The meeting shall be confidential.

9. The participants shall connect to the virtual meeting room through a secure internet connection and shall avoid the use of an open or public internet connection.

10. The parties and third parties are strictly prohibited from recording, via audio, video or screenshot, the meeting or any part thereof.

11. All participants shall follow the confidentiality and security rules contained in these Additional Working Procedures as well as any additional security guidance that may be provided by the host.

Conduct of the meeting

Access to the virtual meeting room

12. (1) The host will invite participants via email to join the virtual meeting room on the platform.

    (2) For security reasons, access to the virtual meeting room will be password-protected and limited to registered participants.

    (3) Each party and third party shall ensure that only registered participants from its delegation join the virtual meeting room and that the meeting link or password is not forwarded to, or shared with, others.

Advance log-on

13. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

    (2) All participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

Document sharing

14. (1) Each party and third party shall provide the Panel and other participants with a provisional written version of its opening statement, and its closing statement, if available, 20 minutes before delivery at the meeting.

    (2) Any participant wishing to share a document with the Panel and other participants during the meeting shall do so before first referring to such document at the meeting.

Technical problems

15. (1) Each party and third party shall designate a contact person who can liaise with the host during the course of the meeting to report any technical problems that arise with respect to the platform. The host can be contacted via the platform, by sending an email to leslie.stephenson@wto.org, or by calling +41 (0)22 739 6148.

    (2) The Panel will pause the meeting until the technical problem is resolved, unless the affected party or third party agrees that the meeting can proceed without the problem being resolved.

Relation with the Working Procedures of the Panel

16. These Additional Working Procedures complement the Working Procedures of the Panel, adopted on 5 December 2019, and prevail over the latter to the extent of any conflict.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR THE PANEL'S SECOND SUBSTANTIVE MEETING TO BE HELD BY REMOTE MEANS

Adopted on 23 February 2021

General

1. These Additional Working Procedures describe the manner in which the Panel's second substantive meeting with the parties will be held by remote means.

Definitions

2. For the purposes of these Additional Working Procedures:

   "Participant" means any registered person attending the meeting with the Panel by remote means.

   "Platform" means the software or system through which participants attend the meeting with the Panel.

   "Host" means the designated person within the WTO Secretariat responsible for the management of the platform.

Equipment and technical requirements

3. Each party shall ensure that all participants of its delegation join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.

Technical support

4. (1) Each party shall be responsible for providing technical support to the participants of its delegation.

   (2) The host will assist participants in accessing and using the platform in preparation of, and during, the meeting with the Panel.

Pre-meeting

Registration

5. Each party shall provide to the Panel the list of the members of its delegation, on a dedicated form to be provided by the WTO Secretariat, no later than 5:00 p.m. (Geneva time) 10 working days before the meeting with the Panel.

Advance testing

6. Before the meeting with the Panel, the WTO Secretariat will hold two testing sessions: (i) an individual test with the participants of each party; and (ii) a joint test with all participants in the meeting and the panelists. Such testing sessions will seek to detect and resolve any technical problems, as well as to reflect, as far as possible, the conditions of the meeting.

Confidentiality and security

7. The meeting shall be confidential.

8. The participants shall connect to the virtual meeting room through a secure internet connection and shall avoid the use of an open or public internet connection.

9. The parties are strictly prohibited from recording, via audio, video or screenshot, the meeting or any part thereof.

10. All participants shall follow the confidentiality and security rules contained in these Additional Working Procedures as well as any additional security guidance that may be provided by the host.

Conduct of the meeting

Access to the virtual meeting room

11. (1) The host will invite participants via email to join the virtual meeting room on the platform.

    (2) For security reasons, access to the virtual meeting room will be password-protected and limited to registered participants.

    (3) Each party shall ensure that only registered participants from its delegation join the virtual meeting room and that the meeting link or password is not forwarded to, or shared with, others.

Advance log-on

12. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

    (2) All participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

Document sharing

13. (1) Each party shall provide the Panel and other participants, via email, with a provisional written version of its opening statement, and its closing statement, if available, at least 20 minutes before delivery at the meeting.

    (2) Any participant wishing to share a document with the Panel and other participants during the meeting shall do so, via email, before first referring to such document at the meeting.

Technical problems

14. (1) Each party shall designate a contact person who can liaise with the host during the course of the meeting to report any technical problems that arise with respect to the platform. The host can be contacted via the platform, by sending an email to leslie.stephenson@wto.org, or by calling +41 (0)22 739 6148.

    (2) The Panel will pause the meeting until the technical problem is resolved, unless the affected party agrees that the meeting can proceed without the problem being resolved.

Relation with the Working Procedures of the Panel

15. These Additional Working Procedures complement the Working Procedures of the Panel, adopted on 5 December 2019, and prevail over the latter to the extent of any conflict.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. INTRODUCTION

1. In this dispute, Brazil challenges India's domestic support for sugarcane and export subsidies for sugar as inconsistent with Parts IV and V of the Agreement on Agriculture. Brazil does not challenge India's right to support its sugarcane farmers and sugar industry, where such support is provided consistently with its WTO obligations. The measures at issue in this dispute, however, are not only WTO-inconsistent, they also harm Brazil's interests as a major producer and exporter of sugar.

2. India's Central Government annually fixes a so-called "Fair and Remunerative Price" ("FRP"), prescribing the minimum purchase price that sugar mills must pay to farmers for any sugarcane delivered to the mill. Since its introduction in 2009, the FRP level has more than doubled. On top of the FRP, some of India's State Governments prescribe, through so-called State Advised Prices ("SAPs"), minimum purchase prices for sugarcane that are even higher than the already-high FRP. Additionally, India's Central and State Governments provide direct payments, soft loans and other support to sugarcane farmers and sugar mills.

3. These three sets of measures have resulted in artificially high sugarcane prices in India, a 70 per cent increase in sugar production, as well as an all-time high sugar stock of 17.58 million tons in 2019. To evacuate its ever-increasing domestic sugar stocks, India provides subsidies to increase sugar exports, thereby plaguing the world sugar market with its excess production. With these three sets of measures, India had become the world's second largest producer and third largest exporter of sugar by the end of the 2018/19 sugar season.

4. As summarized in Section 0, below, and as set out in its submissions, Brazil has established that India's provision of domestic support for sugarcane is inconsistent with the Agreement on Agriculture. Under Article 7.2(b) of the Agreement on Agriculture, India's domestic support must not exceed the applicable *de minimis* level of 10 per cent of the value of production. Yet, India's domestic support for sugarcane far exceeds that *de minimis* level.

5. Moreover, and as summarized in Section 0, below, and as set out in its submissions, Brazil has established that India's export subsidies for sugar are inconsistent with Articles 3.3 and 8 of the Agreement on Agriculture. Under those provisions, India is not entitled to provide the type of export subsidies for sugar at issue in these proceedings.

6. For the most part, India did not dispute, or even agreed with, Brazil's argument and evidence. There are no more than a few instances, in which India has even challenged Brazil's arguments and evidence. In each case, Brazil has demonstrated that India's arguments have no basis in law or in fact. This includes an unfounded Request for a Preliminary Ruling by the Panel (Section 0). As a result, the number of issues that the Panel is called upon to resolve in this dispute is narrow. Based on the argument and evidence before it, the Panel must rule in Brazil's favor.

II. INDIA PROVIDES DOMESTIC SUPPORT FOR SUGARCANE IN A MANNER INCONSISTENT WITH ITS OBLIGATIONS UNDER THE AGREEMENT ON AGRICULTURE

7. Brazil claims that India's domestic support for sugarcane though the FRP, SAPs and other domestic support measures is inconsistent with its domestic support obligations under Part IV of the Agreement on Agriculture. Specifically, Brazil has demonstrated that India's domestic support for sugarcane far exceeds the permissible 10 per cent *de minimis* level that applies to India. As a result, India's domestic support for sugarcane is inconsistent with Article 7.2(b) of the Agreement on Agriculture.

A. Factual Background on India's Domestic Support to Sugarcane Farmers

8. India's Central and State Governments each enjoy legislative and executive power to enact laws and regulations over matters relating to the sugar industry. As summarized below, in the exercise of that authority, they maintain three sets of measures that provide domestic support to sugarcane. India has not disputed the factual background on its domestic support measures that are at issue in this dispute, as summarized below.

1. India's Central Government fixes a "Fair and Remunerative Price" for sugarcane

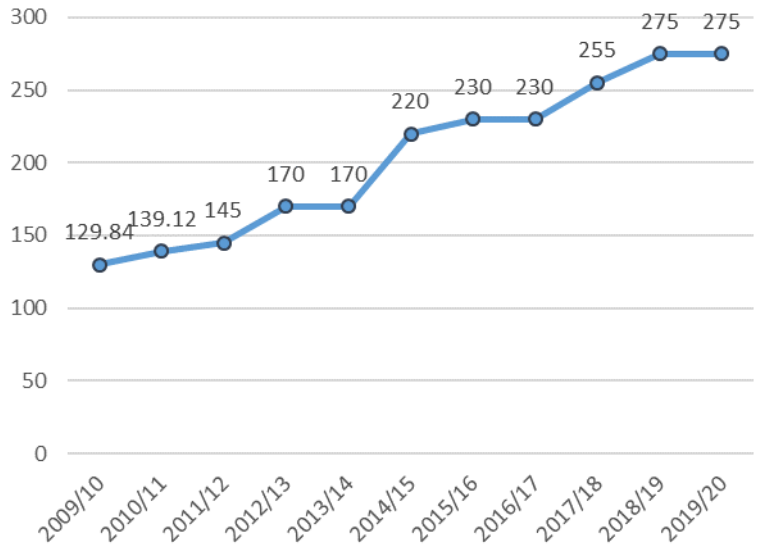
9. Section 3 of the Essential Commodities Act 1955 empowers India's Central Government to control the production, supply and distribution of essential commodities, including sugarcane. In exercise of that power, it has adopted the Sugarcane (Control) Order 1966.

10. Section 3(1) of the Sugarcane (Control) Order provides that the Central Government may fix a fair and remunerative price of sugarcane to be paid by producers of sugar or their agents for the sugarcane they purchase. Section 3(2) of the Order requires that no person sell or agree to sell sugarcane to a producer of sugar or his agent, and that no producer or agent shall purchase or agree to purchase sugarcane, at a price lower than the FRP. It further requires that the sugar producer (*i.e.*, a sugar mill) or its agent pay sugarcane farmers within 14 days from the date of delivery of the sugarcane. Failure to comply with the FRP may result in certain penalties, provided for under the Essential Commodities Act 1955.

11. India's Central Government has fixed the FRP since 2009. Since then, its level has more than doubled. Each year, India's Commission for Agricultural Costs and Prices ("CACP"), an entity affiliated with India's Ministry of Agriculture and Farmers Welfare, recommends a basic FRP rate linked to a basic sugarcane recovery rate, as well as a premium rate for sugarcane whose recovery rate, or quality, exceeds the basic recovery rate. The CACP's recommendation is subject to consideration and the approval by India's Central Government Cabinet. Following the Cabinet's approval, the Department of Food & Public Distribution ("DFPD") of the Ministry of Consumer Affairs, Food & Public Distribution announces the FRP through both an official letter to the "Chief Secretaries of All Sugar Producing States" and the website of the India's Government Press Information Bureau.

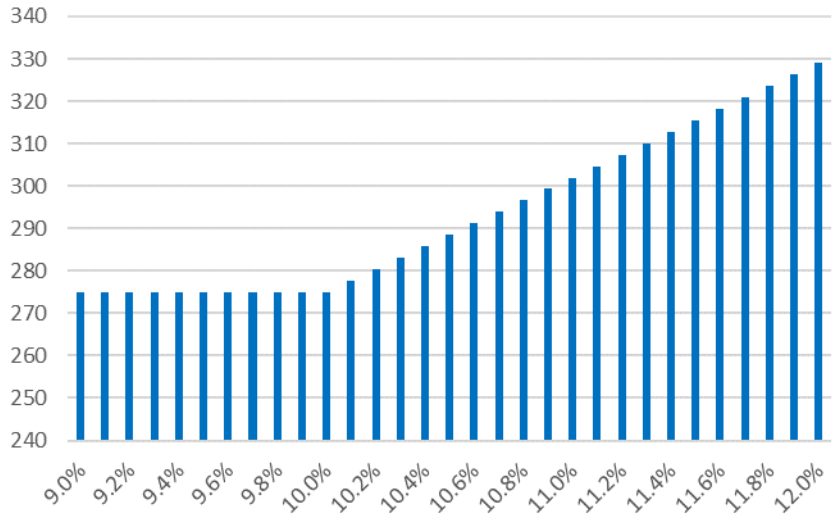
12. Figure 1, below, displays the basic FRP rates announced by the DFPD for each sugar season since the 2009/10 sugar season.

Figure 1 – The FRP at the Basic Recovery Rate for the Sugar Seasons 2009/10 to 2019/20 (unit: INR per 100 kg)



13. Using the FRP for the 2019/2020 sugar season, Figure 2, below, illustrates the operation of the FRP premium rates for sugarcane whose quality exceeds the basic recovery rate. To that end, it shows the minimum FRP that a sugarcane farmer receives for sugarcane at different recovery rates. For the 2019/2020 sugar season, the FRP was fixed at INR 275 per 100 kilograms for a basic recovery rate of 10 per cent, subject to a premium of INR 2.75 per 100 kilograms for each 0.1 per cent increase in the recovery rate over and above 10 per cent. As shown in Figure 2, sugarcane with a recovery rate below 10 per cent would not be penalized, and would receive the FRP on the basis of an assumed 10 per cent recovery rate.

Figure 2 – The FRP at Different Recovery Rates for the Sugar Season 2019/20 (unit: INR per 100 kg)



2. Certain State Governments fix "State Administered Prices" for sugarcane

14. The Sugarcane (Control) Order 1966 also permits India's State Governments to fix minimum sugarcane purchase prices, provided that such prices are higher than the FRP. These State-level minimum sugarcane price schemes are called "State Administered Prices". Such SAPs are fixed by Bihar, Haryana, Punjab, Tamil Nadu, Uttar Pradesh and Uttarakhand.

15. The State Governments of Bihar, Haryana, Punjab, Uttar Pradesh, and Uttarkhand set SAP rates for different varieties of sugarcane. These SAPs take the form of specific prices set for, typically, three categories of sugarcane comprising specific varieties of sugarcane.

16. The State Government of Tamil Nadu applied SAPs for the sugar seasons 2014/15, 2015/16 and 2016/17, using a basic rate linked to a basic sugarcane recovery rate of 9.5 per cent, and a premium rate for sugarcane whose quality exceeds that basic recovery rate. Since the 2017/18 sugar season, Tamil Nadu operates a mandatory revenue-sharing regime.

3. India's Central and State Governments provide other domestic support to further support sugarcane farmers

17. India's Central and State Governments maintain additional domestic support for sugarcane. Brazil has organized these additional programs into three categories.

18. The first category comprises programs that appear to be designed, and operate, to enable sugar mills to pay farmers sugarcane arrears, addressing sugar mills' challenge to pay sugarcane farmers the required FRP or SAPs. These programs include:

- the Central Government's Scheme for Assistance to Sugar Mills for the 2017/18 and 2018/19 sugar seasons;

- the Central Government's Scheme for Extending Production Subsidy to Sugar Mills for the 2015/16 sugar season;
- the Central Government's Scheme for Creation and Maintenance of Buffer Stock launched in 2018 and 2019;
- the Central Government's Scheme for Defraying Expenditure Towards Internal Transport for the 2018/19 sugar season (which has as its purpose the reduction of sugarcane arrears);
- the Central Government's Scheme for Providing Assistance to Sugar Mills for Expenses on Marketing Costs for the 2019/20 sugar season (which has as its purpose the reduction of sugarcane arrears);
- the Central Government's Scheme for Incentive Payments for Marketing and Promotion Services for Raw Sugar 2014 (which has as its purpose the reduction of sugarcane arrears);
- the Central Government's Scheme for Extending Soft Loan to Sugar Mills for the sugar seasons 2014/15 and 2018/19;
- direct payments for sugar mills provided by the State Government of Bihar to pay sugarcane farmers
- a one-time settlement of loans to all cooperative sugar mills by the State Government of Haryana; and
- soft loans subsidized by certain State Governments.

The details of these programs are set out in Appendix-A of Brazil's First Written Submission ("Appendix-A programs").

19. The second category comprises programs that offer additional support to sugarcane farmers on top of the support provided by the FRP and SAPs, so that farmers receive benefits beyond the FRP or SAPs. These programs include:

- the foregoing purchase tax of the State Government of Andhra Pradesh;
- the provision of a transitional production incentive to sugarcane farmers by the State Government of Tamil Nadu; and
- the provision of direct payments for sugar mills to pay sugarcane farmers an incentive price by the State Government of Karnataka.

The details of these programs are set out in Appendix-B of Brazil's First Written Submission ("Appendix-B programs").

B. India Provides Domestic Support for Sugarcane in Excess of the Applicable 10 Per Cent *De Minimis* Level

1. Legal framework applicable to Brazil's domestic support claims

20. Under Part IV of the Agreement on Agriculture, each Member's principal domestic support obligations depend on whether its Schedule includes, in Section I of Part IV, a Total Aggregate Measurement of Support ("AMS") commitment. Brazil has established, and India does not dispute, that India's Schedule does not contain a Total AMS commitment. In these circumstances, Article 7.2(b) of the Agreement on Agriculture applies, and requires India not to provide domestic support to agricultural producers in excess of the relevant *de minimis* level set out in Article 6.4 of the Agreement on Agriculture.

21. Article 6.4 specifies that, with respect to the provision of product-specific domestic support (such as domestic support for sugarcane), the applicable *de minimis* level for a developing country Member (such as India) is 10 per cent of the value of production of the basic agricultural product during the relevant year. Consequently, India cannot provide domestic support to its sugarcane producers at levels that are in excess of 10 per cent of the value of production of sugarcane in any given year.[1] India agrees.

22. Pursuant to Article 1(a)(ii) of the Agreement on Agriculture, the level of a Member's domestic support "during any year of the implementation period and thereafter" is assessed through the calculation of its Current AMS. That Current AMS must 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 tables of supporting material incorporated by reference in Part IV of the Member's Schedule".

23. Accordingly, in this dispute, Brazil has calculated India's provision of domestic support for sugarcane based on the relevant provisions in Annex 3 of the Agreement on Agriculture and has taken "into account" constituent data and methodology used in the tables of supporting material of India's Schedule, where applicable.

2. India's far exceeds the *de minimis* level solely through the domestic support provided by the market price support under the FRP and SAPs

24. Paragraph 1 of Annex 3 of the Agreement on Agriculture, for the purpose of applying specific AMS calculation rules, categorizes domestic support measures that are not exempted from reduction commitments into three categories: (i) market price support; (ii) non-exempt direct payments; and (iii) other non-exempt policies. Following this initial categorization of non-exempt product-specific domestic support measures under paragraph 1, the remainder of Annex 3 sets out calculation rules applicable to each of the categories of domestic support, including (i) in paragraph 8 for market price support; (ii) in paragraphs 10-12 for non-exempt direct payments; and (iii) in paragraph 13 for other non-exempt policies.

a. India provides market price support for sugarcane through the FRP and SAPs

i. Brazil has established that India's FRP and SAPs for sugarcane constitute market price support

25. Brazil has established that the FRP and SAPs constitute "market price support", within the meaning of paragraphs 1 and 8 of Annex 3. Paragraph 8 of Annex 3 provides that "market price support shall be calculated using the gap between a fixed external reference price" (or "FERP") "and the applied administered price" (or "AAP") "multiplied by the quantity of eligible production" (or "QEP").

26. Thus, "market price support" exists where there is a "gap" between an AAP and the FERP, and there are rules for determining the QEP. Since the FERP is "fixed" by historical data pursuant to paragraph 9 of Annex 3, Members provide "market price support" when they set an AAP. The term "administered price" under paragraph 8 refers to a price that is determined not by market forces but by administrative action. As the panel in *China – Agricultural Producers* noted, an AAP is "the price set by the government at which specified entities will purchase certain basic agricultural products".[2] Because the AAP is fixed by the government rather than discovered by market forces, the government may need to adopt additional measures to balance supply and demand so as to maintain

[1] Alternatively, if the Panel were to consider the absence of a Total AMS commitment level in Section I of Part IV of India's Schedule to be a zero entry, Brazil has established that Articles 3.2 and 6.3 of the Agreement of Agriculture require India's Current Total AMS not to exceed that zero level. Pursuant to Article 6.4 of the Agreement on Agriculture, a Member's Current Total AMS does not include any product-specific or non-product-specific AMS values that are below or equal to the applicable *de minimis* level of support. Therefore, Articles 3.2 and 6.3 of the Agreement of Agriculture would lead to the same domestic support obligation for India as under Article 7.2(b) of the Agreement on Agriculture, *i.e.*, India's provision of domestic support for sugarcane must not exceed the applicable 10 per cent *de minimis* level.

[2] Panel Report, *China – Agricultural Producers*, para. 7.177.

the AAP, and to prevent market prices from falling below the AAP, as envisaged by the second sentence of paragraph 8.

27. The FRP and SAPs are market price support within the meaning of paragraphs 1 and 8 of Annex 3 of the Agreement on Agriculture, because they are minimum purchase prices set by the Central and State Governments of India.

ii. India erred in arguing that market price support must involve government purchases

28. India argued that, because its Governments do not themselves purchase sugarcane and pay sugarcane producers the FRP or SAPs, the support delivered through the FRP and SAPs is neither market price support, nor any other form of domestic support subject to India's commitments under the Agreement on Agriculture. In support of that argument, India asserted that paragraph 2 of Annex 3, read together with paragraph 1 of Annex 3, delineates the scope of a Member's domestic support commitments by: (i) limiting the provider of domestic support to governments or their agents; and (ii) confining the form of domestic support only to "subsidies", which, according to India, are limited to budgetary outlays and revenue foregone. As Brazil has established, India erred.

29. First, Brazil has explained that the *scope of* measures that are subject to a Member's *domestic support* commitments under the Agreement on Agriculture is governed by Article 6 of the Agreement on Agriculture. Article 6.1 of the Agreement on Agriculture provides that "all [] domestic support measures in favor of agricultural producers" are subject to the reduction commitments, unless the Member providing the support demonstrates compliance with the criteria for certain exemptions set out in in Annex 2 and Articles 6.2 and 6.5 of the Agreement on Agriculture. Article 1(h) similarly explained that "all domestic support provided in favour of agricultural producers" must be included in the AMS calculations, unless specifically exempt. Similarly, Article 7.2(a) refers to "any domestic support measure in favour of agricultural producers" when framing the obligation contained therein.

30. India did not dispute that the FRP and SAPs deliver support in favor of sugarcane farmers. Indeed, the FRP and SAPs prevent sugarcane producers' revenue per unit of sugarcane from falling below a minimum floor price set by the FRP and SAPs. Nor did India argue – let alone demonstrate – that the FRP and SAPs are exempt from its domestic support commitments under the exemptions in Annex 2 and Articles 6.2 and 6.5 of the Agreement on Agriculture.

31. Accordingly, the FRP and SAPs are domestic support measures in favor of sugarcane producers that are subject to India's domestic support commitments.

32. Second, India's argument that paragraph 2 of Annex 3 limits the scope of "market price support" to measures that come in the *form* of a "*subsidy*" is bereft of textual support. As Brazil has established, by its own terms, paragraph 2 applies only if there is a "subsid[y] under paragraph 1". Where applicable, it provides that calculation of such "subsidies" "shall include both budgetary outlays and revenue foregone by governments or their agents". Neither paragraph 1 nor paragraph 2 of Annex 3 characterize "market price support" as a "subsidy". Instead, "market price support" is a form of "domestic support", which is the term used to describe the subject matter and scope of the disciplines in Part IV of the Agreement on Agriculture. Had the drafters intended to subject "subsidies" to disciplines, they would have framed the disciplines in Part IV not in terms of "domestic *support*" but in terms of "domestic *subsidies*". They did not.

33. Yet, even assuming, *arguendo*, that paragraph 2 of Annex 3 were to apply to all three forms of "support" under paragraph 1, including "market price support", it would still not limit the scope of "market price support" to schemes involving government purchases, and therewith budgetary outlays or revenue foregone, as India argues. Brazil has shown that the term "include" in paragraph 2 indicates that what follows – *i.e.*, "both budgetary outlays and revenue foregone by governments or their agents" – is a non-exhaustive list that would not preclude the existence of "subsidies" in a form other than budgetary outlays or revenue foregone. Moreover, Brazil has shown that, contrary to India's argument, the term "both", which immediately follows the term "include" in paragraph 2, does not, and cannot, transform a non-exhaustive list into an exhaustive list. Thus, India erred in arguing that paragraph 2 limits domestic support measures, including market price support, to those that involve either budgetary outlays or revenue foregone.

34. *Third*, the ordinary meaning and context of the term "market price support", as well as the object and purpose of the Agreement on Agriculture, are at odds with India's argument that "market price support" must involve government purchases.

35. The term "market price support" appears in paragraphs 1 and 8 of Annex 3. Nothing in the legal text of those provisions limits "market price support" to schemes involving government purchases. Indeed, the second sentence of paragraph 8, which concerns the treatment of budgetary payments made to maintain the price gap, such as buying-in or storage costs, does not limit such buying-in or storage costs to costs incurred by governments.

36. Turning to relevant context, Annex 4 of the Agreement on Agriculture clarifies that the term "market price support" is "defined in Annex 3",[3] and has the same meaning under Annex 4 as it has under Annex 3. Annex 4 then confirms that "market price support" is a form of domestic support that covers a broad range of measures that do not necessarily involve government purchases. Further relevant context in Annex 2 clarifies that "transfers from consumers" – which occur where government measures set prices at a price higher than they otherwise would be – may constitute domestic support. Similarly, Article 6.1 confirms that "all [] domestic support measures in favour of agricultural producers" are subject to the reduction commitments, without requiring that they involve government purchases, or budgetary outlays or revenue foregone. Article 6.2 also confirms the broad coverage of domestic support, recognizing that "assistance" may be "*direct or indirect*" in encouraging agricultural and rural development. Thus, the relevant context contradicts India's argument that "market price support" must be limited to schemes involving government purchases.

37. As additional context, Brazil pointed to India's own supporting tables, as incorporated into its Schedule, explaining that India's supporting tables are at odds with India's interpretation of the term "market price support", and further confirm Brazil's interpretation. Indeed, in its supporting tables, India identified as "market price support" a program that is similar to the FRP for sugarcane. That program similarly did not involve government purchases of sugarcane, and instead required sugar mills to pay an AAP. India has been unable to explain why its position in this dispute deviates from the correct understanding of the term "market price support" that it applied when putting together its supporting tables.

38. Finally, the object and purpose of the Agreement on Agriculture is consistent with Brazil's interpretation. The third recital of its Preamble refers to "substantial progressive reductions in agricultural support and protection [] resulting in correcting and preventing restrictions and distortions in world agricultural markets". Direct price interventions, such as under the FRP and SAPs, raise the price received by producers, which negotiators recognized is one of the most distortive forms of domestic support. Excluding from reduction commitments forms of market price support, such as the FRP and SAPs, that do not involve government purchases would defeat the object and purpose of the Agreement on Agriculture. It would also create, without any textual basis, a wide and easily abused loophole in the disciplines.

iii. Conclusion

39. In short, Brazil has established that the FRP and SAPs constitute "market price support". Brazil has also refuted India's erroneous arguments that sought to exclude from the domestic support disciplines in the Agreement on Agriculture the domestic support provided to India's sugarcane producers by the FRP and SAPs.

b. India's market price support for sugarcane under the FRP and SAPs results in domestic support that far exceeds the applicable de minimis level

40. Paragraph 8 of Annex 3 sets out the domestic support quantification rules for market price support, which India provides through the FRP and SAPs. Paragraph 8 requires that the support be calculated on the basis of the following "price gap" formula:

$$MPS = (AAP - FERP)*QEP$$

[3] Agreement on Agriculture, Annex 4, paragraph 1.

41. Brazil applied the "price gap" formula for each State in India growing sugarcane. India did not dispute that approach.

42. Starting with the AAP, Brazil recalls that certain States in India apply the FRP, while others apply a higher SAP. For States that apply the FRP, the AAP applicable in a given year is determined through that year's FRP at the basic recovery rate and any premium for higher recovery rates. That is, the applicable AAP may differ depending on the average recovery rate for sugarcane. Brazil has therefore estimated the AAP for each State using its average recovery rate. For the States that apply SAPs, Brazil has adopted an AAP at the rate for the middle category of sugarcane varieties. India did not dispute Brazil's approach.

43. The FERP derives from India's supporting tables in G/AG/AGST/IND. Since sugarcane recovery rates in India today are higher than the 8.5 per cent applicable when India reported the FERP in its supporting tables, Brazil has adjusted the FERP consistent with paragraph 9 of Annex 3. Specifically, Brazil adjusted the FERP for each State to ensure that the FERP was expressed at the same sugarcane quality level, or recovery rate, at which the AAP was expressed. Again, India did not dispute Brazil's approach.

44. The QEP refers to the amount of production of a product that is fit, or able, to benefit from the price support provided through the AAP. The legal framework for the FRP and SAPs does not put any limitations on the production of sugarcane that may benefit from the FRP or SAPs. Brazil thus used as the annual QEP in each State the entirety of the annual sugarcane production in that State. Once again, India did not dispute Brazil's approach.

45. Using, for each State, the values for the three elements of the "price gap" formula for "market price support", Brazil calculated the total annual amount of domestic support provided by India through the FRP and SAPs. Comparing that annual amount to India's official annual data for the "total value of production" of sugarcane, Brazil calculated that India's provision of domestic support through the FRP and SAPs amounts to 115 per cent, 118 per cent, 113 per cent, 108 per cent and 105 per cent of the value of production in the sugar seasons 2014/15, 2015/16, 2016/17, 2017/18 and 2018/19, respectively.

46. Each of these annual values far exceeds the *de minimis* level of 10 per cent of the value of sugarcane production that India is entitled to provide under Article 7.2 of the Agreement on Agriculture. Thus, based on the FRP and SAPs alone, India's domestic support for sugarcane is inconsistent Part IV of the Agreement on Agriculture.[4]

3. India further exceeds the *de minimis* level by providing other non-exempt product-specific domestic support to sugarcane producers

47. In addition to market price support, India also provides other domestic support to sugarcane farmers through various programs introduced by India's Central and State Governments. To recall, the Appendix-A programs appear to be designed, and operate, to enable sugar mills to pay for sugarcane arrears, while the Appendix-B programs provide additional support to sugarcane farmers on top of that provided by the FRP and SAPs.

48. Each of these programs provides support in favor of sugarcane farmers. India has not claimed, let alone demonstrated, that any of these programs is exempted from reduction commitments by virtue of Annex 2, or Article 6.2, or Article 6.5. Accordingly, these programs constitute either non-exempt direct payments or other non-exempt policies, within the meaning of paragraph 1 of Annex 3. Consistent with paragraphs 10, 12 and 13 of Annex 3, the level of support provided by non-exempt direct payments or other non-exempt policies can be calculated using the budgetary outlay approach.

49. However, pursuant to the second sentence of paragraph 8 of Annex 3, budgetary payments made to maintain the gap between the AAP and the FERP, such as buying-in or storage costs, shall

[4] Brazil has also shown that India's provision of domestic support through the FRP alone far exceeds 10 percent of the value of India's sugarcane production.

not be included in the AMS. Since the Appendix-A programs appear to involve payments made to maintain the gap between the AAP and the FERP, Brazil does not include them in the AMS calculation.

50. By contrast, the Appendix-B programs provide support to sugarcane farmers above and beyond the market price support provided by the FRP and SAPs. Therefore, they must be included in the AMS calculation. Adding the budgetary outlays for the Appendix-B programs, the value of India's domestic support increases marginally, to 115 per cent, 118 per cent, 113 per cent, 109 per cent and 105 per cent of the value of production in the sugar seasons 2014/15, 2015/16, 2016/17, 2017/18 and 2018/19, respectively. Each of these annual values continues to far exceed the *de minimis* level of 10 per cent of the value of sugarcane production that India is entitled to provide under Article 7.2.

51. In light of certain evidentiary difficulties in connection with these programs (not least due to India's refusal to answer factual questions on them), and prompted by questions from the Panel, Brazil accepted, however, that, if the Panel finds that India's provision of market price support alone results in an inconsistency with Article 7.2(b), the Panel may simply categorize those measures as non-exempt domestic support, but need not additionally calculate the support provided by the Appendix-B programs.

52. Brazil has emphasized, however, that not calculating the support provided by the measures identified and described in Appendix-A and Appendix-B does not mean that India's compliance obligations are limited to any particular component of AMS – *e.g.*, market price support. Instead, India's compliance obligations with respect to domestic support for sugarcane will concern the overall AMS level provided through market price support, non-exempt direct payments and other non-exempt policies for sugarcane.

C. Conclusion

53. In sum, Brazil has established that India's provision of domestic support through the FRP and SAPs alone amounts to 115 per cent, 118 per cent, 113 per cent, 108 per cent and 105 per cent of the value of production in the sugar seasons 2014/15, 2015/16, 2016/17, 2017/18 and 2018/19, respectively, far exceeding the 10 per cent *de minimis* level. When the other support is added, the margin by which the total level of support exceeds *de minimis* levels increases further.

54. Article 7.2(b) of the Agreement on Agriculture requires India not to provide domestic support in excess of the 10 per cent *de minimis* level. The Panel should therefore find that India violates its domestic support commitments under the Agreement on Agriculture.[5]

III. INDIA PROVIDES EXPORT SUBSIDIES FOR SUGAR CONTRARY TO ARTICLES 3.3 AND 8 OF THE AGREEMENT ON AGRICULTURE

55. Brazil claims that India provides export subsidies for sugar under six programs:

i. the Scheme for Assistance to Sugar Mills for the 2018/19 season;

ii. the Scheme for Creation and Maintenance of Buffer Stock in 2018;

iii. the Scheme for Creation and Maintenance of Buffer Stock in 2019;

iv. the Scheme for Assistance to Sugar Mills for the 2017/18 season;

v. the Scheme for Extending Production Subsidy to Sugar Mills for the 2015/16 season; and

vi. Scheme for Providing Assistance to Sugar Mills for Expenses on Marketing Costs including Handling, Upgrading and Other Processing Costs and Costs of International

[5] In the alternative, India acts inconsistently with Articles 3.2 and 6.3 because it exceeds its nil commitment level by providing levels of domestic support for sugarcane in excess of its *de minimis* level of 10 per cent.

and Internal Transport and Freight Charges on Export of Sugar (the "MAEQ Scheme") for the 2019/20 season.

56. As summarized below, Brazil has established that each of these measures provides export subsidies for sugar under Article 9.1(a) of the Agreement on Agriculture. By providing Article 9.1(a) export subsidies for sugar, India acts consistently with Articles 3.3 and 8 of the Agreement on Agriculture.

A. Factual Background on India's Export Subsidies for Sugar

57. To recall, India maintains certain subsidies to evacuate surplus sugar production through exports. To that end, India maintains an export quota regime, under which each sugar mill is allocated an annual amount of sugar that it must export. To further incentivize sugar mills to fulfill their allocated export quota, India conditions their eligibility for various assistance programs upon fulfilment of their export quotas.

58. For the 2017/18 and 2018/19 sugar seasons, India maintains an export quota regime involving "Minimum Indicative Export Quotas" ("MIEQs") that require sugar mills to export an allocated amount of sugar. To encourage sugar mills to export the prescribed quantities for the 2018/19 sugar season, India conditions the sugar mills' eligibility for the Scheme for Assistance to Sugar Mills (2018/19 season) and the Scheme for Creation and Maintenance of Buffer Stock (2018) to fulfilment of their MIEQs. Additionally, sugar mills that have exported against the MIEQ for the 2018/19 season obtain more subsidies under the Scheme for the Creation and Maintenance of Buffer Stocks (2019). For the 2015/16 sugar season, a similar export subsidy regime features an export quota regime linked to assistance programs.

59. For the 2019/20 sugar season, India changed the label of its export quota regime from MIEQ to "Maximum Admissible Export Quantity" ("MAEQ"). However, India continues the same basic elements that characterize its export subsidy regime in the 2018/19 as well as in previous sugar seasons. In particular, under the MAEQ Scheme, sugar mills that fulfil their allocated export quota are eligible to a lump sum subsidy of, in the 2019/20 sugar season, INR 10,448 for every ton of sugar exported. India also increased the MAEQ export quota to a total of 6 million tons of sugar, a 20 per cent over the 2018/19 sugar season.

B. India Provides Article 9.1(a) Export Subsidies Inconsistent with Articles 3.3 and 8 of the Agreement on Agriculture

1. Legal framework applicable to Brazil's export subsidy claims

60. Part V of the Agreement on Agriculture and Section II of Part IV of each Member's Schedule define a Member's export subsidy commitments for agricultural goods.

61. Article 1(e) of the Agreement on Agriculture defines "export subsidies" as "subsidies contingent upon export performance, including the export subsidies listed in Article 9". Article 8 provides that "[e]ach Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule".

62. "[C]onformity with this Agreement" is assessed for two different types of "export subsidy commitments", which Members have undertaken pursuant to Article 3.3 of the Agreement on Agriculture and Section II of Part IV of their Schedules. For *scheduled* agricultural products, *i.e.*, products "specified in Section II of Part IV" of Member's Schedule, it must not provide export subsidies "in excess of the budgetary outlay and quantity commitment levels specified therein", except as permitted under Articles 9.2(b) and 9.4. For *unscheduled* agricultural products, *i.e.*, products *not* specified in Section II of Part IV of a Member's Schedule, it must not provide export subsidies at all, again except as permitted under Articles 9.2(b) and 9.4. Thus, the manner in which compliance with a Member's export subsidy obligations is assessed depends on whether Section II of Part IV of its Schedule specifies, for the product at issue, the right to provide export subsidies, within the limits of the scheduled budgetary outlay and quantity reduction commitments. India does not disagree with this legal framework.

63. Section II of Part IV of India's Schedule does not specify any product for which India has scheduled the right to provide, within limits, export subsidies. Thus, consistent with Articles 3.3 and 8, India can provide export subsidies only to the extent permitted under Article 9.2(b) and Article 9.4. Brazil has explained that Article 9.2(b) is no longer applicable. Brazil has also explained that, during the "implementation period", Article 9.4 allows developing country Members, such as India, to provide export subsidies for (i) the "costs of marketing" or the "costs of international transport and freight" (Article 9.1(d)) or (ii) through internal transport subsidies (Article 9.1(e)). Thus, consistent with Articles 3.3 and 8, India is not permitted to provide export subsidies for sugar falling under Article 9.1(a). Again, India does not disagree with this part of the legal framework.

64. India has invoked, only with respect to the MAEQ Scheme, Article 9.4 (asserting that it falls within Articles. 9.1(d) and (e) and that the "implementation period" continues). As summarized below (Section 0), Brazil has established that the export subsidies under the MAEQ Scheme fall under Article 9.1(a). Since India was unable to show that the MAEQ Scheme falls under Article 9.1(d) or (e), Brazil does not consider it necessary for the Panel to resolve the question whether Article 9.4 continues to apply today.

2. India provides export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture

65. As summarized below, Brazil has established that India is providing Article 9.1(a) export subsidies for sugar, in violation of Article 3.3 and 8 of the Agreement on Agriculture.

a. Export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture

66. Article 9.1(a) refers to "the provision by governments or their agencies of *direct subsidies*, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, *contingent on export performance*".[6] To assess whether a measure constitutes an export subsidy, within the meaning of Article 9.1(a), it must involve "direct subsidies" that are "contingent on export performance", and it must feature relevant grantors and relevant recipients. India does not disagree.

67. The Agreement on Agriculture does not define the term "subsidy" or "direct subsidies". Previous panels and the Appellate Body have found that the subsidy definition under the SCM Agreement is "highly relevant context for the interpretation of the word 'subsidy' within the meaning of the Agreement on Agriculture".[7] Consistently with the SCM Agreement definition, the Appellate Body explained that a "subsidy", within the meaning of Article 9.1(a) of the Agreement on Agriculture, "involves a transfer of economic resources from the grantor to the recipient for less than full consideration".[8]

68. The term "direct" denotes a relationship between a subsidy grantor and the recipient. Indeed, the remainder of Article 9.1(a) identifies specific entities as relevant grantors and recipients. The relevant granting authorities are either "governments or their agencies", and the relevant recipients are "producers of an agricultural product, a cooperative or other association of such producers", or "a marketing board". India agrees.

69. Thus, "direct subsidies", within the meaning of Article 9.1(a), include the transfer of economic resources from "governments or their agencies" to "producers of an agricultural product, a cooperative or other association of such producers", or "a marketing board". Such transfer of economic resources must be for less than full consideration.

70. The terms "contingent on export performance" or "contingent upon export performance" appear in Articles 1(e) and 9.1(a) of the Agreement on Agriculture, and Article 3.1(a) of the SCM Agreement. The Appellate Body clarified that there is no reason to read the requirement of export contingency differently in the SCM Agreement and in the Agreement on Agriculture. Thus, export contingency under Article 9.1(a) of the Agreement on Agriculture requires a "relationship of

[6] Emphasis added.
[7] Panel Report, *US – FSC*, para. 7.150. *See also* Appellate Body Report, *US – Upland Cotton*, para. 571.
[8] Appellate Body Report, *Canada – Dairy*, para. 87.

conditionality or dependence", or a "tie" between the granting of the subsidy and actual or anticipated exportation.[9] Once again, India agrees.

b. The challenged measures constitute export subsidies, within the meaning of Article 9.1(a) of the Agreement on Agriculture

71. India did not generally dispute the arguments and evidence provided by Brazil in applying the legal standard to the facts of the measures at issue, as summarized below. Indeed, India accepted that each of the measures is consistent upon export performance. India argued instead that (i) Brazil had allegedly failed to provide evidence of actual payments for all of the export subsidies at issue, and (ii), in the alternative, that the MAEQ Scheme is allegedly an export subsidy under Article 9.1(d) or (e) that is covered by Article 9.4. Brazil explains that India erred with both arguments in Sections 0 and 0, further below.

i. Scheme for Assistance to Sugar Mills for the 2018/19 season

72. Brazil has established that India provides, under the Scheme for Assistance to Sugar Mills for the 2018/19 sugar season, export subsidies, within the meaning of Article 9.1(a).

73. Under the Scheme for Assistance to Sugar Mills for the 2018/19 sugar season, India provides "direct subsidies" to eligible sugar mills in the form of direct payments. Eligible sugar mills receive INR 13.88 for every 100 kilograms of sugarcane crushed. For the implementation of this Scheme, India made available from the Central Government's budget INR 20 billion in financial year 2019/20, and INR 2 billion in financial year 2020/21. Since payments under the Scheme are made gratuitously, the Scheme provides for a transfer of economic resources from the Central Government to sugar mills for less than full consideration, and thus constitutes a "direct subsidy".

74. The "direct subsidies" under the Scheme are also "contingent on export performance". To be eligible for the direct payments, sugar mills must prove that they have complied fully with all orders/directives of the DFPD to the sugar mills applicable for the 2018/19 sugar season. This includes the DFPD Order on MIEQ for the 2018/19 season, which requires sugar mills to export their allocated MIEQs of sugar before 30 September 2018. Thus, by requiring that sugar mills comply fully with the applicable DFPD orders/directives, the Scheme ties eligibility for the direct subsidy to the sugar mills' export performance in fulfilling the MIEQs, making the subsidy under this Scheme export contingent.

ii. Scheme for Creation and Maintenance of Buffer Stock in 2018

75. Brazil has established that India provides, under the Scheme for Creation and Maintenance of Buffer Stock, export subsidies, within the meaning of Article 9.1(a).

76. Under the Scheme for Creation and Maintenance of Buffer Stock in 2018, India provides "direct subsidies" to eligible sugar mills in the form of direct payments. Eligible sugar mills receive payments for reimbursement of interest, insurance and storage charges. For the implementation of this Scheme, India disbursed from the Central Government's budget INR 2 billion in financial year 2018/19, and made available INR 4.5 billion in financial year 2019/20. Since payments under this Scheme are made gratuitously, the Scheme provides for a transfer of economic resources from the Central Government to sugar mills for less than full consideration, and thus constitutes a "direct subsidy".

77. The "direct subsidies" under the Scheme are also "contingent on the export performance". To be eligible for the direct payments, the sugar mills are required to comply fully with all the orders/directives issued by the Department of Food & Public Distribution for compliance during the 2018/19 sugar season. This includes the DFPD orders/directives that require sugar mills to export the allocated MIEQs. Thus, by requiring that sugar mills comply fully with the applicable DFPD orders/directives, the Scheme ties eligibility for the direct subsidy to the sugar mills' export performance in fulfilling the MIEQs, making the subsidy under this Scheme export contingent.

[9] Appellate Body Report, *US – FSC*, paras. 141-142. *See also* Appellate Body Report, *US – Upland Cotton*, paras. 571-572.

iii. Scheme for Creation and Maintenance of Buffer Stock in 2019

78. Brazil has established that India provides, under the Scheme for Creation and Maintenance of Buffer Stock in 2019, export subsidies, within the meaning of Article 9.1(a).

79. Under the Scheme for Creation and Maintenance of Buffer Stock in 2019, India provides "direct subsidies" to eligible sugar mills in the form of direct payments. Eligible sugar mills receive payments for reimbursement of interest, insurance and storage charges. For the implementation of this Scheme, India made available from the Central Government's budget INR 1 billion in financial year 2019/20 and INR 2 billion in financial year 2020/21. Since payments under this Scheme are made gratuitously, the Scheme provides for a transfer of economic resources from the Central Government to sugar mills for less than full consideration, and thus constitutes a "direct subsidy".

80. The "direct subsidies" under the Scheme are also "contingent on the export performance". Sugar mills that fulfil their exported requirements under the MIEQ for the 2018/19 season are provided additional payments, compared to those mills that failed to do so. Thus, by enhancing the subsidies provided sugar mills that fulfil the requirements under the MIEQ for the 2018/19 season, the Scheme ties eligibility for the full amount of direct subsidies to sugar mills' export performance in fulfilling the MIEQs, making the subsidy under this Scheme export contingent.

iv. Scheme for Assistance to Sugar Mills for the 2017/18 season

81. Brazil has established that India provides, under the Scheme for Assistance to Sugar Mills for the 2017/18 season, export subsidies, within the meaning of Article 9.1(a).

82. Under the Scheme for Assistance to Sugar Mills for the 2017/18 season, India provides "direct subsidies" to eligible sugar mills in the form of direct payments. Eligible sugar mills receive INR 5.5 for every 100 kilograms of sugarcane crushed. For the implementation of this Scheme, India disbursed from the Central Government's budget INR 3.76 billion in financial year 2018/19, and made available INR 630 million in financial year 2019/20. Since payments under the Scheme are made gratuitously, the Scheme provides for a transfer of economic resources from the Central Government to sugar mills for less than full consideration, and thus constitutes a "direct subsidy".

83. The "direct subsidies" under the Scheme are also "contingent on export performance". By requiring that sugar mills have complied fully with the applicable DFPD orders/directives, the Scheme requires sugar mills to export the allocated MIEQ of sugar within a certain time frame. Thus, by requiring that sugar mills comply fully with the applicable DFPD orders/directives, the Scheme ties eligibility for the direct subsidy to the sugar mills' export performance in fulfilling the MIEQs, making the subsidy under this Scheme export contingent.

v. Scheme for Extending Production Subsidy to Sugar Mills for the 2015/16 season

84. Brazil has established that India provides, under the Scheme for Extending Production Subsidy to Sugar Mills for the 2015/16 sugar season, export subsidies, within the meaning of Article 9.1(a).

85. Under the Scheme for Extending Production Subsidy to Sugar Mills for the 2015/16 sugar season, India provides "direct subsidies" to eligible sugar mills in the form of direct payments. Eligible sugar mills receive INR 4.5 for every 100 kilograms of sugarcane crushed. For the implementation of this Scheme, India disbursed from the Central Government's budget INR 5.22 billion in financial year 2016/17 and INR 227.2 million in financial year 2017/18. Since payments under this Scheme are made gratuitously, the Scheme provides for a transfer of economic resources from the Central Government to sugar mills for less than full consideration, and thus constitutes a "direct subsidy".

86. The "direct subsidies" under the Scheme are also "contingent on export performance". To be eligible for the direct payment, the Scheme provides that sugar mills must have achieved at least 80 per cent of the MIEQ obligations. Thus, by tying the eligibility for the subsidies under this Scheme to the sugar mill's fulfillment of their MIEQ obligations, the Scheme ties eligibility for the direct

subsidy to the sugar mills' export performance in fulfilling the MIEQs, making the subsidy under this Scheme export contingent.

vi. MAEQ Scheme for the 2019/20 season

87. Brazil has established that India provides, under the MAEQ Scheme for the 2019/20 season, export subsidies, within the meaning of Article 9.1(a).

88. Under the MAEQ Scheme, India provides "direct subsidies" to eligible sugar mills in the form of a direct payment. Eligible sugar mills receive a lump sum payment of INR 10,448 for every ton of sugar exported. For the implementation of this Scheme, India made available from the Central Government's budget INR 5.5 billion in financial year 2019/20 and INR 2 billion in financial year 2020/21. Since payments under the MAEQ Scheme are made gratuitously, the Scheme provides a transfer of economic resources from the Government to sugar mills for less than full consideration, and thus constitutes a "direct subsidy".

89. The "direct subsidies" under the MAEQ Scheme are also "contingent on export performance". To be eligible for the direct payment, the sugar mills must fulfill their pre-allocated MAEQ export quota. Thus, by tying the eligibility of the subsidy under the MAEQ Scheme to fulfillment of this export quota, the Scheme ties eligibility for the direct subsidy to the sugar mills' export performance in fulfilling the MAEQ, making the subsidy under this Scheme export contingent.

c. India has failed to rebut Brazil's argument and evidence demonstrating that the six measures at issue constitute Article 9.1(a) export subsidies

90. As noted, India did not engage directly with Brazil's argument and evidence under Article 9.1(a) of the Agreement on Agriculture. Instead, India argued that a panel can find export subsidies under Article 9.1 of the Agreement on Agriculture only where there is evidence that the government has actually paid a financial contribution. India asserted that Brazil had not met its burden to demonstrate the "making" of a financial contribution.

91. At the outset, Brazil emphasizes that India's argument is moot. This is because, although not required to do so, Brazil has in fact placed evidence before the Panel demonstrating actual disbursements of funds for each of the export subsidies at issue. Accordingly, even if the Panel were to accept India's erroneous legal theory, the unrebutted evidence shows that funds have actually been disbursed under each export subsidy at issue.

92. Moreover, and contrary to India's argument, neither the Agreement on Agriculture nor the SCM Agreement require showing actual disbursement of funds to establish the existence of a subsidy. Instead, both permit establishing the existence of a subsidy on the basis of a legal instrument that provides for its payment – *i.e.*, based on the evidence from the legal instruments providing for the export subsidies, as summarized in the previous section.

93. Article 9.1(a) of the Agreement on Agriculture concerns "the provision" of a direct subsidy that is contingent on export performance. The term "provision" refers to the action of making available. It does not require evidence of actual disbursements. Instead, evidence of a commitment to disburse funds, for example from a legal instrument, suffices for there to be the "provision" of a subsidy under Article 9.1(a). This conclusion is supported by the context of Article 9.2(a)(i), which clarifies that a Member with an export subsidy reduction commitment may neither *allocate* nor incur any amount of export subsidy in excess of its commitment level. For Members without an export subsidy reduction commitment, such as India, this means that no amount of export subsidy may be allocated, let alone incurred. In short, India's argument regarding the need for evidence of actual disbursements fails under the terms of the Agreement on Agriculture.

94. India also sought to ground its flawed arguments on the definition of a "subsidy" in the SCM Agreement. Again, India's argument fails. One way of establishing the existence of an export subsidy under Article 9.1(a) of the Agreement on Agriculture may be to demonstrate that the measure at issue involves a "financial contribution" listed in Article 1.1(a)(1) of the SCM Agreement that confers a "benefit". However, Article 1.1(a)(1)(i) provides that a "financial contribution" exists where "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)". The examples of

relevant forms of "financial contribution" in Article 1.1(a)(1)(i) – in particular, "*potential* direct transfer of funds"[10] – demonstrate that the actual disbursement of funds is not dispositive of the question of whether a "financial contribution" exists. Thus, India's argument regarding the need for evidence of actual disbursements also fails under the terms of the SCM Agreement.

95. Having failed on these arguments, India next asserted that the requirement of actual disbursement of funds applies to at least one form of "financial contribution" – namely, a "direct transfer of funds" and, in particular, "grants". India focused on the term "transfer" to argue that a grant requires showing actual disbursement of funds. Again, India erred.

96. A commitment to provide a grant itself amounts to a "direct transfer of funds" in the form of a "grant". The dictionary meaning of "transfer" is "[t]he action of transferring or fact of being transferred; conveyance or removal from one place, person, etc., to another; to convey or make over (title, right, or property) by deed or legal process".[11] It covers both the "action of transferring", for example a payment, as well as the existence of a legal process for the transfer of funds, for example a commitment to pay. In *US – Carbon Steel (India)*, the Appellate Body confirmed that the term "a direct transfer of funds" in Article 1.1(a)(1)(i) only speaks to the *manner* or *method* by which the funds are conveyed. It does *not* speak to the *timing* of disbursements of the funds, or requires evidence of actual disbursements. The Appellate Body further noted that the use of the word "involve" preceding the term "a direct transfer of funds" suggests that "the government practice need not consist, or be comprised, solely of the transfer of funds, but may be a broader set of conduct in which such a transfer is implicated or included".[12] Therefore, a "transfer of funds" can be established by evidence of a "government practice" that involves a "legal process", for example in the form of a legal instrument that sets out an obligation to pay or a right to receive or retain funds. Article 1.1(a)(1)(i) of the SCM Agreement, thus, covers government practices that can implicate disbursements of funds, for example, by making available economic resources to be transferred to the recipient in the form of a grant.

97. In addition to being unsupported by the text of the relevant agreements, India's theory would also open the door to circumvention of the export subsidies obligations. Where a Member adopts annual export subsidy measures, such as India's measures at issue, evidence of actual disbursements would only ever become available after payments have been made, such that those measures could never be challenged effectively in WTO dispute settlement.

98. Finally, India also argued that demonstrating a grant confers a "benefit", under Article 1.1(b) of the SCM Agreement, required evidence of a market benchmark. Relying on the distortions of India's sugar market from the FRP and SAPs, India argued that there can be no reliable market benchmark against which to assess whether its grants to sugar mills confer a "benefit". India's argument is absurd. The market at issue is the market for financing, and that market does not provide free money. Grants therefore confer a "benefit".

d. India's alternative argument with respect to only the MAEQ Scheme fails to show that the MAEQ Scheme is an Article 9.1(d) or (e) export subsidy that could be covered by Article 9.4

99. With respect to the MAEQ Scheme only, India developed an alternative argument, contending that the MAEQ Scheme falls within the scope of Articles 9.1(d) and (e) of the Agreement on Agriculture and, on that basis, is permitted under Article 9.4. India erred.

100. Regardless of whether Article 9.4 continues to allow developing country Members to provide certain Articles 9.1(d) or (e) export subsidies, India has failed to establish that the MAEQ Scheme provides those types of export subsidies. Instead, the weight of the evidence on the record shows that the MAEQ Scheme does not involve export subsidies under Articles 9.1(d) or (e).

[10] Emphasis added.

[11] Oxford English Dictionary, OED Online, "transfer v.", available at: https://www.oed.com/view/Entry/204699?rskey=eMKMeQ&result=2&isAdvanced=false#eid, last viewed 18 March 2021, **(Exhibit BRA-3)**.

[12] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.89-4.90.

101. India argued, in essence, that because the legal instrument setting out the MAEQ Scheme uses certain language also used in Article 9.1(d) and (e), the export subsidies provided thereunder automatically qualify as export subsidies falling under Articles 9.1(d) and (e). However, rather than the replicating certain words in a measure, Articles 9.1(d) and (e) require the existence of qualitative and quantitative relationships between the receipt of the subsidy and the incurrence of the types of costs or charges listed under Articles 9.1(d) and (e).

102. Qualitatively, the term "to reduce" in Article 9.1(d) denotes a rational relationship between the subsidy and either the "costs of marketing" or the "costs of international transport and freight". For "costs of marketing", only export subsidies that serve to reduce "specific types of costs that are incurred as part of and during the process of selling a product" can be covered under Article 9.1(d).[13] For an export subsidy to be covered by Article 9.1(e), the legal text is unambiguous that the subsidies must take the form of "internal transport and freight charges" that are "more favourable than for domestic shipment".

103. Quantitatively, at a minimum, the subsidy amounts must not exceed the actual costs under the relevant cost categories or charges. India agrees.

104. These qualitative and quantitative relationships, and the resulting scope of Articles 9.1(d) and (e), must be interpreted strictly and narrowly, such that Article 9.4 is not applied in a manner that would circumvent reduction commitments.

105. As noted, the required qualitative and quantitative relationships between the subsidy at issue and the types of costs or charges listed under Articles 9.1(d) and (e) cannot be established merely by replicating the language of these provisions. Instead, they must be reflected in the measure considered as a whole, including its structure, design and operation. Although not required to do so (as it was India that asserted that the MAEQ Scheme falls under Articles 9.1(d) and (e)), Brazil has proffered argument and evidence to demonstrate that the MAEQ Scheme, considered as a whole, including its structure, design and operation, and the export subsidies provided thereunder, do not fall under these provisions. India has failed to rebut that argument and evidence.

106. *First*, Brazil has demonstrated that the stated purpose of the MAEQ Scheme, based on the text of the measure, is to ensure the payment by sugar mills of sugarcane arrears owed to farmers. That purpose is most starkly confirmed by the existence of a provision that requires government payments to be made, on behalf of the sugar mills, to sugarcane farmers' bank accounts where sugarcane arrears exist. The text and the design and operation of the MAEQ Scheme, therefore, demonstrates that its purpose is *not* to offset transport and marketing costs incurred by sugar mills in relation to export sales.

107. *Second*, Brazil has demonstrated that the MAEQ Scheme does not involve the qualitative aspects of subsidies covered by Articles 9.1(d) and (e). Article 9.1(d) only covers export subsidies that serve to reduce "specific types of costs that are incurred *as part of* and *during* the process of selling a product".[14] However, under the MAEQ Scheme, sugarcane arrears arise because sugar mills have purchased sugarcane, *prior* to the process of producing and selling sugar. Faced with this evidence, India argued that, by improving the liquidity of sugar mills, payments under the MAEQ Scheme ultimately reduce the cost of marketing. However, this extreme stretch of the coverage of Article 9.1(d) has already been roundly rejected by the Appellate Body in *US – FSC*. As the Appellate Body explained, if purchasing raw materials could be considered as an example of "costs of marketing" for export, then so too can virtually any other cost incurred by a business engaged in exporting.[15]

108. Nor can the MAEQ Scheme fall under Article 9.1(e) of the Agreement on Agriculture, because a direct payment simply does not constitute "internal transport and freight charges" under this provision.

109. *Third*, Brazil has demonstrated that the application of a single and unchanging MAEQ subsidy rate per ton of sugar exported for all subsidy recipients reveals that, quantitatively, the MAEQ

[13] Appellate Body Report, *US – FSC*, para. 130.
[14] Appellate Body Report, *US – FSC*, para. 130 (emphasis in original).
[15] Appellate Body Report, *US – FSC*, para. 131.

Scheme does not provide for export subsidies covered by Article 9.1(d) or (e). To be eligible for the lump sum MAEQ export subsidy, sugar mills do not need to show that they have actually incurred costs under any of the items listed; nor are they required to show actual expenditure under any of the cost items. This single-rate design of the MAEQ Scheme does not, and cannot, account for whether a recipient actually incurs certain cost, and, even if such costs are incurred, the actual level of the costs. The lump sum subsidy that sugar mills receive under the MAEQ Scheme simply bears no rational relationship to any of the costs that the MAEQ Scheme allegedly covers.

110. Consistent with these points, Brazil has proffered evidence showing that significant quantities of sugar exports from India benefit from subsidies under the MAEQ Scheme, and that those subsidies far exceed the relevant cost allegedly covered under the Scheme. Unsurprisingly, therefore, the audited annual reports of various sugar mills in India reveal that the recipients of subsidies under the MAEQ Scheme consistently treat the grants received as other revenue, rather than as an offset against transportation or marketing costs incurred.

111. Faced with Brazil's uncontestable argument and evidence showing that the MAEQ Scheme does not involve Article 9.1(d) or (e) export subsidies, India turned to a flawed technical procedural argument. India argued that Brazil bore the burden to establish a *prima facie* case that the MAEQ Scheme is not covered by Article 9.4, *and to do so in its First Written Submission*, and that, having allegedly failed to do so, Brazil's later arguments and evidence must all be rejected. Once again, India erred.

112. It is well established in WTO law that the party who asserts the affirmative of a claim or defense bears the burden of proof. Thus, contrary to India's assertion, it was India's, and not Brazil's, burden to demonstrate that the MAEQ Scheme is an export subsidy under Articles 9.1(d) or (e). This is because it was India that raised Article 9.4 and Articles 9.1(d) and (e) in its First Written Submission. Yet, even assuming that the initial burden lay with the Brazil (which it did not), Brazil has discharged that burden by submitting relevant argument and evidence in accordance with the Panel's Working Procedures. As a result, and as summarized above, the Parties have fully briefed the substance of the issue raised by India. Since India has declined the many opportunities it has had, or has been unable, to refute Brazil's arguments and evidence, there is also no issue of due process. Nor is there any other legal basis for the Panel to decline discharging its duty under Article 11 of the DSU to make an objective assessment of the matter, including the evidence, before it. In short, India's argument relating to the allocation of the initial burden of proof is simply a distraction, and is irrelevant to the resolution of the present dispute.

C. Conclusion

113. As summarized above, Article 3.3 and Article 8 of the Agreement on Agriculture, read together with Section II of Part IV of India's Schedule, preclude India from providing export subsidies for sugar, within the meaning of Article 9.1(a) of the Agreement on Agriculture. Nonetheless, India provides Article 9.1(a) export subsidies for sugar. In so doing, India acts inconsistently with Articles 3.3 and 8.

IV. INDIA'S PRELIMINARY RULING REQUEST

114. With its First Written Submission, India filed a Request for a Preliminary Ruling by the Panel. India alleged, first, that certain legal instruments, which it erroneously identified as "measures" at issue, had *expired prior to* the establishment of the Panel, and that those alleged "measures", therefore, fell outside the Panel's terms of reference. India also asserted that the Panel does not have jurisdiction over subsidies provided under the MAEQ Scheme, because that Scheme was *enacted after* the establishment of the Panel. India erred. As summarized below, under the applicable legal standard, the question whether a measure exists at the time of Panel establishment is not determinative of a panel's terms of reference.

A. The Panel Has Authority to Examine the Legal Instruments that India Asserts Have Expired Prior to the Panel Establishment

115. In response to India's first argument, Brazil explained that the Panel's terms of reference are governed by Articles 7.1 and 6.2 of the DSU. The Panel was established by the DSB with the standard terms of reference envisaged in Article 7.1. These terms of reference require the Panel to

examine "the matter" set out in Brazil's panel request. Specifically, the Panel is called upon to assess the consistency of those of India's measures that are identified in Brazil's panel request with the provisions of the Agreement on Agriculture listed therein, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that agreement. Article 6.2 of the DSU, in turn, requires Brazil's panel request to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[16]

116. Brazil explained that it properly identified three sets of measures at issue: (i) the FRP, (ii) SAPs, and (iii) other non-exempt support for sugarcane (rather than specific legal instruments that from time to time provide for these measures). Brazil also explained that it properly set out the legal basis for its claims associated with these measures. The Panel, therefore, has authority to review these three sets of measures (which India did not assert have ceased to exist). Thus, rather than constituting the measures at issue, the legal instruments cited by India as allegedly having expired merely constitute evidence of the existence of the three sets of measures Brazil challenges.

117. In any event, the Panel is not precluded from making findings and recommendations on measures that have expired, where those measures are specifically identified in the panel request, and hence are within a panel's terms of reference. This is the case here, irrespective of whether the contested instruments are characterized as legal instruments that evidence the existence of specifically identified measures (as Brazil argues), or as measures at issue (as India would style the contested instruments). The Panel is justified in making findings and recommendations on expired measures, for example, where the expired measures continue to affect the operation of a covered agreement (here the Agreement on Agriculture), and where findings and recommendations contribute to a position solution of the dispute. Thus, contrary to India's arguments, expiry of a measure is simply not a basis for the Panel to decline validly conferred jurisdiction.

B. The Panel Has the Authority to Examine the MAEQ Scheme

118. In response to India's second argument, Brazil has established that, contrary to India's assertion, Article 6.2 of the DSU does not categorically preclude the inclusion in a panel request and a panel's term of reference of measures that come into existence or are completed after a panel request. Instead, where the terms of the panel request at issue so permit, measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference.

119. An assessment of whether a post-establishment measure falls within a panel's terms of reference is a substantive rather than a formalistic one, requiring a panel to consider the following: (i) whether the terms of the panel request permit the identification of the post-establishment measure; (ii) whether the original and the subsequent measures are "in essence, the same"; and (iii) whether findings and recommendations on the post-establishment measure would be necessary to bring about a prompt and positive resolution of the dispute, under Articles 3.3 and 3.7 of the DSU. Brazil has established that the MAEQ Scheme satisfies these three requirements.

120. *First*, Brazil's panel request is broad enough to cover the MAEQ Scheme. The express wording of its panel request identifies the specific measures at issue as including "Federal level export subsidies pertaining to sugar and sugarcane which make the provision of financial support contingent on export subsidies", including certain legal instruments identified by name as well as "all other Federal-level instruments, including all successor instruments, and any amendments thereto, providing Federal-level subsidies contingent on export performance during the 2014/15, 2015/16, 2016/17, 2018/19 seasons and subsequent seasons". The request also covers any "related, successor, replacement or implementing measures". The MAEQ Scheme fits comfortably within the express wording of Brazil's panel request as a "Federal-level instrument[]… providing Federal-level subsidies contingent on export performance" during a "subsequent season{}". The MAEQ Scheme is also closely "related" to the export subsidies that Brazil specifically identified in its panel request.

121. *Second*, the MAEQ Scheme is, in essence, the same as India's export subsidies policies in previous sugar seasons (*i.e.*, the sugar seasons 2015/16, 2017/18 and 2018/19). The MAEQ Scheme shares the same policy purpose and the same design, structure and impact as earlier export

[16] *See* Appellate Body Report, *Argentina – Import Measures*, para. 5.39.

subsidies. Even though India adopts different names for those subsidies, the policy objectives of each of them, and the MAEQ Scheme, are the same – to address the chronic issues of arrears owed by sugar mills to sugarcane farmers. Furthermore, the associated export quota regimes all operate to evacuate the surplus sugar stocks.

122. *Finally*, Brazil has shown that findings and recommendations covering the MAEQ Scheme are necessary for the prompt and positive resolution of the dispute, especially in light of India's recurring pattern of providing direct subsidies contingent upon fulfillment of minimum export volume requirements. Given the fundamental disagreement between India and Brazil on the legal characterization of the MAEQ Scheme, Brazil has shown that it is necessary for the Panel to examine the nature of this scheme in order to provide clarity as to whether a measure such as the MAEQ Scheme can benefit from any exemption under Article 9.4 of the Agreement on Agriculture, as India argues, or whether it falls under Article 9.1(a), as Brazil has established.

123. For these reasons, Brazil requests that the Panel finds that the MAEQ Scheme is within its terms of reference, and make findings and recommendations covering the MAEQ Scheme.

V. CONCLUSION

124. In concluding, Brazil requests that the Panel make the following findings:

- India has provided domestic support to sugarcane producers in excess of the *de minimis* threshold of 10 per cent of the total value of production for sugarcane. Therefore, India has acted inconsistently with its obligations under Article 7.2(b) of the Agreement on Agriculture.

- India has provided export subsidies, within the meaning of Article 9.1(a) of the Agreement on Agriculture, in a manner inconsistent with Article 3.3 and Article 8 of the Agreement on Agriculture.

Article 19.1 of the DSU requires that a panel "shall recommend that the Member concerned bring the measure into conformity with [a] covered agreement" where "a measure is inconsistent with a covered agreement". Brazil, therefore, requests the Panel to recommend that India bring its measures into conformity with the Agreement on Agriculture.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. Australia has brought this dispute because it is concerned that the significant support India provides to its producers of sugarcane and sugar is inconsistent with India's obligations under the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Australia does not take issue with India's right to support its sugarcane farmers and sugar industry. However, India must do so consistently with its WTO obligations. Australia is a major exporter of sugar and considers that India's measures have a detrimental impact on Australia's interests.

2. The evidence and arguments Australia has set out in its submissions establish a *prima facie* case that India maintains domestic support for sugarcane producers that vastly exceeds its permissible level under the Agreement on Agriculture, and provides export subsidies for sugar in violation of its commitments under both the Agreement on Agriculture and the SCM Agreement. Further, Australia has demonstrated that India has breached its obligations under those Agreements (or, in the alternative, under the General Agreement on Tariffs and Trade 1994 (GATT 1994)) by failing to notify the WTO Membership of its measures relating to sugarcane and sugar.

3. As Australia has demonstrated in its submissions, India has failed to provide any legal or factual basis to rebut Australia's *prima facie* case in respect of any of the claims advanced. Australia asks the Panel to dismiss India's flawed defence of its measures, which is underpinned by unpersuasive legal arguments based on clear misinterpretations of India's obligations.

4. Australia notes that India, in its first written submission, requested the Panel make a preliminary ruling that certain "measures" challenged by Australia were outside the scope of the Panel's terms of reference.[1] Australia argued in response that India had failed to establish that the Panel lacked the authority to assess any elements of Australia's claims.[2] Australia's arguments on the substantive issues before the Panel are summarized below.

II. MEASURES AT ISSUE

A. DOMESTIC SUPPORT

5. India provides domestic support for sugarcane producers in excess of its permitted level under the Agreement on Agriculture through the following measures.

1. Fair and Remunerative Price

6. The key element of India's support for its sugarcane producers is the Fair and Remunerative Price (FRP). The FRP is a mandatory minimum price, or floor price, set by the Central government for each sugar season[3] and payable by producers of sugar (sugar mills) for sugarcane.[4]

7. The Sugarcane (Control) Order 1966, made under the Essential Commodities Act 1955, provides that the Central government may determine the FRP by notification in the Gazette of India.[5]

[1] India's first written submission, paras. 32–46.
[2] Australia's comments on India's request for a preliminary ruling; Australia's comments on India's response regarding India's request for a preliminary ruling.
[3] India's sugar season begins on 1 October and ends on 31 September of the following year.
[4] Australia's first written submission, para. 23.
[5] Sugarcane (Control) Order 1966 (**Exhibit JE-45**); Essential Commodities Act 1955 (**Exhibit JE-43**); Australia's first written submission, paras. 24–26.

Sub-clause 3(2) of that Order prohibits the sale or purchase of sugarcane at a price lower than the FRP. Penalties for non-compliance include imprisonment and fines.[6]

8. India does not dispute that it fixes the FRP or the prices set in the sugar seasons from 2014–15 to 2019–20, as established by Australia's evidence.[7]

2. State Advised Prices

9. In addition to the Central-level FRP, some Indian States also set minimum prices that must be paid for sugarcane. These are known as State Advised Prices (SAPs) and exist in parallel with the FRP. In those States where a SAP applies, the sugar mills must pay the SAP instead of the FRP, and the SAPs are the same as, or higher than, the FRP.[8]

10. Like the FRP, the SAPs are mandatory. The relevant State regulatory instruments generally provide that contravention is an offence punishable by fines and imprisonment.[9]

11. Australia claims – and India does not contest[10] – that, during various sugar seasons between 2014–15 and 2018–19, six Indian States (Bihar, Haryana, Punjab, Tamil Nadu, Uttarakhand and Uttar Pradesh) set SAPs.[11]

3. Other State-level programmes

12. Three Indian State governments maintain or have maintained programmes that provide assistance to sugarcane producers in addition to the support provided by the minimum sugarcane price.

(a) Andhra Pradesh: Purchase tax remittance

13. Andhra Pradesh offered a purchase tax remittance of INR 60 per metric tonne in the 2014–15 and 2015–16 sugar seasons. Under this programme, the purchase tax that would otherwise have been payable by sugar mills was foregone, and the benefit was passed on to sugarcane farmers who therefore received a price higher than the FRP.[12]

14. India claims that no expenditure was made under this programme.[13] Australia disagrees.[14]

(b) Karnataka: Incentive price payment

15. In the 2017–18 sugar season, Karnataka provided a "Payment of Incentive Price for Sugar Cane through Sugar Factories" under which sugarcane farmers received – via the sugar mills – an incentive sugarcane price higher than the FRP.[15]

16. India argues that no expenditure was made under this programme.[16] Australia disagrees.[17]

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[6] Essential Commodities Act 1955 (**Exhibit JE-43**), Section 7; Australia's first written submission, para. 37.

[7] India's first written submission, paras. 16–18, 41; Australia's first written submission, Table 2.

[8] Australia's first written submission, para. 41.

[9] Australia's first written submission, para. 43.

[10] India does not dispute that Haryana, Punjab, Uttarakhand and Uttar Pradesh set SAPs: India's first written submission, paras. 29–30. India argues that Bihar and Tamil Nadu no longer set SAPs but does not dispute that those States did, in the relevant past sugar seasons, set SAPs: India's first written submission, paras. 30, 42(vii). *See also*, Australia's second written submission, paras. 18–20.

[11] For details of the applicable sugar seasons and the SAPs in these States, see Australia's first written submission, paras. 48–61, Tables 4–9.

[12] Australia's first written submission, paras. 190–192; Australia's responses to Panel questions 28(c) (paras. 84–86), 28(d) (paras. 87–91).

[13] India's responses to Panel questions 28(d) (p. 20), 74(b) (p. 11).

[14] Australia's comments on India's response to Panel question 74(b), paras. 31–32.

[15] Australia's first written submission, para. 195; Australia's response to Panel question 77, paras. 94–98.

[16] India's response to Guatemala's question 3, p. 2.

[17] Australia's comments on India's response to Guatemala's question 3, paras. 60–61.

(c) Tamil Nadu: Production incentive payment

17. Under Tamil Nadu's "production incentive to sugarcane farmers" programme, the State government pays, directly to sugarcane farmers, the difference between Tamil Nadu's SAP for the 2016–17 sugar season and the relevant season's base FRP.[18] Australia has adduced evidence of the amounts disbursed under this programme in the 2017–18 and 2018–19 sugar seasons.[19] India has not challenged that evidence.

4. Other measures involving payments to maintain the FRP and SAPs

18. India implements a range of other measures at both the Central and State levels that provide domestic support in favour of sugarcane producers. Those measures are production subsidies; soft loans; buffer stock subsidies; transport, freight and marketing subsidies; and other State-level measures. Although the measures are directed to sugar mills, the funds are paid to mills to support their payment of the FRP or applicable SAP, or are paid to sugarcane farmers on mills' behalf to clear the mills' sugarcane price debts.[20]

19. With one minor exception, India does not dispute the facts regarding these measures.[21] Australia also challenges some of the same measures as providing export subsidies.

B. EXPORT SUBSIDIES

20. India violates its obligations under the Agreement on Agriculture and the SCM Agreement through the measures described below, which provide export-contingent subsidies.

21. A central feature of India's regime of export subsidies for sugar are its Minimum Indicative Export Quotas (MIEQ) and Maximum Admissible Export Quantities (MAEQ), under which India allocates sugar export quotas to sugar mills on a per-mill basis. India ties MIEQ and MAEQ to direct payment schemes, making financial assistance, or the value of that assistance, contingent upon compliance with government orders or directives imposing MIEQ and MAEQ.[22]

1. Production subsidy schemes operating in conjunction with Minimum Indicative Export Quota orders

22. India provides production subsidies to sugar mills to help clear their debts to sugarcane farmers arising from the obligation to pay the FRP. These schemes are the "Scheme for extending production subsidy to sugar mills", implemented in the 2015–16 sugar season, and the "Scheme for Assistance to Sugar Mills", implemented in the 2017–18 and 2018–19 sugar seasons. Mills' eligibility to receive the subsidy is, under each iteration of the scheme, subject to compliance with MIEQ orders.[23]

2. Buffer stock subsidy schemes operating in conjunction with Minimum Indicative Export Quota orders

23. India provides buffer stock subsidies to assist sugar mills to clear sugarcane price debts arising from the obligation to pay farmers the FRP. These schemes are the "Scheme for Creation and Maintenance of Buffer Stock of 30 Lakh MT", introduced in 2018, and the "Scheme for the Creation and Maintenance of Buffer Stock of 40 Lakh MT", introduced in 2019. The 2018 iteration of

[18] Australia's first written submission, paras. 198–201. The "base FRP" is the minimum price payable for sugarcane at or below the FRP's basic recovery rate (or quality). In the 2018–19 sugar season, sugarcane with a recovery rate below the FRP's basic recovery rate received a minimum price lower than the base FRP: Australia's first written submission, paras. 28–35, Table 2.

[19] Australia's response to Panel question 73, paras. 71–75.

[20] These measures are listed in Australia's first written submission, paras. 181–184, Annexes A–E.

[21] India's first written submission, para. 43; Australia's second written submission, paras. 22–23.

[22] Australia's first written submission, paras. 219–220.

[23] Australia's first written submission, para. 230.

the scheme linked compliance with MIEQ with eligibility to receive payments, while the 2019 iteration linked favourable MIEQ performance with the value of available payments.[24]

3. Purported transport, freight and marketing subsidy scheme operating in conjunction with Maximum Admissible Export Quantities orders

24. India provides self-described "transport, freight and marketing" subsidies to sugar mills to help them clear sugarcane price debts arising from the obligation to pay the FRP. India provides these subsidies through the "Scheme for providing assistance to sugar mills for expenses on marketing costs including handling, upgrading and other processing costs and costs of international and internal transport and freight charges on export of sugar" (MAEQ scheme), which applied from 1 October 2019 to 31 December 2020. Eligibility to receive the subsidy is subject to mills exporting at least 50% of their MAEQ allocations.[25]

4. Duty Free Import Authorisation scheme

25. India incentivizes mills to export sugar during seasons of overproduction by offering to forego sugar import duties in subsequent seasons. In March 2018, India amended its Duty Free Import Authorisation (DFIA) scheme in order to entitle sugar mills that exported refined sugar during a six-month period in the 2017–18 sugar season to import raw sugar duty free during the 2019–20 and 2020–21 seasons.[26]

C. FAILURE TO NOTIFY MEASURES

26. India has not notified Members of its annual domestic support for sugarcane subsequent to 1995–1996, and India has not submitted an export subsidy notification for sugar since 2009–10.[27] India does not dispute these facts. This failure to submit notifications of its measures breaches India's obligations under the Agreement on Agriculture and the SCM Agreement or, in the alternative, under the GATT 1994.

III. INDIA'S DOMESTIC SUPPORT IN FAVOUR OF SUGARCANE PRODUCERS VIOLATES ITS OBLIGATIONS UNDER THE AGREEMENT ON AGRICULTURE

27. Under the Agreement on Agriculture, India may provide domestic support in favour of its agricultural producers, provided that support does not exceed its commitment levels. In the context of the Agreement on Agriculture, domestic support is expressed in numerical – monetary – terms[28] as an annual level of support, referred to as the "Aggregate Measurement of Support" (AMS). Domestic support may be product-specific support provided for an agricultural product in favour of the producers of that product, or it may be non-product- specific support provided in favour of agricultural producers in general.[29] A Member's Total AMS is the sum of all of its non-exempt domestic support in favour of agricultural producers, excluding support that does not exceed a permitted *de minimis* level.[30]

28. Articles 6.4 and 7.2(b) of the Agreement on Agriculture provide that, where a developing country Member has no Total AMS commitment in Part IV of its Schedule of Concessions on Goods (Schedule), the Member must not provide non-exempt, product-specific domestic support in excess

[24] Australia's first written submission, paras. 231–233, Annex C.
[25] Australia's first written submission, para. 234, Annex D-03; Australia's opening statement at the first substantive meeting, para. 76.
[26] Australia's first written submission, para. 235; Australia's second written submission, paras. 214–217.
[27] Australia's first written submission, paras. 450–466.
[28] Agreement on Agriculture, Article 1(a) and Annex 3, paragraph 6. *See also*, Australia's first written submission, para. 84.
[29] Agreement on Agriculture, Article 1(a). *See also*, Article 6.4(a) and Annex 3; Australia's first written submission, para. 86.
[30] Agreement on Agriculture, Articles 1(h), 6.4 and 7.2(a). *See also*, Australia's first written submission, paras. 87, 90, 94.

of the *de minimis* level of 10 per cent of the total value of production of a basic agricultural product during the relevant year.[31]

29. India is a developing country Member and agrees that it has no Total AMS commitment in Part IV, Section I of its Schedule.[32] Thus, India's non-exempt domestic support for sugarcane producers must not exceed 10 per cent of the total value of sugarcane production in any sugar season.[33]

30. Some domestic support measures are exempt from reduction commitments pursuant to Articles 6.2 or 6.5, or Annex 2.[34] These measures are not included in the calculation of a Member's Total AMS.[35] India has not argued or adduced evidence that any of the domestic support measures challenged by Australia are exempt.[36]

31. Annex 3 of the Agreement on Agriculture, which is titled "Domestic Support: Calculation of Aggregate Measurement of Support", describes how to calculate a Member's AMS.[37] Paragraph 1 of Annex 3 provides that the product-specific AMS shall be calculated 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')".[38] Annex 3 as well as Annex 4 stipulate how to quantify the monetary value of each of these kinds of support to calculate a product-specific AMS.

32. To determine whether non-exempt product-specific domestic support exceeds the *de minimis* percentage, the product-specific AMS is divided by the total value of production of the relevant basic agricultural product in the relevant year.[39]

33. India's domestic support measures in favour of its sugarcane producers constitute market price support and other non-exempt support.

A. MARKET PRICE SUPPORT

1. The meaning of market price support

34. Australia considers that "market price support" must be interpreted in accordance with its ordinary meaning, read in context, and in light of the Agreement on Agriculture's object and purpose.[40] Market price support will exist when a Member sets a price for a basic agricultural product through administrative action and determines the production eligible to receive that price.[41]

35. India, on the other hand, advocates for an unjustifiably narrow interpretation of market price support.[42] A proper interpretation of the Agreement on Agriculture demonstrates that India's arguments are erroneous.

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[31] Australia's first written submission, paras. 98–100, 148. The Agreement on Agriculture provides in Article 1 that "unless the context otherwise requires… (i) 'year'… in relation to the specific commitments of a Member refers to the calendar, financial or marketing year specified in the Schedule relating to that Member."

[32] India's response to Panel question 46, p. 4; Australia's first written submission, paras. 103–107.

[33] Australia's first written submission, para. 108.

[34] Australia's first written submission, para. 142.

[35] Agreement on Agriculture, Article 7.2(a).

[36] Australia's response to Panel question 51, para. 17.

[37] Agreement on Agriculture, Article 1(a)(ii).

[38] Agreement on Agriculture, Annex 3, paragraph 1.

[39] Agreement on Agriculture, Article 6.4(a)(i). See, for example, the panel's approach in *China – Agricultural Producers*, Tables 9–16, and para 7.412. *See also*, Australia's first written submission, paras. 145–147.

[40] Consistent with Article 31(1) of the Vienna Convention on the Law of Treaties, which forms part of the customary rules of interpretation of public international law: Appellate Body Report, *US – Gasoline*, p. 17. Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides that the WTO covered agreements are to be interpreted in accordance with these rules: Australia's second written submission, footnote 32.

[41] Australia's second written submission, paras. 33, 50.

[42] India's first written submission, paras. 62–63; India's responses to Panel questions 18(a) (p. 14), 25(b) (p. 18); India's opening statement at the first substantive meeting, para. 9; India's closing statement at the first substantive meeting, paras. 24–28.

(a) Ordinary meaning

36. "Market price support" is not defined in Article 1 of the Agreement on Agriculture, which defines a range of terms used in the Agreement. Annex 4 of the Agreement states that market price support is "defined in Annex 3".[43]

37. Paragraphs 1 and 8 of Annex 3 both refer to "market price support", so the interpretation of the term should begin with those paragraphs.

38. Australia recalls that paragraph 1 lists the three kinds of domestic support that are, subject to Article 6, to be included in the calculation of the product-specific AMS.[44]

39. India argues that the phrase "or any other subsidy" in paragraph 1 means that market price support must take the form of a subsidy.[45] Australia disagrees. The words "any other" reflect an intent to ensure that all non-exempt domestic support – including support that is neither market price support nor a direct payment – is included in the AMS.[46]

40. Building on the tenuous foundation of its interpretation of paragraph 1 of Annex 3, India contends – based on the words "shall include both" – that paragraph 2 of that Annex provides an exhaustive definition of what may constitute a subsidy under paragraph 1.[47] Again, Australia disagrees. Paragraph 2 simply provides that "both budgetary outlays and revenue foregone by governments or their agents"[48] are subsidies that are included in the AMS calculation. The term "includes" is not exclusive or restrictive, and the term "both" provides emphasis.[49]

41. The critical flaws in India's arguments become even more apparent in light of the only other paragraph in Annex 3 that includes the words "market price support": paragraph 8. That paragraph undermines India's defence,[50] which is why India has opted either to ignore[51] or to downplay[52] its significance.

42. Paragraph 8 of Annex 3 provides:

> 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.

43. The first sentence of paragraph 8 sets out the formula for calculating the value of market price support to be included in the AMS, which may be represented by the following equation:

> (Applied Administered Price – Fixed External Reference Price) x Quantity of Eligible Production = value of market price support

44. The formula has three components: an Applied Administered Price (AAP), the Fixed External Reference Price (FERP) and a Quantity of Eligible Production (QEP). Pursuant to the second

[43] Agreement on Agriculture, Annex 4, para. 1.

[44] See paragraph 31 above. *See also*, Australia's second written submission, para. 56, citing Chairman's note on options in the agricultural negotiations, MTN.GNG/AG/W/1/Add.4 (**Exhibit JE-156**), para. 3.

[45] India's responses to Panel questions 18(a) (p. 14), 18(c) (p. 14); India's opening statement at the first substantive meeting, paras. 24–25; India's second written submission, paras. 16–18.

[46] Australia's second written submission, para. 57.

[47] India's opening statement at the first substantive meeting, paras. 26–28; India's closing statement at the first substantive meeting, para. 28; India's second written submission, paras. 20–24.

[48] Agreement on Agriculture, Annex 3, paragraph 2 (emphasis added).

[49] Australia's second written submission, paras. 59–64.

[50] Australia's opening statement at the first substantive meeting, para. 48; Australia's opening statement at the second substantive meeting, para. 38.

[51] Australia's opening statement at the first substantive meeting, para. 48; Australia's second written submission, para. 36; Australia's opening statement at the second substantive meeting, para. 35.

[52] Australia's second written submission, paras. 25, 68–70; Australia's opening statement at the second substantive meeting, paras. 36–39.

sentence of paragraph 8, budgetary payments made to maintain the "gap" between the FERP and the AAP are not included in the AMS.[53]

45. An AAP is a price that is set, determined, made effective or brought to bear by administrative action (including regulatory action), rather than being determined only by market forces. It need not be a price that is achieved by government expenditure and it need not involve budgetary payments or procurement.[54] In *China – Agricultural Producers*, the panel found that "applied administered price" means "… the price set by the government at which specified entities will purchase certain basic agricultural products".[55]

46. The FERP is a reference price for the basic agricultural product from a base period (the years 1986–88 for original Members), which may be adjusted for quality differences as necessary.[56]

47. The QEP is the quantity or volume of production entitled, fit or able to receive the AAP according to the terms of the measure – not the amount that actually receives the AAP.[57] As the panel in *China – Agricultural Producers* observed, "the pertinent question [to determine the QEP] is whether the [product] that was produced would be able to benefit from the [AAP] if the seller so desired".[58]

48. Accordingly, market price support will exist and have a value measurable under paragraph 8 when a Member sets an AAP for a basic agricultural product that is higher than the relevant FERP, and determines the production eligible to receive the AAP.[59]

49. Paragraph 8 does not stipulate or imply that the government or its agents must procure the product at the AAP. Thus, India's argument that market price support requires government procurement is incompatible with the ordinary meaning of paragraphs 1 and 8 of Annex 3 and reads into the text a limitation that is not there.[60]

50. India seeks to diminish the importance of paragraph 8 by arguing that it only provides how to calculate market price support. According to India, it is paragraphs 1 and 2 of Annex 3 that determine when market price support will exist.[61] India's argument finds no support in the text of Annex 3. As Australia has already outlined, the purpose of Annex 3 is to stipulate the method for calculating in monetary terms a Member's non-exempt domestic support or AMS.[62] The Annex does not differentiate between when market price support exists and how to calculate the value of such support, as India argues.[63]

(b) Context

51. Articles 6.1 and 6.2, and Annex 4, of the Agreement on Agriculture, as well as India's Schedule, each provide relevant context for interpreting "market price support" in this dispute, which serves to reinforce the ordinary meaning of the term.

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[53] Australia's first written submission, paras. 113–115; Australia's opening statement at the first substantive meeting, para. 49.

[54] Australia's first written submission, paras. 116–119, citing Panel Report, *Korea – Various Measures on Beef*, para. 827.

[55] Australia's first written submission, para. 117, citing Panel Report, *China – Agricultural Producers*, para. 7.177.

[56] Agreement on Agriculture, Annex 3, paragraph 9. *See also*, Australia's first written submission, paras. 120–122.

[57] Appellate Body Report, *Korea – Various Measures on Beef*, para. 120. *See also*, Panel Report, *China – Agricultural Producers*, paras. 7.282–286; Australia's first written submission, paras. 123–130.

[58] Panel Report, *China – Agricultural Producers*, para. 7.314. *See also*, Australia's first written submission, paras. 123–130.

[59] Australia's second written submission, para. 33. Market price support may also exist in the absence of a FERP, in which case such support is calculated in accordance with the Agreement on Agriculture, Annex 4, para. 2.

[60] Australia's second written submission, paras. 34–35.

[61] India's closing statement at the first substantive meeting, para. 14; India's second written submission, para. 39.

[62] See paragraph 31 above.

[63] Australia's second written submission, paras. 68–70; Australia's opening statement at the second substantive meeting, paras. 35–39.

52. Article 6.1 provides that a Member's domestic support commitments "apply to all of its [non-exempt] domestic support measures in favour of agricultural producers…"[64]. The Article confirms that the only domestic support measures that are not subject to a Member's commitments are those that are exempt.[65]

53. Article 6.2 provides that both "direct" and "indirect" governmental measures of assistance are subject to domestic support reduction commitments unless they are exempt. It indicates that domestic support measures disciplined by the Agreement on Agriculture may be provided to producers directly by government (or its agents) or through indirect means, such as by regulating the price paid by consumers of a basic agricultural product.[66]

54. Annex 4 describes how to calculate an equivalent measurement of support when market price support exists but it "is not practicable"[67] to calculate that component of the AMS. Budgetary outlays may only be used to calculate the value of market price support when it is not practicable to use the formula in paragraph 8 of Annex 3 or the alternative methodology in paragraph 2 of Annex 4. Also, the budgetary outlays are not limited to those used for government procurement of the product – the outlays must simply be used to maintain the price. Annex 4, therefore, adds further weight to the argument that market price support may exist in the absence of budgetary outlays used to procure the product at the AAP.[68]

55. Finally, the tables of supporting material incorporated by reference in Part IV of India's Schedule confirm that India considered the Sugarcane (Control) Order 1966 in force during the base period had established an AAP and constituted market price support.[69] That Order, which was amended in 2009 to introduce the FRP, fixed the minimum price of sugarcane to be paid by all producers of sugar (the mills) to the producers of sugarcane (the farmers). Like the FRP, the floor price was paid by the mills, not by the Indian government.[70]

56. India argues that Members' Schedules are not relevant to interpreting the meaning of "market price support", and that relying on Schedules would result in terms having multiple meanings.[71] Australia disagrees. Members' Schedules may provide relevant context for interpreting Members' legal obligations.[72] A Member's Schedule cannot override the ordinary meaning of the terms of the Agreement on Agriculture, as India implies it would, but a Schedule may provide relevant context for interpreting those terms. In this instance, the context provided by India's supporting tables reinforces the ordinary meaning of "market price support" and underscores India's own interpretation of the term at the time of constituting its Schedule.[73]

(c) Object and purpose

57. The object and purpose of the Agreement on Agriculture support an interpretation of "market price support" that is not limited to government procurement of a product at the AAP. The Agreement's object and purpose, as stated in its preamble, is relevantly:

[64] Agreement on Agriculture, Article 6.1 (emphasis added).
[65] Australia's second written submission, paras. 38–39.
[66] Australia's second written submission, para. 40.
[67] Agreement on Agriculture, Annex 4, para. 1.
[68] Australia's second written submission, para. 42.
[69] G/AG/AGST/IND, p. 28 incorporated by reference by India's Schedule, Part IV, Section I, Column 3. In notifying its market price support for the base period (1986–88), in a table titled "Aggregate Measurement of Support: Market Price Support", India lists the prices fixed by the Sugarcane (Control) Order 1966 then in force as an "Applied administered price" and uses that price to calculate its market price support for sugarcane.
[70] Australia's first written submission, para. 25; Australia's opening statement at the first substantive meeting, para. 54; Australia's second written submission, para. 43.
[71] India's second written submission, para. 50. *See also*, India's responses to Panel questions 48(e) (p. 6), 63 (p. 5).
[72] Australia's second written submission, para. 45, citing Panel Report, *China – Agricultural Producers*, para. 7.263 and Appellate Body Report, *US – Gambling*, paras. 178, 182.
[73] Australia's second written submission, paras. 44–45; Australia's comments on India's response to Panel question 63, paras. 7–11.

- to achieve "substantial progressive reductions in agricultural support" through specific binding commitments including with respect to "domestic support";[74] and

- to discipline and reduce domestic support measures, with a view to preventing distortions in world agricultural markets and establishing a "fair and market-oriented agricultural trading system".[75]

58. Thus, the Agreement's objectives are broader than that of limiting domestic subsidies in favour of agricultural products. If Members' domestic support commitments were limited to subsidies, as India contends, the Agreement on Agriculture would simply refer to subsidies for agricultural products, rather than specifying three distinct kinds of domestic support, each with alternative methods of calculation.[76]

59. India's argument that market price support requires procurement by government (or its agents) would also undermine the domestic support disciplines in the Agreement by enabling Members to easily circumvent their commitments by ensuring they (or their agents) did not procure the product.[77]

60. Finally, India's interpretation of market price support would undermine the Agreement on Agriculture's goal of preventing distortions in global agricultural markets. The Agreement recognises price support as being inherently trade-distorting and as having production effects.[78] As demonstrated by India's FRP and SAP measures, government mandated floor prices for basic agricultural products impact production decisions and distort trade irrespective of who purchases the product.[79]

(d) Conclusion

61. "Market price support" under the Agreement on Agriculture will exist when a Member establishes an AAP and determines the production eligible to receive that AAP. India's argument that procurement at the AAP by a government (or its agent) is essential is incompatible with a proper interpretation of "market price support".[80]

2. Calculation of India's market price support for sugarcane

(a) The FRP and SAP measures are AAPs

62. The FRP and SAPs are mandatory minimum prices for sugarcane that are determined by the administrative action of India's Central and State governments. The FRP and SAPs are, therefore, AAPs within the meaning of the Agreement on Agriculture.[81]

(b) India's FERP for sugarcane

63. India's supporting table incorporated by reference in Part IV of its Schedule confirms that its FERP is INR 156.16 per metric tonne for sugarcane with a recovery rate of 8.5 per cent. Australia recalls that the FERP may be adjusted for quality differences.[82] As the average recovery rates – or quality – of sugarcane in India today are higher than this historical recovery rate, Australia considers

[74] Agreement on Agriculture, Preamble, recitals 3 and 4.
[75] Agreement on Agriculture, Preamble, recitals 2 and 3. *See also*, Australia's first written submission, para. 126.
[76] Australia's second written submission, para. 58.
[77] Australia's second written submission, para. 47.
[78] Agreement on Agriculture, Annex 2, paragraph 1(b). *See also*, Australia's first written submission, para. 126.
[79] See the evidence that India's FRP and SAP measures impact production decisions cited in footnote 171 of Australia's first written submission, para. 126. *See also*, Australia's second written submission, para. 47.
[80] Australia's second written submission, para. 50.
[81] Australia's first written submission, paras. 153–156.
[82] Agreement on Agriculture, Annex 3, paragraph 9. See paragraph 46 above.

it necessary to adjust India's FERP to allow the AAP and the FERP to be compared at the same quality level.[83]

(c) QEP

64. All sugarcane in India is fit or entitled to receive the FRP and, in States where SAPs apply, all sugarcane produced is able to receive the relevant SAP. The relevant measures do not impose any conditions or limitations on sugarcane that is eligible to be purchased at the FRP or SAP.[84] The price payable may vary based on the quality of the sugarcane but all sugarcane – regardless of quality – is entitled to receive a minimum price.[85]

(d) India's measures involving payments to maintain the "gap" between the FERP and the AAP

65. Australia considers that India maintains measures – at both the Central and State levels – that achieve or maintain the AAPs for sugarcane, being the FRP or SAPs.[86] Consistent with the second sentence of paragraph 8 of Annex 3, Australia has not included the budgetary outlays for these measures in calculating India's AMS for sugarcane. However, Australia nonetheless considers that they are measures through which India is providing or has provided non-exempt domestic support, which should be covered by the Panel's findings.[87]

(e) India's market price support exceeds its permitted level

66. Australia has calculated India's market price support for sugarcane producers in the sugar seasons 2014–15 to 2018–19 using the formula in Annex 3 of the Agreement on Agriculture and data from official Indian government instruments and publications. These calculations, a summary of which is at Annex A, demonstrate that India's market price support, provided through its FRP and SAP measures, vastly exceeds its permitted *de minimis* level.[88] Thus, through its market price support alone, India violates its obligations under the Agreement on Agriculture.

B. OTHER NON-EXEMPT DOMESTIC SUPPORT

67. In addition to market price support, India also provides other non-exempt domestic support to it sugarcane producers in the form of non-exempt direct payments or other policies.

1. Calculation of India's other non-exempt domestic support for sugarcane

68. Paragraphs 10, 12 and 13 of Annex 3 of the Agreement on Agriculture provide that the value of other non-exempt domestic support measures may be measured using budgetary outlays.[89] Australia recalls that the value of these measures should only be added to the product-specific AMS if the budgetary payments are not made to maintain the gap between the FERP and the AAP.[90]

2. The Andhra Pradesh, Karnataka and Tamil Nadu programmes

69. The Andhra Pradesh purchase tax remittance, the Karnataka incentive price payment and the Tamil Nadu production incentive payment programmes constitute "non-exempt direct payments"

[83] Australia's first written submission, paras. 158–162; Australia's response to Panel question 62(a), paras. 26–32.

[84] Australia's first written submission, para. 164.

[85] For instance, the FRP consists of a minimum or base price payable for sugarcane of a basic recovery rate but premiums are payable for cane with higher recovery rates. In the 2018–19 and 2019–20 sugar seasons, sugarcane with a recovery rate below the basic recovery rate received a lower floor price: Australia's first written submission, paras. 28–35, Table 2.

[86] These measures are listed in Australia's first written submission, paras. 182–183.

[87] Australia's first written submission, paras. 181–186; Australia's response to Panel question 20(b), paras. 47–51.

[88] Australia's domestic support calculations, Microsoft Excel workbooks, Revision 3 (**Exhibit AUS-1 (Revision 3)**).

[89] Australia's first written submission, paras. 135–143.

[90] Agreement on Agriculture, Annex 3, paragraph 8. See paragraph 44 above.

or "other subsid[ies] not exempted from the reduction commitment".[91] Under those programmes, the State governments provide funds not directed towards paying – or, in other words, maintaining – the FRP, which result in the sugarcane farmers receiving additional income. Thus, the budgetary outlays for these programmes may be added to India's AMS for sugarcane, as Australia has done in its calculations.[92]

70. However, in view of the very marginal increases in India's AMS for sugarcane that arise from including the programmes' budgetary outlays, if the Panel finds that India's market price support exceeds its permitted level, Australia considers that the Panel may decide to not to include these programmes in India's AMS. If the Panel were to exercise judicial economy, Australia considers that the Panel's ruling should nevertheless apply to all forms of India's non-exempt domestic support, whether or not these were included in the AMS.[93]

C. INDIA'S AMS FOR SUGARCANE PRODUCERS VASTLY EXCEEDS ITS PERMITTED *DE MINIMIS* LEVEL

71. Australia has established, through argument and evidence, that India's domestic support in favour of its sugarcane producers – consisting of market price support and other non-exempt support – vastly exceeds its permitted *de minimis* level. Australia's calculations of India's domestic support in the sugar seasons from 2014–15 to 2018–19, as summarized in Annex A, demonstrate the magnitude of India's violation.[94]

72. By India's own admission, the principal measures through which it maintains this level of domestic support – the FRP and SAPs – remain in effect.[95]

IV. INDIA'S EXPORT SUBSIDIES FOR SUGAR ARE INCONSISTENT WITH ITS OBLIGATIONS UNDER THE AGREEMENT ON AGRICULTURE AND THE SCM AGREEMENT

73. Under the Agreement on Agriculture, India has committed to limit its export subsidies to producers of agricultural products. Pursuant to Articles 3.1(a) and 8 of the Agreement, India has also undertaken not to provide export subsidies otherwise than in conformity with its scheduled reduction commitments.

74. Under Article 3.3 of the Agreement on Agriculture, India has committed not to provide any export subsidies of the kinds listed in Article 9.1 for unscheduled agricultural products. Further, it has committed, under Article 10.1, not to use export subsidies of kinds not listed in Article 9.1, in a manner that results in, or threatens to lead to, circumvention of its export subsidies reduction commitments. The prohibition in Article 3.3 applies subject to Article 9.4, which concerns only export subsidies of the kinds listed in Articles 9.1(d) and (e).[96]

75. India agrees that Part IV, Section II, of its Schedule contains no export subsidy reduction commitments in relation to sugar.[97] Sugar is, therefore, an unscheduled agricultural product, for which India must not provide any Article 9.1 export subsidies.[98]

76. Articles 3.1(a) and 3.2 of the SCM Agreement also prohibit India from granting or maintaining export subsidies. Pursuant to Article 1.1. of the SCM Agreement, a "subsidy" is deemed

[91] Agreement on Agriculture, Annex 3, paragraph 1; Australia's first written submission, paras. 189–202; Australia's responses to Panel questions 26(a) (paras. 61–62), 27 (paras. 71–83), 50 (paras. 8–12).
[92] Australia's domestic support calculations, Microsoft Excel workbooks, Revision 3 (**Exhibit AUS-1 (Revision 3)**).
[93] Australia's response to Panel question 23(a), paras. 53–54.
[94] Australia's domestic support calculations, Microsoft Excel workbooks, Revision 3 (**Exhibit AUS-1 (Revision 3)**).
[95] India's first written submission, paras. 16–18, 29–30; Australia's opening statement at the first substantive meeting, para. 8.
[96] Australia's first written submission, paras. 236–252; Australia's second written submission, para. 90.
[97] India's response to Panel question 38, pp. 25–26.
[98] Australia's first written submission, paras. 247–251; Australia's second written submission, para. 91.

to exist where there is a "financial contribution" by a "government or public body" that confers a "benefit" on its recipient.[99]

77. India's sugar export subsidies are contrary to its obligations under both agreements. Australia begins its analysis with the Agreement on Agriculture because, to the extent of any inconsistency between the two agreements, the Agreement on Agriculture prevails.[100] India acknowledges this hierarchy between the two Agreements.[101]

A. INDIA PROVIDES "DIRECT SUBSIDIES" THAT ARE "CONTINGENT ON EXPORT PERFORMANCE" WITHIN THE MEANING OF ARTICLE 9.1(A) OF THE AGREEMENT ON AGRICULTURE

78. Article 1(e) of the Agreement on Agriculture defines "export subsidies" as "subsidies contingent on export performance", including the practices listed in Article 9.1. Article 9.1(a) of the Agreement concerns direct subsidies including payments-in-kind, that are provided by governments or their agencies to a firm, an industry, producers of an agricultural product, a cooperative or other association of such producers, or to a marketing board, and that are contingent on export performance.[102]

1. India's production subsidies, buffer stock subsidies and its MAEQ and DFIA schemes are Article 9.1(a) subsidies

79. India's production and buffer stock subsidies and its MAEQ and DFIA schemes are export subsidies within the meaning of Article 9.1(a).

80. Each scheme involves a direct transfer of economic resources from the Indian government to sugar mills for less than full consideration. Pursuant to the production and buffer stock subsidies and the MAEQ scheme, India's Department of Food and Public Distribution makes funds available to clear sugar mills' debts to sugarcane farmers. Under the DFIA scheme, the government foregoes import tax revenue that mills would otherwise owe it.

81. Sugar mills are "producers of an agricultural product".[103] However, noting the degree of overlap between the categories of subsidy recipient in Article 9.1(a),[104] they may also qualify individually as "firms" or collectively as an "industry". The characterization of mills, collectively, as "a cooperative or other association of such producers" may also be appropriate as Indian sugar mills are commonly owned and operated by cooperatives.[105] The schemes leave recipient mills better off than they would otherwise have been. Finally, all are export-contingent, linking the availability of subsidies to the achievement of export quotas or targets, or to past export performance.[106]

2. India misinterprets Article 9.1

82. Australia and India agree on the elements required to satisfy the legal standard under Article 9.1(a) and that the "subsidy" definition in Article 1.1 of the SCM Agreement is relevant to the interpretation of the terms "subsidy" and "subsidies" as they appear in the Agreement on Agriculture.[107] However, Australia and India do not agree on what is required to demonstrate the elements of a subsidy for the purposes of Article 9.1(a). Specifically, India bases its interpretation

[99] Australia's first written submission, paras. 372–388.
[100] Agreement on Agriculture, Article 21.1. *See also*, Australia's first written submission, paras. 212–216; Australia's second written submission, para. 89.
[101] India's first written submission, paras. 91–92.
[102] Australia's first written submission, paras. 253–284; Australia's second written submission, paras. 94–95.
[103] Agreement on Agriculture, Article 9.1(a).
[104] Australia's first written submission, para. 275; Australia's response to Panel question 54, para. 25.
[105] Australia's first written submission, para. 296.
[106] Australia's second written submission, para. 96. *See also*, Australia's first written submission, paras. 288–365.
[107] Australia's second written submission, paras. 98–99; India's responses to Panel questions 29 (p. 21), 54(a) (p. 9).

of the legal standard applicable under Article 9.1(a) on a flawed understanding of the two elements of the SCM Agreement's subsidy definition.[108]

(a) Evidence of actual funds disbursements is not required

83. India insists that because the SCM Agreement deems a subsidy to exist where "there is a financial contribution",[109] Australia must provide evidence of actual disbursements of government funds to substantiate the existence of India's subsidies.[110]

84. Australia disagrees. Article 9.1(a) concerns the "provision" of subsidies. "To provide" funds, is "to make [them] available", as, for example, when a government provides the legislative authority to make payments under a scheme or makes a relevant budgetary allocation.[111]

85. Further, the immediate context of Article 9.1(a) within the Agreement on Agriculture makes clear that the Agreement contemplates a subsidy being demonstrable on an allocation of funds alone. Specifically, Article 9.2(a)(i) provides that a Member's compliance with its scheduled export subsidy reduction commitments may be measured based on budgetary outlays "allocated or incurred."[112]

86. Article 1.1(a)(1)(i) of the SCM Agreement, similarly, provides that "potential direct transfers of [government] funds" may constitute a "financial contribution" for the purposes of a subsidy, thereby acknowledging that a subsidy may exist in situations where actual payments are prospective.[113] In fact, the Appellate Body and previous panels have considered "conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient"[114] sufficient to demonstrate a "direct funds transfer", and that the phrase encompasses situations in which some payments under a measure are yet to be made.[115]

87. Australia does not accept either that the reference in Article 9.1(a) to "payments-in-kind" or the fact that the challenged measures involve "grants", support India's contention that only evidence of actual payments can demonstrate the existence of a "financial contribution" in relation to its export subsidies.[116] The textual references India relies on are simply examples that illustrate the variety of forms a "financial contribution" may take. [117]

88. India's understanding of what is required to demonstrate the existence of a financial contribution is, in any event, moot because Australia has provided evidence of actual payments to sugar mills under the challenged measures.[118]

(b) Australia has demonstrated the existence of a "benefit"

89. India also alleges that Australia has failed to conduct the market comparison necessary to demonstrate the existence of a "benefit" for the purposes of the subsidy definition in the SCM Agreement. Australia disagrees. Australia accepts that the market provides a useful benchmark against which to test the existence of a benefit.[119] However, the market comparison exercise required in this context is simple because it is readily apparent that the market for financial services

[108] SCM Agreement, Articles 1.1(a) and 1.1(b).
[109] SCM Agreement, Article 1.1(a)(1) (emphasis added); India's first written submission, para. 107; India's second written submission, paras. 69, 76, 89.
[110] India's first written submission, paras. 105–109; India's second written submission, paras. 67–89.
[111] Australia's second written submission, paras. 101, 105; Australia's opening statement at the second substantive meeting, para. 57.
[112] Agreement on Agriculture, Article 9.2(a)(i) (emphasis added); Australia's second written submission, para. 106.
[113] Australia's second written submission, para. 107.
[114] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614; Australia's response to Panel question 59, para. 77.
[115] Panel Report, *EC and certain member States – Large Civil Aircraft* (Article 21.5 – US), para. 6.290; Australia's response to Panel question 59, para. 77.
[116] India's second written submission, paras. 72–74.
[117] Australia's opening statement at the second substantive meeting, paras. 49–50, 60–61.
[118] Australia's second written submission, paras. 112–113; Australia's response to Panel question 59, para. 82.
[119] Australia's opening statement at the second substantive meeting, para. 69.

involving the provision of funds does not offer the sort of non-reciprocal gifts or grants available to sugar mills under the challenged measures.[120]

3. India has not established a defence under Article 9.4 in relation to the MAEQ scheme

90. In response to Australia's *prima facie* case that the MAEQ scheme is an Article 9.1(a) export subsidy, India has argued that the scheme falls within Article 9.4 of the Agreement on Agriculture. India has not substantiated that assertion with any evidence that the MAEQ scheme falls under either of Articles 9.1(d) or (e) of the Agreement, which identify the types of export subsidies to which the flexibility in Article 9.4 applies.

91. India has pointed to the MAEQ scheme's notification, which partially replicates the language of Articles 9.1(d) and (e).[121] However, that language represents the extent of the scheme's connection with the transport, freight and marketing subsidies to which Articles 9.1(d) and (e) apply. Merely pointing to WTO-consistent language in the scheme's notification is no substitute for an objective assessment of the scheme's design, operation and purpose – none of which reveals any link to the types of costs that Articles 9.1(d) and (e) contemplate.[122]

92. To meet the legal standard applicable under Article 9.1(d), the subsidy in question must be provided for the distinct purpose of covering "costs of marketing exports of agricultural products", including "the costs of international transport and freight". Under Article 9.1(e), there must be evidence of governmental action taken for the distinct purpose of creating advantageous conditions for "internal transport and freight charges on export shipments" vis-à-vis domestic shipments. This relationship between the subsidy and the purposes identified in Articles 9.1(d) and (e) respectively must also be quantifiable, with the assistance provided reducing but not exceeding actual costs or charges.[123] India agrees that subsidies that fall within Articles 9.1(d) and (e) must not exceed the costs incurred.[124]

93. Australia has adduced compelling evidence that the MAEQ scheme does not satisfy the legal standards applicable under Articles 9.1(d) and (e). The scheme's purposes, as indicated in its notification, are to help sugar mills offset the cost of buying sugarcane by satisfying debts owed to sugarcane farmers and to incentivize export by making eligibility to claim assistance conditional upon meeting an export target.[125]

94. Moreover, the MAEQ scheme gives no indication of a link between assistance provided and actual costs of the kinds identified in Articles 9.1(d) and (e). The only metric used to calculate the subsidy's value is the number of tonnes of sugar exported.[126] India's contention that the subsidies improve sugar mills' financial position and therefore ultimately reduce transport, freight and marketing costs reflects an unacceptably broad interpretation of the applicable legal standards, which require evidence of a direct relationship between relevant subsidies and costs of the kinds identified in Articles 9.1(d) and (e).[127]

95. Despite asserting that it determined the value of MAEQ payments following significant stakeholder consultation, India has not adduced any probative evidence of such consultations and, consequently, of the relationship required by the legal standards applicable under Articles 9.1(d) and (e).[128] Australia, on the other hand, has shown that the MAEQ scheme's design fails to ensure

[120] Australia's second written submission, para. 110; Australia's opening statement at the second substantive meeting, paras. 69–72. *See also,* Australia's response to Panel question 53, paras. 20–22; Australia's first written submission, para. 269.

[121] India's first written submission, paras. 119–120, 122.

[122] Australia's response to Panel question 43, para. 128; Australia's second written submission, paras. 128–133.

[123] Australia's second written submission, paras. 120–122; Australia's response to Panel question 56(a), para 39.

[124] India's response to Panel question 81, p. 14.

[125] Australia's second written submission, paras. 125, 130–133.

[126] Australia's second written submission, para. 131.

[127] India's opening statement at the first substantive meeting, para. 15; Australia's second written submission, paras. 138–140.

[128] India's opening statement at the first substantive meeting, para. 17; Australia's second written submission, paras. 141–146; Australia's response to Panel question 82, paras. 104–109.

that the assistance provided does not exceed the actual transport, freight and marketing costs that sugar mills typically incur.[129]

96. Finally, Australia does not accept India's assertion that the proper characterization of Article 9.4 is as an "autonomous right" rather than a typical "exception" or "defence", or India's related argument that Australia bore the burden of both raising and proving the provision did not apply to the MAEQ scheme in its first written submission.[130] To oblige a complainant to anticipate any provision a respondent may raise in its defence and to explain why that provision does not apply would place an unsustainable evidentiary burden on complainants and compromise the efficiency of dispute settlement.[131] If a respondent asserts, in response to evidence and argument that it maintains Article 9.1(a) export subsidies, that those subsidies in fact fall within the meaning of Articles 9.1(d) or (e), it is for the respondent to prove the affirmative of that assertion.[132] India's argument is, in any case, moot, given Australia's comprehensive evidence and argument that the scheme does not satisfy the legal standards applicable under Articles 9.1(d) and (e).[133]

B. INDIA PROVIDES PROHIBITED SUBSIDIES WITHIN THE MEANING OF ARTICLE 3.1(A) OF THE SCM AGREEMENT

97. The Agreement on Agriculture does not authorize India's export subsidies, which therefore remain subject to the disciplines of the SCM Agreement and are inconsistent India's obligations under Articles 3.1(a) and 3.2.

1. India's production subsidies, buffer stock subsidies and its MAEQ and DFIA schemes are Article 3.1(a) subsidies

98. A measure that satisfies the definition of a "subsidy" in Article 1.1 of the SCM Agreement will involve a "financial contribution", by a "government or public body", that confers a "benefit" on its recipient. Article 3.1(a) "prohibits subsidies that are conditional upon… or are dependent for their existence on", or are "tied to" export performance.[134]

99. Under each of India's production and buffer stock subsidies and its MAEQ scheme, there is a "financial contribution" in the form of a "government practice" involving the "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. Each scheme involves the transfer of funds from a government agency either to sugarcane farmers on behalf of mills or to sugar mills directly. Under the DFIA scheme, there is a "financial contribution" within the meaning of Article 1.1(a)(1)(ii), with a government agency foregoing revenue by waiving the customs duties sugar mills would otherwise owe it.[135] All schemes confer a "benefit" on recipient mills, leaving them better off, with respect to debts owed, funds accrued or tax liability, than they would otherwise be.[136] All schemes are export-contingent, with the availability of financial assistance tied to export performance.[137]

2. India misinterprets the legal standard applicable for establishing the existence of an Article 1.1 subsidy

100. In response to Australia's *prima facie* case that India maintains export subsidies contrary to its obligations under Articles 3.1(a) and 3.2 of the SCM Agreement, India repeats its argument that evidence of actual funds transfers is required to demonstrate the existence of a "financial

[129] Australia's second written submission, paras. 147–169; Australia's response to Panel question 84, para. 115.

[130] India's opening statement at the second substantive meeting, paras. 77–83; Australia's responses to Panel questions 92(a) (paras. 143–148), 92(b), (paras. 149–153, 156).

[131] Australia's response to Panel question 92(b), para. 152; Panel Report*, India – Export Related Measures*, para. 7.11.

[132] Australia's second written submission, para. 119, citing Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14; Australia's response to Panel question 92(b), para. 152.

[133] Australia's response to Panel question 92(b), para. 154.

[134] Australia's second written submission, paras. 203–204.

[135] Australia's first written submission, paras. 394–397, 405–408, 413–416, 426.

[136] Australia's first written submission, paras. 398–400, 409, 417, 427–427.

[137] Australia's first written submission, paras. 401–403, 410–411, 420–422, 430–431.

contribution" for the purposes of the "subsidy" definition in Article 1.1 of the SCM Agreement.[138] India also recycles its argument that a complex market comparison is needed to establish the "benefit" component of the Article 1.1 subsidy definition.[139] Australia disagrees, for the reasons outlined above in relation to India's subsidies under Article 9.1(a) of the Agreement on Agriculture.[140]

3. India misinterprets Article 27 and Annex VII

101. India contends that it is exempt from the export subsidy prohibition in Article 3.1(a) of the SCM Agreement by virtue of the flexibility Article 27.2 of the Agreement affords developing country Members.[141] Australia disagrees. Article 27.2(b) provides that the Article 3.1(a) prohibition shall not apply to "other developing country Members" – i.e. those not referred to in Annex VII to the Agreement – for a period of eight years after the WTO Agreement's entry into force. On a plain reading of the text of the provision itself, Article 27.2(b) expired on 1 January 2003.

102. Accepting "the clarity of the plain textual meaning"[142] of Article 27.2(b) is consistent with customary rules of treaty interpretation[143] and does not render, as India argues, parts of the SCM Agreement useless or redundant vis-à-vis some developing country Members.[144] Nor does it undermine the mandatory language of Annex VII(b), pursuant to which listed developing countries "shall be subject to the provisions which are applicable to other developing country Members"[145] upon their graduation from the Annex. The mandatory language in Annex VII(b) concerns the applicability, to graduating developing country Members, of Article 27.2(b). It does not concern the provision's content, including its temporal limit. Moreover, as the inclusion in Annex VII(b) of the sub-clause "which are applicable to other developing country Members" makes clear, Article 27.2(b) applies to graduates from Annex VII(b) on exactly the same terms, including with respect to its expiry, as it does for "other developing country Members."[146]

103. Further, a plain reading of Article 27.2(b) does not, as India claims, frustrate a harmonious reading of Article 27 as a whole. India contends, for example, that Article 27.4 anticipates different eight-year export subsidy phase out periods for different categories of developing country Member.[147] Australia disagrees. Article 27.4 both cross-references Article 27.2(b) and refers twice to "the eight-year period".[148] As this use of the definite article "the" makes clear, Article 27.4 refers to the specific eight-year period introduced in Article 27.2(b).[149]

104. Far from denying developing country Members equal treatment as India argues,[150] a plain reading of Article 27.2(b) is consistent with the different levels of flexibility that Article 27 and Annex VII afford developing country Members according to their circumstances.[151]

105. India graduated from Annex VII(b) to the SCM Agreement in 2017. It was, thereafter, subject to the export subsidies prohibition in Article 3.1(a). Until 2017, India benefited from an extended period of exemption from the Agreement's export subsidies prohibition appropriate to its evolving income level.[152]

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[138] India's first written submission, paras. 146–147. *See also,* India's second written submission, paras. 67–89.
[139] India's first written submission, para. 147. *See also*, India's second written submission, paras. 90–97.
[140] See paragraphs 83 to 88 above.
[141] India's first written submission, paras. 129–145.
[142] Appellate Body Report, *Peru – Agricultural Products,* para. 5.94.
[143] See footnote 40 above.
[144] India's first written submission, para. 137.
[145] SCM Agreement, Annex VII(b) (emphasis added).
[146] Australia's second written submission, paras. 185–190.
[147] India's first written submission, para. 141.
[148] SCM Agreement, Article 27.4 (emphasis added).
[149] Australia's second written submission, para. 192.
[150] India's first written submission, paras. 139–140.
[151] Australia's second written submission, paras. 198–199.
[152] Australia's second written submission, paras. 195–201.

4. The DFIA scheme does not fall within footnote 1

106. India's DFIA scheme is, as outlined above, an export subsidy within the meaning of Article 9.1(a) of the Agreement on Agriculture.[153] The DFIA scheme is not authorized by the Agreement on Agriculture. It does not, moreover, fall within the carve-out, in footnote 1 to the SCM Agreement, from that Agreement's definition of a "subsidy". The DFIA scheme therefore remains subject to the prohibition on export subsidies in Articles 3.1(a) and 3.2 of the SCM Agreement.

107. Footnote 1 to the SCM Agreement, read together with Annex I(i), provides that, a measure will not be deemed to be a subsidy if it comprises: (i) a remission or drawback, including full or partial exemption or deferral; (ii) of import charges; (iii) on imported inputs consumed in the production of an exported product; and (iv) the remission or drawback is not in excess of those charges levied on the inputs.[154]

108. To satisfy the third element of this legal standard a measure must follow a sequencing that ensures it applies to imported inputs that are "consumed in the production of [an] exported product".[155] As the guidance in Annexes II to III to the SCM Agreement articulates, inputs so "consumed" include, relevantly, those "physically incorporated"[156], in the sense that they are "physically present",[157] in the exported product.[158]

109. Australia recalls that the DFIA scheme permits mills that exported white sugar during a 6-month period in the 2017–18 sugar season to import raw sugar duty free during two subsequent seasons.[159] This sequencing reverses the logic of footnote 1, read with Annex I(i), and interpreted, as footnote 1 directs, in context with the guidance in Annexes II to III to the SCM Agreement. Raw sugar imported from 2019 to 2021 cannot be either "physically incorporated" or "physically present" in refined sugar exported in 2018.[160]

110. Additionally, the existence of a verification system to ensure that the DFIA scheme's beneficiaries do not receive duty waivers for more imported raw sugar than they use to produce white sugar exports cannot guarantee that the scheme falls within footnote 1 to the SCM Agreement. The verification system associated with the DFIA scheme, regardless of its efficacy in preventing excess remissions, cannot alter the scheme's inconsistency with the temporal requirements of footnote 1, read with Annex I(i), to the SCM Agreement.[161]

111. Australia does not, as India claims, argue that footnote 1, read with Annex I(i), is so restrictive as to apply only when precisely the same inputs imported duty free are physically present in an exported product.[162] Australia recognises that Annex I(i) allows "where appropriate" for "substitution."[163] This flexibility makes sense where domestic and imported inputs are commingled in the production of products destined for domestic and export markets. However, it does not follow that, in allowing an equivalent quantity of home market inputs to be substituted for imported inputs, Annex I(i) to the SCM Agreement also permits the substitution of future imported inputs for equivalent quantities of imported inputs used to produce past exports.[164]

112. Finally, Australia does not accept India's contention, based on its position that footnote 1 to the SCM Agreement (read with Annex I(i)) is not a typical "exception" or "defence", that Australia bore the burden of proving no later than in its first written submission that the DFIA scheme did not

[153] See paragraphs 79 to 81 above.
[154] Australia's response to Panel question 58(b), para. 65; Australia's second written submission, para. 211, citing Panel Report, *India – Export Related Measures*, para. 7.178, Table 2.
[155] SCM Agreement, Annex I(i) (emphasis added).
[156] SCM Agreement, footnote 61.
[157] SCM Agreement, Annex II(II)(3).
[158] Australia's response to Panel question 85, paras. 119–123.
[159] See paragraph 25 above.
[160] Australia's response to Panel question 85, paras. 119 and 126.
[161] Australia's comments on India's response to Panel question 88, paras. 49–52.
[162] India's opening statement at the second substantive meeting, para. 90; Australia's closing statement at the second substantive meeting, para. 24.
[163] SCM Agreement, Annex II(I)(2).
[164] Australia's comments on India's response to Panel question 88, paras. 53–54.

fall within footnote 1.[165] As Australia articulated with respect to the allocation of burden under Article 9.4 of the Agreement on Agriculture,[166] the characterization of a provision other than as a typical exception or affirmative defence does not determine which party bears the initial burden of raising that provision. The proper characterization of footnote 1 and the implications of that characterization, including for the allocation of burden of proof, is in any case moot. Australia has addressed comprehensively the question of whether the DFIA scheme falls within footnote 1 and India had ample opportunity to respond.[167]

V. INDIA HAS FAILED TO NOTIFY ITS DOMESTIC SUPPORT IN FAVOUR OF SUGARCANE PRODUCERS AND EXPORT SUBSIDIES FOR SUGAR IN BREACH OF ITS WTO OBLIGATIONS

113. Australia has established that India maintains domestic support for sugarcane producers and export subsidies for sugar. India has not submitted notifications of these measures, in breach of its obligations under the Agreement on Agriculture and the SCM Agreement, or, in the alternative, under the GATT 1994.

A. INDIA'S NOTIFICATION OBLIGATIONS UNDER THE AGREEMENT ON AGRICULTURE, THE SCM AGREEMENT AND THE GATT 1994

1. Agreement on Agriculture

114. Article 18 of the Agreement on Agriculture provides, in mandatory terms, that:

- progress in the implementation of commitments negotiated under the Uruguay Round reform programme shall be reviewed by the Committee on Agriculture (Article 18.1);
- the review process shall be undertaken on the basis of notifications submitted by Members in relation to such matters and at such intervals as shall be determined (Article 18.2);
- in addition to the notifications to be submitted to inform the review process (under Article 18.2), any new domestic support measure, or modification of an existing measure, for which exemption from reduction is claimed shall be notified promptly by Members (Article 18.3); and
- domestic support notifications shall contain details of the relevant new or modified measure and its conformity with criteria set out in in the Agreement on Agriculture (Article 18.3).

115. Accordingly, India is required to submit notifications concerning its domestic support and export subsidies to the Membership through the Committee on Agriculture. Notifications are essential for ensuring transparency and enabling the Committee to monitor the implementation of Members' commitments effectively.[168]

(a) India misinterprets Article 18 of the Agreement on Agriculture

116. India claims that Article 18 of the Agreement on Agriculture does not place any obligations on Members, but merely grants the Committee on Agriculture the discretion to determine how the review process is conducted.[169] In making this argument, India ignores the mandatory language and overall scheme of Article 18. Contrary to India's assertion, the Committee's role is not to be determined as a matter of discretion. Rather, the Committee shall review Members' progress in the implementation of their commitments and its review shall be undertaken on the basis of notifications

[165] India's opening statement at the second substantive meeting, para. 89.
[166] See paragraph 96 above.
[167] Australia's comments on India's response to Panel question 86(a), paras. 44–46.
[168] Australia's first written submission, paras. 437–443; Australia's response to Panel question 44(b), para. 141; Australia's second written submission, paras. 223–224.
[169] India's first written submission, para. 158.

to be submitted by Members.[170] If Members had no obligation to submit notifications, the Committee would be unable to discharge its mandatory function.

117. Further, India argues that Committee document G/AG/2, which sets out the notification requirements and formats under Article 18,[171] uses hortatory language that is suggestive in nature and does not give rise to a binding obligation.[172] India's argument is without merit. The document G/AG/2 is not a treaty-level instrument and does not modify Members' obligations under Article 18. Australia's claim is under Article 18, not under G/AG/2.[173]

118. Australia asks the Panel to find that Article 18 imposes binding notification obligations on Members.

2. SCM Agreement

119. Article 25 of the SCM Agreement requires India to notify the Members of subsidies falling within Article 1.1, which are specific within the meaning of Article 2, that India grants or maintains within its territory.[174] Such notifications must be submitted not later than 30 June of each year and must conform to Articles 25.2 to 25.6.[175]

120. India does not dispute that Article 25 imposes mandatory notification obligations.[176]

3. GATT 1994

121. India is obliged under Article XVI:1 of the GATT 1994 to notify other Members of the extent, nature and estimated effects on trade, of any subsidy it grants or maintains, including income or price support, which operates directly or indirectly to increase exports of any product from its territory.[177]

122. India does not dispute that Article XVI:1 imposes mandatory notification obligations.[178]

B. INDIA HAS BREACHED ITS NOTIFICATION OBLIGATIONS BY FAILING TO NOTIFY ITS DOMESTIC SUPPORT IN FAVOUR OF SUGARCANE PRODUCERS AND ITS EXPORT SUBSIDIES FOR SUGAR

123. India does not dispute that it last notified its domestic support to sugarcane in its 1995–96 notification to the Committee on Agriculture and that its most recent notification of its export subsidies for sugar was in 2009–10, which covered the marketing years 2004–05 to 2009–10. Thus, India has not met its legal obligations under the Agreement on Agriculture and the SCM Agreement to notify the Membership of its domestic support for sugarcane producers and its export subsidies for sugar.[179]

124. In the alternative, India is in breach of its obligation pursuant to Article XVI:1 of the GATT 1994 to notify Members of India's subsidies that operate directly or indirectly to increase its sugar exports.[180]

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[170] Agreement on Agriculture, Articles 18.1 and 18.2.
[171] G/AG/2, 30 June 1995, p. 24.
[172] India's first written submission, para. 158.
[173] Australia's response to Panel question 44(b), para. 140; Australia's second written submission, paras. 225–229.
[174] SCM Agreement, Article 25.2; Australia's first written submission, paras. 444–446.
[175] SCM Agreement, Article 25.1.
[176] India's first written submission, para. 157.
[177] Australia's first written submission, paras. 447–448.
[178] India's first written submission, para. 157.
[179] Australia's first written submission, para. 450–458.
[180] Australia's first written submission, paras. 459–466.

VI. CONCLUSION

125. For the foregoing reasons, Australia submits that:

- Through its market price support and other non-exempt domestic support, India maintains domestic support for sugarcane producers that exceeds the *de minimis* level of 10 per cent of the total value of production of sugarcane contrary to India's obligation under Article 7.2(b) of the Agreement on Agriculture.

- India's production and buffer stock subsidies operating in conjunction with the MIEQ orders, and its MAEQ and DFIA schemes constitute:

  – export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture, and are therefore inconsistent with India's obligations under Articles 3.3 and 8 of the Agreement on Agriculture, or, in the alternative Articles 8 and 10.1; and

  – prohibited export subsidies that are inconsistent with India's obligations under Articles 3.1(a) and 3.2 of the SCM Agreement.

- By failing to notify its annual domestic support for sugarcane and sugar subsequent to 1995–96 or to submit an export subsidy notification since 2009–10, India has acted inconsistently with its obligations under Articles 18.2 and 18.3 of the Agreement on Agriculture and Article 25 of the SCM Agreement, or, in the alternative, Article XVI:1 of the GATT 1994.

126. Australia respectfully requests the Panel to find accordingly.

ANNEX A Summary of Australia's calculations of India's AMS for sugarcane in the sugar seasons 2014–15 to 2018–19

Option 1

	Unit	2014-15	2015-16	2016-17	2017-18	2018-19
Value of production	Million Rs.	784,330.00	746,600.00	724,410.00	989,670.00	1,055,920.00
MPS using AAP(FRP plus average premium)	Million Rs.	791,939.81	815,274.15	703,842.00	1,006,325.89	1,075,845.33
—as a percentage of production value	Per cent	**100.97%**	**109.20%**	**97.16%**	**101.68%**	**101.89%**
MPS using AAP(FRP or SAP)	Million Rs.	903,751.21	880,418.37	815,045.23	1,072,684.68	1,110,085.41
—as a percentage of production value	Per cent	**115.23%**	**117.92%**	**112.51%**	**108.39%**	**105.13%**
—difference between MPS using AAP(FRP plus average premium) and AAP(FRP or SAP)	Per cent	14.26%	8.73%	15.35%	6.71%	3.24%
Additional non-exempt domestic support						
—Andhra Pradesh (Annex B-01)	Million Rs.	66.00	66.00			
—Tamil Nadu (Annex B-02)	Million Rs.				1364.30	980.30
—Karnataka (Annex B-03)	Million Rs.				0.10	
Total additional non-exempt	Million Rs.	66.00	66.00	0.00	1364.40	980.30
AMS using AAP(FRP+SAP) and other non-exempt domestic support	Million Rs.	903,817.21	880,484.37	815,045.23	1,074,049.08	1,111,065.71
—as a percentage of production value	Per cent	**115.23%**	**117.93%**	**112.51%**	**108.53%**	**105.22%**
—difference between AMS including other non-exempt domestic support and MPS using AAP(FRP+SAP)	Per cent	0.01%	0.01%	0.00%	0.14%	0.09%

Option 2

	Unit	2014-15	2015-16	2016-17	2017-18	2018-19
Value of production	Million Rs.	965,290.00	958,640.00	946,980.00	1,173,510.00	1,230,490.00
MPS using AAP(FRP plus average premium)	Million Rs.	791,939.81	815,274.15	703,842.00	1,006,325.89	1,075,845.33
—as a percentage of production value	Per cent	**82.04%**	**85.04%**	**74.32%**	**85.75%**	**87.43%**
MPS using AAP(FRP or SAP)	Million Rs.	903,751.21	880,418.37	815,045.23	1,072,684.68	1,110,085.41
—as a percentage of production value	Per cent	**93.62%**	**91.84%**	**86.07%**	**91.41%**	**90.21%**
—difference between MPS using AAP(FRP plus average premium) and AAP(FRP or SAP)	Per cent	11.58%	6.80%	11.74%	5.65%	2.78%
Additional non-exempt domestic support						
—Andhra Pradesh (Annex B-01)	Million Rs.	66.00	66.00			
—Tamil Nadu (Annex B-02)	Million Rs.				1364.30	980.30
—Karnataka (Annex B-03)	Million Rs.				0.10	
Total additional non-exempt	Million Rs.	66.00	66.00	0.00	1364.40	980.30
AMS using AAP(FRP+SAP) and other non-exempt domestic support	Million Rs.	903,817.21	880,484.37	815,045.23	1,074,049.08	1,111,065.71
—as a percentage of production value	Per cent	**93.63%**	**91.85%**	**86.07%**	**91.52%**	**90.29%**
—difference between AMS including other non-exempt domestic support and MPS using AAP(FRP+SAP)	Per cent	0.01%	0.01%	0.00%	0.12%	0.08%

Notes:

1. For calculations, refer to Australia's domestic support calculations, Microsoft Excel workbooks, Revision 3 (**Exhibit AUS-1 (Revision 3)**).

2. Australia considers there are two potential options for India's total value of production, both of which are reasonable. Option 1 uses as the value of production the figures in Row 4.1 "Sugarcane" of India's Ministry of Statistics and Programme Implementation, National Accounts Statistics 2020, Statement 8.1.2 Crop-wise value of output (**Exhibit JE-147**). Option 2 uses as the value of production the sum of the figures in Rows 4.1 "Sugarcane" and 4.2 "gur" of Exhibit JE-147. See Australia's response to Panel question 60, paras. 1–14.

3. "MPS" is market price support; "Rs" is Indian Rupees.

4. References to Annexes are to Annexes in Australia's first written submission.

ANNEX B-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF GUATEMALA

I. INTRODUCTION

1. Guatemala's legal claims in this dispute concern two main aspects: (i) India's domestic support for sugarcane producers, which is provided in amounts greatly exceeding India's permitted *de minimis* level of 10%; and (ii) India's export subsidies for sugar, which India maintains despite the fact that it has no export subsidy entitlements inscribed in its World Trade Organization ("WTO") Schedule of Concessions.

2. At the heart of India's regime is the Market Price Support ("MPS") provided by the Indian Government to sugarcane producers through the federal-level Fair and Remunerative Price ("FRP") and, in the case of certain Indian States, the State Advised Price ("SAP"). The FRP and SAP are government-mandated prices for sugarcane purchases. Additionally, India imposes stockholding requirements for sugar, subsidized sugar buffer stocks, as well as subsidies for sugar mills that comply with export quotas.

3. India's system of administered prices has produced dire consequences for sugar mills, which must purchase sugarcane at the high prices mandated by the Government. Indian authorities have fixed the FRP and SAP at such high levels that sugar mills can no longer afford to pay in full this price to sugarcane growers.[1] This has caused an accumulation of overdue payments (or arrears) that sugar mills owe to sugarcane growers. The Indian Sugar Mills Association ("ISMA") calculates that on 31 March 2019 sugarcane arrears reached "historic levels" of Indian Rupees ("INR") 30'000 crore, approximately 4.2 billion US Dollars ("USD").[2] Sugarcane arrears jeopardize the livelihood of India's 50 million sugarcane farmers, who struggle to make a living without payment for their produce.[3] India's measures, thus, could achieve the exact opposite result than the alleged intention of addressing the "livelihood concerns of India's largely low-income, resource-poor sugarcane farmers" as argued by India in its first written submission.[4]

4. India's sugarcane and sugar regime functions as a vicious circle, in which one trade-distorting policy engenders problems that must be addressed through additional trade-distorting policies. Needless to say, this regime is financially unsustainable in the long run for the Indian Government and other sugar producing and exporting countries like Guatemala.[5] Guatemala is part of the WTO group of "small and vulnerable economies". This reflects Guatemala's status as a developing country with an economy that relies on just a few productive sectors. The sugar industry is one of those sectors. In addition, the sugar sector in Guatemala creates over 63'000 direct jobs and over 314'000 indirect jobs.[6] Hence, the sugar industry is of the utmost importance for Guatemala. While Guatemala understands the importance of supporting low-income farmers, any such support measures must comply with WTO obligations.[7] For the reasons set out below, Guatemala does not consider that India's domestic support for sugarcane and export subsidies for sugar comply with India's obligations under the Agreement on Agriculture and the SCM Agreement.

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[1] Financial Express, "Centre not appreciating mills 'huge financial crisis'", 20 April 2018, available at https://www.financialexpress.com/market/commodities/centre-not-appreciating-mills-huge-financial-crisis/1139014/, last accessed on 15.11.2020, Exhibit GTM-15.

[2] See India Sugar Mills Association, Presentation during the brainstorming session under the Chairmanship of Joint Secretary (sugar), 11 June 2019, Exhibit JE-12, p. 10.

[3] Frontline, "Bitter glut", available at: https://frontline.thehindu.com/thenation/agriculture/article24321068.ece, last accessed on 15.11.2020, Exhibit GTM-43. The Hindu, "Sugarcane farmers demand settlement of arrears", 27 June 2018, https://www.thehindu.com/news/national/karnataka/sugarcane-farmers-demand-settlement-of-arrears/article24265636.ece, last accessed on 15.11.2020, Exhibit GTM-44.

[4] India's first written submission, para. 2.

[5] The Wall Street Journal 2019, Exhibit GTM-2.

[6] ASAZGUA, Exhibit GTM-10, p. 3.

[7] Guatemala's opening statement at the first substantive meeting, paras. 2.10 – 2.11.

II. ROADMAP TO THIS EXECUTIVE SUMMARY

5. Guatemala's integrated executive summary is structured as follows:

- Section III addresses India's request for a preliminary ruling.
- Section IV explains that India's lack of cooperation in these proceedings does not affect the Panel's ability to make an objective assessment under Article 11 of the DSU.
- Section IV addresses Guatemala's legal claim that India's domestic support measures are inconsistent with India's obligations under Article 7.2(b) of the Agreement on Agriculture.
- Section V contains Guatemala's legal claim that India's export subsidies are inconsistent with Articles 3.3, 8, and 9.1 of the Agreement on Agriculture, and consequently, also with Article 3.1(a) of the SCM Agreement.
- Finally, in Section VI, Guatemala presents its specific requests for legal findings and recommendations from the Panel.

III. INDIA'S REQUEST FOR A PRELIMINARY RULING

6. In its first written submission, India requested the Panel to find that certain measures are outside of the Panel's terms of reference either because they allegedly expired *prior* to the establishment of the Panel, or because they were allegedly enacted *after* the establishment of the Panel.[8]

7. Guatemala argued that India's request for a preliminary ruling was without legal basis. With respect to the measures that allegedly expired *prior* to the Panel establishment, Guatemala noted that India erroneously equated "measures" with "legal instruments", which are two different legal concepts. A measure is an act or omission of a WTO Member, the existence of which is demonstrated through legal instruments or other evidence.[9] Consequently, the expiry of a legal instrument is not the same as the expiry of a measure.[10] This is particularly important with respect to legal claims involving domestic support under the Agreement on Agriculture, where complainants must necessarily rely on historical data.[11] Moreover, even if a measure had expired before the establishment of the Panel, this "is not dispositive of the question whether the panel can address claims in respect of that measure".[12] Nonetheless, none of the measures at issue had expired.[13]

8. With respect to the measure that were allegedly enacted *after* the Panel establishment, the MAEQ Scheme 2019, Guatemala argued that this measure is properly within the Panel's terms of reference because the Panel's terms of reference, as expressed in Guatemala's Panel request, are broad enough to include the MAEQ Scheme 2019; it is of the same essence as the export subsidies identified in Guatemala's Panel request; and the inclusion of the MAEQ Scheme 2019 in the Panel's terms of reference is necessary to secure a positive solution to the dispute.[14]

9. In its preliminary rulings dated 9 November 2020 and 14 December 2020, the Panel rejected India's request and found that the relevant measures were within the Panel's terms of reference.

IV. INDIA'S LACK OF COOPERATION IN THESE PROCEEDINGS DOES NOT AFFECT THE PANEL'S ABILITY TO MAKE AN OBJECTIVE ASSESSMENT UNDER ARTICLE 11 OF THE DSU

10. India's lack of cooperation has permeated every single stage of these proceedings. For example, when the Panel or the complainants have posed direct questions to India on matters related

[8] India's first written submission, paras. 41-46.

[9] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. See Guatemala's comments on India's request for a preliminary ruling, para. 10.

[10] Guatemala's comments on India's response regarding India's preliminary ruling request, para. 5.

[11] Panel Report, *China – Agricultural Producers*, para. 1.3.

[12] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 268 referring to Appellate Body Report, *US – Upland Cotton*, paras. 269-272.

[13] Guatemala's comments on India's response regarding India's preliminary ruling request, para. 5.

[14] Ibid.

to the operation and sources of the FRP, SAP, and other measures providing domestic support, India has deliberately decided not to answer the specific questions[15], answered vaguely[16], or answered late[17].

11. In India's view, its conduct is justified because the burden to make a *prima facie* case under the Agreement on Agriculture lies on the complainants, and thus, the complainants are "best placed to explain the calculations they have sought to adopt".[18] However, the fact that the complainants bear the burden of making a *prima facie* case does not liberate the respondent from its obligation to assist the Panel in discharging its duty under Article 11 of the DSU to make an objective assessment of the matter before it, including an objective assessment of the facts. In the light of Article 3.10 of the DSU, "[c]ollaboration from parties to a dispute is essential for a panel to be able to discharge its function of making 'an objective assessment of the matter before it'".[19]

12. India also argues that, because of confidentiality concerns, it cannot share information expressly requested by the Panel with respect to estimated costs of marketing and transportation in the context of sugar exports.[20] Guatemala notes that confidentiality concerns cannot be invoked as valid grounds for withholding information that is expressly requested by the Panel. Paragraph 2.3 of the Working Procedures offers the possibility of adopting additional procedures for the treatment and handing of confidential information at the request of any Party. India chose not to avail itself of these possible procedures. India's choice, however, cannot be invoked by India as a justification for not providing the information requested by the Panel.[21]

13. In any event, India's lack of cooperation and collaboration does not affect the Panel's ability to make an objective assessment of the legal and factual issues before it; nor has this lack of cooperation in any way affected the ability of the complainants to make a *prima facie* case of violation under the Agreement on Agriculture and the SCM Agreement. As a matter of fact, the complainants have provided significant argument and evidence, including over 170 joint exhibits, individual exhibits[22], and detailed calculations[23] to make a *prima facie* case of violation under the said agreements.

V. INDIA'S DOMESTIC SUPPORT FOR SUGARCANE FARMERS IS INCONSISTENT WITH ARTICLE 7.2(B) OF THE AGREEMENT ON AGRICULTURE

A. Introduction

14. Pursuant to paragraph 1 of Annex 3 of the Agreement on Agriculture, domestic support can be provided in the form of Market Price Support ("MPS"), non-exempt direct payments, or any other subsidy not exempted from the reduction commitment ("other non-exempt policies"). India provides domestic support in the form of MPS, through the FRP and SAP, and in the form of non-exempt direct payments and other non-exempt policies, through other federal and state-level measures.[24]

15. In accordance with Article 7.2(b) of the Agreement on Agriculture, domestic support by developing countries that did not inscribe reduction commitments in their Schedules, such as India[25], may not exceed 10% of the value of production of the relevant basic agricultural product (in this case, sugarcane). India's domestic support from sugar season 2014/2015 to sugar season 2018/2019 has reached levels that greatly exceed these limits, ranging from **86% to 94%**[26], or alternatively, from **105% to 118%**[27], depending on the figures used for the calculation of total

[15] See e.g. India's answer to Panel's questions 6(a) and (b), 7, 45, 64, 66, 70(c), 71(a)-(d) and 72.
[16] See e.g. India's answers to Panel's questions 5(a) and (b), 62, 63(b), 70(a), 74(b) and (c).
[17] India responded to Guatemala's questions after the second substantive on 29 April 2021, seven days after the date stipulated by the Panel. See Guatemala's letter dated 28 April 2021 on India's lack of response to Guatemala's questions.
[18] See e.g. India's response to Panel's question 72.
[19] Panel Report, *Argentina – Import Measures*, para. 6.31.
[20] See e.g. India's answer to Panel's question 82(c).
[21] Guatemala's closing statement at the second substantive meeting, para. 3.6.
[22] For example, Guatemala has provided over 50 exhibits. Australia has provided over 100 exhibits.
[23] See Exhibit GTM-45 (Revision 12 May 2021).
[24] Guatemala's first written submission, paras. 73 – 99.
[25] India's response to Panel's question 46.
[26] See Exhibit JE – 174.
[27] Guatemala's updated calculations of India's AMS, Exhibit GTM-45, Revision 12 May 2021.

value of sugarcane production.[28] India, therefore, acts inconsistently with its obligations under Article 7.2(b) of the Agreement on Agriculture.

16. In the following sub-sections, Guatemala describes the measures at issue, explains that these measures provide domestic support in excess of the *de minimis* limits, and, finally, responds to India's arguments.

B. The FRP, the SAP and India's other domestic support measures

17. With respect to MPS, since 2009, India has imposed administered prices for sugarcane purchases, which, at the federal level, are called the FRP, and at the State level, the SAP.[29] The FRP and SAPs are fixed by the Indian Government and must be paid by sugar mills.[30] If sugarcane is purchased below the administered prices, India imposes penalties that may include imprisonment.[31]

18. The FRP is composed of two elements:[32]

- A base price in INR per quintal[33] for sugarcane with a recovery rate equivalent or below an established basic recovery rate. The recovery rate refers to the amount of sugar that can be extracted from sugarcane.[34] Sugarcane with a recovery rate equivalent or below the basic recovery rate receives the base price of the FRP.

- A premium that increases in proportion to the recovery rate. Sugarcane with a recovery rate above the basic recovery rate would receive the FRP base price plus a premium. As the recovery rate is normally an indication of the quality of the sugarcane, this system seeks to encourage production of higher quality sugarcane.

19. The FRP operates at the level of the Central Government and has a nationwide coverage. Furthermore, six Indian States also impose their own administered prices for sugarcane in the form of SAP. These six States are Bihar, Haryana, Punjab, Tamil Nadu, Uttarakhand, and Uttar Pradesh. These six States collectively account for 60% of total sugar production in India.[35] All of these States, with the exception of Tamil Nadu[36], apply a State base price that can vary depending on the variety of sugarcane. Sugarcane of early and mid-varieties receives a higher SAP than sugarcane of normal varieties or unrecommended varieties.[37] Assured of receiving the high FRP and, in certain states, the even higher SAPs, farmers are encouraged to produce sugarcane instead of other crops.[38]

20. In addition to the FRP and the SAP, the Central and State Governments provide other measures to assist sugar mills and sugarcane producers. These measures include direct payments, soft loans, and revenue foregone, among other things.[39] For example, Andhra Pradesh foregoes fiscal revenue to the benefit of sugarcane growers. In essence, payments of purchase tax in the amount of INR 6/quintal normally made by sugar mills to the State of Andhra Pradesh are re-directed to sugarcane producers so that they can receive income additional to the FRP for their sugarcane.[40] Similarly, Tamil Nadu provides "incentive payments" to support the transition from the SAP to the Revenue

[28] See Guatemala's answer to Panel's question 60, and Guatemala's comments on India's answer to Panel's question 60.
[29] Guatemala's first written submission, paras. 55, 72.
[30] Guatemala's first written submission, paras. 37-38.
[31] Guatemala's first written submission, paras. 50, 72.
[32] Guatemala's first written submission, para. 40.
[33] 1 quintal is equivalent to 100 kg.
[34] A 9.5% recovery rate means that from 100 kg of sugarcane crushed, 9.5 kg of sugar can be produced.
[35] Guatemala's first written submission, paras. 51–72. The production of sugarcane in sugar season 2017/18 in Bihar, Haryana, Punjab, Tamil Nadu, Uttarakhand, and Uttar Pradesh was 218.815 million MT of sugarcane. India's total production of sugarcane in sugar season 2017/18 was 355.098 million MT. See Annex Table 1.1 of CACP, Price Policy for Sugarcane (2019-20 sugar season), August 2018, Exhibit JE-53, pp. 53-54.
[36] Tamil Nadu applies the SAP based on recovery rates in a manner similar to the FRP. For example, the SAP in Tamil Nadu for the sugar season 2016-2017 was "Rs.275 per quintal linked to 9.5% with increase of Rs.2.42 for every 0.1%-point increase in recovery above 9.5 per cent". See CACP, Price Policy for Sugarcane (2018-19 sugar season), August 2017, Exhibit JE-52, p. 57.
[37] Guatemala's first written submission, paras. 53-54.
[38] Guatemala's second written submission, para. 4.
[39] Guatemala's first written submission, paras. 72-99.
[40] CACP, Price Policy for Sugarcane (2018-19 sugar season), August 2017, Exhibit JE-52, Annex Table 2.2, column 2014-15, row Andhra Pradesh.

Sharing Formula ("RSF")[41]. These payments are "over and above the Fair and Remunerative Price"[42].

C. India's FRP and SAP provide MPS in excess of the 10% *de minimis* limit

21. In accordance with paragraph 8 of Annex 3, MPS is measured by calculating the gap between the Fixed External Reference Price ("FERP") and the Applied Administered Price ("AAP"), which is then multiplied by the quantity of eligible production ("QEP").[43] This formula, known as the "price gap" formula or methodology, can be illustrated as follows:

MPS in absolute terms	=	(AAP	-	FERP)	*	QEP	
		first element		*second element*		*third element*	

22. The price gap formula with the three elements just discussed is used to state the level of MPS in absolute terms. The resulting MPS in absolute terms must be added to other forms of domestic support, where applicable, so that the total amount of domestic support can be divided by the total value of production to state the level of domestic support as a percentage of the total value of production.

Domestic support in relation to total value of production	=	Domestic support in absolute terms	÷	(Total national production	*	Producer price)
				total value of production fourth element		

23. For the calculation of MPS, Guatemala determined the values of the AAP, the FERP, the QEP and the total value of production based on India's official data and documents.[44]

24. With respect to the AAP, Guatemala relied on the FRP and the SAP. For the States that did not apply SAPs, Guatemala calculated the AAP on the basis of the FRP (base level FRP plus any possible premium that resulted when the recovery rate in a State exceeded the recovery rate for the base level).[45] For the six States that did apply SAPs, Guatemala calculated the AAP on the basis of the SAP for the mid-point variety, with the exception of Tamil Nadu, which operates an SAP on the basis of a base rate and premiums in accordance with recovery rates (similar to the FRP).[46]

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[41] The use of SAPs has been criticised by Indian experts and federal specialised agencies. For example, Dr. Rangarajan's Report (Exhibit GTM-31, para. 5, pp. 7-8) and the CACP reports (see e.g. CACP, Price Policy for Sugarcane 2019-20 sugar season, August 2018, Exhibit JE-53, p. 4) have advised Indian States to eliminate the SAP and replace it with a RSF. The RSF is a way of determining the remuneration payable to sugarcane producers based not on a price fixed for sugarcane, but rather on a distribution between sugarcane producers and sugar mills of the revenue generated by sugar mills from sales of sugar and/or other products made from sugarcane.

[42] Paragraph (g)(ii) of Statement of Objects and Reasons, paragraph (i)(a) of Amendment of section 2, paragraph (f) of Amendment of section 4 of the Karnataka Act No. 28 of 2014, Exhibit GTM-28.

[43] The AAP is "the price set by the government at which specified entities will purchase certain basic agricultural products" (see Panel Report, *China – Agricultural Producers*, para. 7.177). The quantity of production eligible refers to "the amount of production of a product which is fit, or able to benefit from the price support provided through the AAP" (see Panel Report, *China – Agricultural Producers*, para. 7.283). Put differently, quantity of production eligible is the amount of production that is *eligible* to be purchased at the AAP, rather than the amount of production that was *actually* purchased at the AAP (see Appellate Body Report, *Korea – Various Measures on Beef*, para. 120). The FERP is fixed and stated in each Member's Supporting Table. Pursuant to paragraph 9 of Annex 3 of the Agreement in Agriculture, it "shall be based on the years 1986 to 1988 […]" and "may be adjusted for quality differences as necessary". Nothing in the Agreement on Agriculture, however, allows the FERP to be adjusted for other factors.

[44] See Guatemala's updated calculations of India's AMS, Exhibit GTM-45, Revision 12 May 2021.

[45] Guatemala's first written submission, para. 143. See Exhibit GTM-45, Revision 12 May 2021, "MPS for sugarcane in absolute terms - 2014/15 to 2018/19", Tables 9.1 - 9.5.

[46] Guatemala's first written submission, para. 143. See Exhibit GTM-45, Revision 12 May 2021, "MPS for sugarcane in absolute terms - 2014/15 to 2018/19", Tables 9.1 - 9.5. Note that, for Tamil Nadu, Guatemala calculated the AAP on the basis of the base SAP rate, without premiums, as the average recovery rate of

25. With respect to the FERP, Guatemala relied on the figures provided in India's Supporting Table[47], i.e. INR 156.16/mt based on a recovery rate of 8.5%, which, in accordance with paragraph 9 of Annex 3, were adjusted for quality differences in light of the actual recovery rates, which in some States are higher than 8.5%.[48]

26. In relation to the QEP, in the absence of any legal limitation on the QEP, the entire production of sugarcane in India was considered as eligible to receive the AAP for purposes of calculating India's MPS for sugarcane under paragraph 8 of Annex 3 of the Agreement on Agriculture.[49]

27. Finally, with respect to the total value of sugarcane production, Guatemala relied on the figures provided in MOSPI's National Account Statistics (Exhibit JE-147). This document can be read in two different ways. India has chosen not to explain how its own official document should be read. In any event, on the basis of the evidence before the Panel, in particular, MOSPI's National Account Statistics (Exhibit JE-147); and "National Accounts Statistics Sources and Methods 2007" (Exhibit JE-168), a document explaining the sources of the data and the methods used by MOSPI in preparing the statistics submitted in Exhibit JE-147, the Panel can make an objective assessment of the figures that should be used for the calculation of India's total value of production.

28. As explained in Guatemala's response to Panel's question 60, there are two options for calculating the total value of sugarcane production. MOSPI's National Account Statistics contains entry 4, titled "Sugars", which in turn is subdivided into three sub-entries, "4.1 Sugarcane", "4.2 gur", and "4.3 others". The first option includes only sub-entry 4.1 of MOSPI's data and is based on Guatemala's original reading of MOSPI's statistics based on the ordinary meaning of "Sugarcane" in sub-entry 4.1. The second option includes sub-entries 4.1 *and* 4.2 ("Sugacane" and "gur") and is based on the additional clarifications provided by "National Accounts Statistics Sources and Methods 2007" (Exhibit JE-168). This document clarified that the actual sales of sugarcane include both "Sugarcane" and "gur" sales.[50] Guatemala considers that either option is valid for the calculation of India's total value of sugarcane production. However, on the basis of the clarifications provided by Exhibit JE-168, Guatemala has a preference for Option 2 (calculating the total value of sugarcane production on the basis of "Sugarcane" and "gur"). Moreover, Option 2 also happens to be more favourable to India. As can be seen in Guatemala's revised calculations in Exhibit GTM-45 (Revision 12 May 2021), Option 2 results in lower AMS margins. In any event, Guatemala would nonetheless not object if the Panel were to rely only on heading 4.1 ("Sugarcane"), as originally envisaged in Option 1. Guatemala, therefore, has included both options in its revised calculations in Exhibit GTM-45 (Revision 12 May 2021).

29. In accordance with Guatemala's calculations, India's MPS provided through the FRP and the SAP, results in AMS levels ranging from **86% to 94%**[51] (Option 2), or alternatively, from **105% to 118%**[52] (Option 1), depending on the figures used for the calculation of total value of sugarcane production[53]. Under either option, India acts inconsistently with its obligations under Article 7.2(b) of the Agreement on Agriculture.

D. India's other domestic support measures further exacerbate India's breach of its obligation not to exceed the 10% *de minimis* limit

30. In principle, pursuant to Article 7.2(a) of the Agreement on Agriculture, every domestic support measure should be included in the calculation of a Member's Current Total AMS, except for, *inter alia*, measures that are exempted from reduction "by reason of any other provisions of this Agreement", including Annex 2, Articles 6.2 and 6.5, and paragraph 8 of Annex 3. The second

sugarcane in Tamil Nadu was below 9.5% in each of the relevant sugar seasons. Note also that, Guatemala did not provide calculations of the AAP on the basis of the FRP for States providing SAPs because, in Guatemala's view, these calculations do not accurately reflect the applicable AAPs in the States providing SAPs. In any event, if the Panel were to consider that it is not necessary to take into account the SAPs in the calculation of India's AMS, Guatemala incorporates by reference Australia and Brazil's calculations of India's AMS on the basis of the FRP alone, without SAPs. See revised versions of AUS-1 and BRA-1.

[47] India's Supporting Table, G/AG/AGST/IND, p. 29.

[48] See Guatemala's updated calculations of India's AMS, Exhibit GTM-45, Revision 12 May 2021.

[49] See Guatemala's first written submission, paras. 148-153.

[50] See Guatemala's answer to Panel's question 60.

[51] See Exhibit JE–174.

[52] Guatemala's updated calculations of India's AMS, Exhibit GTM-45, Revision 12 May 2021.

[53] See Guatemala's answer to Panel's question 60, and Guatemala's comments on India's answer to Panel's question 60.

sentence of paragraph 8 of Annex 3 of the Agreement on Agriculture states that "[b]udgetary payments made to maintain th[e] gap [between the AAP and the FERP] such as buying-in or storage costs shall not be included in the AMS". Thus, when incorporating into the AMS calculation the domestic support resulting from a MPS system (calculated based on the difference between the AAP and FERP), one must exclude budgetary payments made to "maintain th[e] gap [between the AAP and the FERP]", which, in principle, would have qualified as domestic support measures that should have been added to AMS.

31. In its first written submission, Guatemala identified multiple budgetary payments made by India to assist sugar mills in paying sugarcane producers the AAP for the sugarcane purchased. These budgetary payments were either expressly described in Guatemala's first written submission,[54] or incorporated by reference in Guatemala's first written submission.[55]

32. Guatemala considers that – with the exception of two state-level measures (Andhra Pradesh's purchase tax exemption and Tamil Nadu's incentive payments) included by Guatemala in the calculation of India's AMS[56] – these budgetary payments qualify as budgetary payments made to maintain the gap within the meaning of paragraph 8 of Annex 3 of the Agreement on Agriculture.[57] Therefore, unless India states or the Panel finds otherwise, Guatemala submits that these budgetary payments should not be included in India's AMS calculation.

33. With respect to the two state-level measures that, in principle, should be included in the AMS calculation because they are *not* applied to maintain the gap between the FERP and India's AAP[58], Guatemala understands that the amount of domestic support resulting from them is marginal in comparison to the domestic support provided through India's MPS. Hence, should the Panel consider that, in order to resolve the dispute, it would be sufficient to include in India's AMS calculation only the domestic support resulting from India's MPS, Guatemala would not object to excluding these two

[54] Bihar's direct payments (Guatemala's first written submission, para. 87); Central Government Soft Loans Scheme for sugar seasons 2014-15 and 2018-19 (Guatemala's first written submission, para. 89-92); Andhra Pradesh's soft loans (Guatemala's first written submission, para. 93); Bihar's soft loans (Guatemala's first written submission, para. 94-95); Uttar Pradesh's loans for payment of sugarcane arrears for sugar season 2018-19 (Guatemala's first written submission, para. 96); Karnataka's transitional payments (Guatemala's first written submission, paras. 170-175); Tamil Nadu's transitional payments (Guatemala's first written submission, paras. 176-179); and Andhra Pradesh's purchase tax exemption (Guatemala's first written submission, paras. 180-184).

[55] Bihar's purchase tax exemption (Australia's first written submission, Annex E-02, para. 508); Gujarat soft loan Scheme 1 (Australia's first written submission, Annex E-03, para. 510); Gujarat soft loan Scheme 4 (Australia's first written submission, Annex E-03, para. 511); Haryana's financial assistance to clear sugarcane arrears of sugar year 2018 (Australia's first written submission, Annex E-04); Haryana's soft loans or loan relief to clear cane dues of sugar year 2018 (Australia's first written submission, Annex E-04); Maharashtra's purchase tax exemption (Australia's first written submission, Annex E-06); Punjab assistance to sugar mills to pay sugarcane arrears for sugar season 2017-18 (Australia's first written submission, Annex E-07); Punjab's payment of SAP for sugar season 2018-19 (Australia's first written submission, Annex E-07); Tamil Nadu's loans to cooperative sugar mills (Australia's first written submission, Annex E-08, para. 517); Telangana's purchase tax exemption (Australia's first written submission, Annex E-09); Uttar Pradesh's purchase tax exemption (Australia's first written submission, Annex E-10, para. 520); Uttar Pradesh's guarantee and guarantee fee waiver (Australia's first written submission, Annex E-10, para. 521); Uttar Pradesh's loans for payment of sugarcane arrears for sugar season 2016-17 (Australia's first written submission, Annex E-10, para. 522); Uttar Pradesh's loans for payment of sugarcane arrears issued in 2018 (Australia's first written submission, Annex E-10, para. 523); and Uttar Pradesh's payments of INR 450 per MT against purchase of sugarcane by mills for sugar season 2017-18 (Australia's first written submission, Annex E-10, para. 524).

[56] Originally, Guatemala included three state-level measures in the calculation of India's AMS. Based on the available evidence, i.e. Karnataka's Budget Estimates for the financial year 2020-21 (Exhibit JE-173), as well as India's response to Guatemala's question 3, Guatemala decided to withdraw from India's domestic support calculations the amounts budgeted under the "Payment of Incentive Price for Sugar Cane through Sugar Factories" scheme, see Exhibit GTM-45 (Revision 12 May 2021). Guatemala notes that the withdrawal of these amounts (0.1 INR million) from the calculation of India's domestic support has negligible effects in terms of India's AMS levels. Indeed, after withdrawing these amounts from Guatemala's calculations, the AMS levels calculated by Guatemala continue to be aligned with the AMS levels calculated by the other complainants that did not withdrawn the amounts budgeted under this scheme.

[57] As noted in Guatemala's answer to Panel's question 21, it is understood that these budgetary payments could become relevant to India's AMS calculations in a future scenario, for example as part of India's implementing actions in this dispute if India were to eliminate its system of AAP but keep this type of budgetary payments. If that were to occur, these budgetary payments would no longer be maintaining a gap created by an AAP and thus, like any other domestic support measures, they would have to be included in the AMS. In that case, India would need to ensure that all forms of domestic support, regardless of whether they are MPS or other policies, are kept within *de minimis* levels.

[58] Guatemala's first written submission, paras. 169-190.

state-level measures from the calculation of India's AMS.

34. In this respect, a finding of WTO-inconsistency based on India's MPS alone would not mean that, in order to bring its AMS within *de minimis* levels, India would need to reduce only its MPS measures. Rather, to comply with the Panel's findings, India would have to ensure that the sum of all types of domestic support – MPS, non-exempt direct payments, or any other non-exempt policies – does not exceed its *de minimis* levels under the Agreement on Agriculture.

E. India's has failed to rebut the complainants' *prima facie* case of violation under Article 7.2(b) of the Agreement on Agriculture

35. India does not dispute that it legally mandates sugar mills to purchase sugarcane at the administered prices. Similarly, India takes no issue with the data used by Guatemala in the domestic support calculations or with the results of these calculations.[59] India's defence in this proceeding has focused on disputing the legal characterization of the FRP and the SAP as MPS.

36. With respect to the domestic support measures other than MPS, India agrees that the domestic support provided through non-exempt direct payments and other non-exempt measures may be calculated using budgetary outlays.[60] However, India argues that, because the FRP and the SAPs should not be counted as domestic support, the remaining state-level measures would be the only domestic support to be accounted for, but that they do not alone exceed the 10% *de minimis* rule.[61]

37. India's arguments are based on an incorrect reading of Annex 3 of the Agreement on Agriculture. As demonstrated by Guatemala, the FRP and the SAPs do provide domestic support.[62] Together, the FRP, the SAPs and the two state-level measures provide an overall amount of domestic support that exceeds the 10% *de minimis* rule.[63]

38. In the following subsections, Guatemala will rebut the arguments put forward by India.

1. Domestic support need not consist of budgetary outlays and revenue foregone by government or their agents

39. India alleges that domestic support can exist only if the support consists of budgetary outlays or revenue foregone, but not when the government sets an AAP to be paid by private entities. India contends that its argument is grounded in paragraph 2 of Annex 3 read together with paragraph 1 of Annex 3 of the Agreement on Agriculture.

40. Paragraphs 1 and 2 of Annex 3 of the Agreement on Agriculture provide:

> 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. (emphasis added).

41. According to India, paragraph 2 of Annex 3 establishes that MPS, as a form of domestic support, can be provided only when "governments or their agents" purchase the agricultural product at the AAP. India also argues that the term "both", which follows the term "include", limits "the universe of actions from/by the government or their agents to budgetary outlays and revenue

[59] See also Guatemala's closing statement at the first substantive meeting, para. 2.10.
[60] India's response to Panel question 49.
[61] India's first written submission, para. 82; India's opening statement at the first substantive meeting, para. 11.
[62] Guatemala's opening statement at the first substantive meeting, paras. 3.7-3.14; Guatemala's closing statement at the first substantive meeting, paras. 2.5-2.9.
[63] Guatemala's updated calculations of India's AMS, Exhibit GTM-45 (Revision 12 May 2021).

foregone".[64]

42. India's interpretation is legally incorrect and is at odds with other provisions of the Agreement on Agriculture. India incorrectly reads the clause "shall include" as "shall only include". In essence, India's argument requires incorporating words into paragraph 2 of Annex 3 that simply are not there. India effectively reads the terms "shall include" as "shall only include". This interpretative approach is not permissible under article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention") and, therefore, should be rejected by the Panel.[65]

43. As noted in Guatemala's opening statement at the first substantive meeting,[66] the ordinary meaning of the term "include" is "[c]ontain as part of a whole"[67], "that what follows is not an exhaustive, but a partial, list of all covered items"[68]. The term "include" is used to indicate that the examples that follow are "illustrative, not exhaustive"[69], "illustrative and expansive"[70], and that there may be other issues to be considered among those mentioned.[71] Hence, the stipulation in paragraph 2 of Annex 3 that subsidies "shall include" budgetary outlays and revenue foregone by governments or their agents" merely illustrates the types of measures that can constitute domestic support. It does not have the meaning ascribed by India of limiting MPS to those measures that involve budgetary outlays or revenue foregone by governments.

44. Furthermore, India presents an equally invalid argument when asserting that the term "both" after the term "include" in paragraph 2 of Annex 3 indicates that domestic support is limited to budgetary outlays and revenue foregone. The term "both" does not have the limiting effect that India is attaching to it. The term "both" is used when referring to "two things, people, or groups previously specified", that is, to emphasise that "the one as well as the other" is covered under a relevant category.[72] Thus, the clause "shall include both" simply means that two examples are being provided. It does not mean that the two elements stated thereafter are the only possible means of providing domestic support. Canada[73], the European Union[74], Japan[75] and the United States[76] also agree that domestic support is not limited to budgetary outlays and revenue foregone.

45. Moreover, Article 6.1 and paragraphs 1 and 8 of Annex 3 of the Agreement on Agriculture confirm that domestic support measures are not limited to budgetary outlays and revenue foregone. Article 6.1, titled "Domestic Support Commitments", states that the "domestic support reduction commitments of each Member […] shall apply to *all* [] *domestic support measures* in favour of agricultural producers" (emphasis added), which means that the scope of application of domestic support commitments is broad and in no manner limited to the subset of measures argued by India. Moreover, nothing in paragraph 1 of Annex 3, which sets out the three different types of domestic support, limits domestic support measures to budgetary outlays and revenue foregone.

46. Nowhere in paragraph 8 of Annex 3 is there any indication that MPS is limited to budgetary outlays and revenue foregone by governments or their agents as alleged by India. In fact, MPS exists when there is an AAP; a production eligible to receive that AAP; and there is a FERP that is lower than the AAP. Guatemala agrees with the panel in *Korea – Various Measures on Beef* that "[m]arket price support as defined in Annex 3 can exist even where there are no budgetary payments".[77] As explained by that panel, this is because "[m]arket price support gauges the effect of a government policy measure on agricultural producers of a basic product rather than the budgetary cost of that

[64] India's closing statement at the first substantive meeting, para. 27-28.
[65] Guatemala's opening statement at the first substantive meeting, paras. 3.7-3.14; Guatemala's closing statement at the first substantive meeting, paras. 2.5-2.9.
[66] Guatemala's opening statement at the first substantive meeting, para. 3.8.
[67] Shorter Oxford Dictionary, 6th Ed., Definition of "include", p. 1353, Exhibit GTM-46.
[68] Panel Report, *China – Publications and Audiovisual Products*, para. 7.294.
[69] Appellate Body Report, *Chile – Price Band System*, paras. 209-210.
[70] Appellate Body Report, *Australia – Apples*, paras. 174-175.
[71] Panel Report, *EC – Bed Linen*, para. 6.156.
[72] Oxford English Dictionary, OED Online, "both, pron., adv., and adj.", Exhibit JE-155.
[73] Canada's oral statement at the first substantive meeting, para. 7.
[74] The European Union's oral statement at the first substantive meeting, para. 4.
[75] Japan's oral statement at the first substantive meeting, para. 5.
[76] The United States' third party submission, para. 22.
[77] Panel Report, *Korea – Various Measures on Beef*, para. 827.

measure borne by government".[78]

47. Therefore, India's argument that the term "both" after the term "include" limits domestic support to budgetary outlays and revenue foregone by government and their agents should be rejected by the Panel.

48. Moreover, India does not explain how its interpretation of paragraphs 2 of Annex 3 can be reconciled with other provisions of the Agreement on Agriculture related to domestic support. For example, Article 6.2 of the Agreement on Agriculture provides that "government measures of assistance, whether direct or indirect" are subject to domestic support reduction commitments. Similarly, paragraph 1(a) of Annex 2 of the Agreement on Agriculture indicates that domestic support may consist of "transfers from consumers". India does not explain how it reconciles its view that all forms of domestic support must necessarily involve budgetary outlays and revenue foregone with the fact that the Agreement on Agriculture recognizes that domestic support can consist of "indirect government measures of assistance" and "transfers from consumers".

2. To resolve the dispute, the Panel need not determine whether the three types of domestic support in paragraph 1 of Annex 3 of the Agreement on Agriculture are "subsidies"

49. India's argument that, under paragraph 2 of Annex 3, MPS can exist only if there are budgetary outlays or revenue foregone is predicated on the notion that the clause "any other subsidy" in paragraph 2 applies to all three types of domestic support listed in paragraph 1 of Annex 3, including MPS. That is, according to India, all three forms of domestic support listed therein constitute "subsidies".[79]

50. As Guatemala explained,[80] an interpretation made pursuant to Article 3.2 of the DSU and Article 31 of the Vienna Convention supports Guatemala's view that "market price support" is not limited to subsidies. Article 31(1) of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*" (emphasis added).

51. With respect to the ordinary meaning of the terms, nothing in paragraphs 1 and 8 of Annex 3, the relevant provisions to ascertain the meaning of MPS, limits MPS to subsidies. Paragraph 1 of Annex 3 provides that domestic support measures include MPS. Paragraph 8 of Annex 3 identifies the constituent elements of MPS and therefore clarifies that MPS exists whenever a Member: (i) sets an AAP; (ii) determines the quantity of production eligible to receive that AAP; and (iii) there is an FERP which is lower than the AAP. The ordinary meaning of these terms has been clarified by previous WTO panels and the Appellate Body.[81]

52. These terms are used in a specific context – the rules on domestic support provided in the Agreement on Agriculture. Article 1(h)(ii) states that the level of domestic support provided during any year of the implementation year and thereafter will be calculated "in accordance with the provisions of this Agreement, including Article 6 […]". The provisions of the Agreement on Agriculture, including Articles 6.1, 6.2, 7.1, 7.2(a), paragraph 1 of Annex 2 and paragraph 13 of Annex 3 of the Agreement on Agriculture, provide that the disciplines on domestic support apply to domestic support "measures", which is a much broader category than just "subsidies". If, as India suggests, the domestic support provisions and reduction commitments were intended to apply only to "subsidies", the drafters would have specified in Article 6.1 that "domestic support reduction commitments of each Member […] shall apply to all [] domestic support *subsidies* in favour of agricultural producers." The other references to measures in the provisions mentioned above would also have been stated differently. The drafters did not do so. They expressly used the term "measures" rather than "subsidies". Thus, as reflected in these provisions of the Agreement on Agriculture, the disciplines on domestic support apply to domestic support "measures" in general, not only to "subsidies", as argued by India.

53. Indeed, India's interpretative approach would make redundant the treaty term "domestic

[78] Ibid.
[79] India's closing statement at the first substantive meeting, paras. 24-25, 28.
[80] Guatemala's opening statement at the first substantive meeting, paras. 3.1-3.18; Guatemala's second written submission, paras. 6-53.
[81] See footnote 43 above.

support" in Articles 1(b) and (h), 3.1, 6.1 – 6.5, 7.1 and 7.2(a), 13(a) and 13(b), 18.3 and 18.4, paragraph 1 of Annex 2, paragraph 5 of Annex 3 and paragraph 1 of Annex 4 of the Agreement on Agriculture. If all three forms of domestic support listed in paragraph 1 of Annex 3 were subsidies, there would have been no need for the drafters of the Agreement on Agriculture to introduce the term "domestic support" in the first place.[82] Equating "domestic support" with "subsidies" would reduce the terms "domestic support" in the Agreement on Agriculture to redundancy or inutility – an interpretative approach that is impermissible under article 3.2 of the DSU and Article 31 of the Vienna Convention.[83]

54. This is also confirmed by paragraph 13 of Annex 3, which provides that "[o]ther non-exempt *measures*" include "input *subsidies and other measures* such as marketing-cost reduction *measures*" (emphasis added). The fact that "other-non-exempt *measures"* includes "input *subsidies*" makes clear that "measures" is a broader term than "subsidies". If the phrase "other non-exempt measures" covered only subsidies, this phrase should have read "[o]ther non-exempt subsidies" and would have included "input subsidies and other subsidies", not "input subsidies and other measures". Thus, domestic support measures may include subsidies but are not limited to them.

55. Moreover, Articles 6.1 and 7.1 of the Agreement on Agriculture, read together with Articles 6.2, 6.5 and Annex 2 provide that all domestic support measures, *unless expressly exempted by the agreement*, are to be measured and included in a Member's AMS.[84] Paragraph 1 of Annex 3 identifies three forms of domestic support measures, one of which is market price support. As explained below in section V.E.3, paragraph 8 of Annex 3 sets out the constitutive elements and the price-gap formula to calculate MPS. None of these provisions limits MPS to subsidies.

56. Guatemala's proposed interpretation is also in line with the object and purpose of the Agreement on Agriculture, which, as noted above, consists of "correcting and preventing restrictions and distortions in world agricultural markets".[85] If one were to accept India's argument that MPS covers only subsidies provided by governments or their agents in the form of budgetary outlays and revenue foregone, it would be easy for WTO Members to circumvent their MPS obligations by requiring private entities to pay AAPs.

57. Therefore, based on the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the Agreement on Agriculture, MPS is not limited to subsidies. Moreover, the third parties do not consider MPS to be a subsidy in the sense of paragraph 2 of Annex 3.[86]

58. Furthermore, based on the syntax of paragraph 1 of Annex 3, there could be different ways of interpreting the phrase "any other subsidy" in paragraph 1, all of which lead to a different conclusion than the one reached by India. For example, one possible interpretation is that the phrase "any other subsidy" in paragraph 1 indicates that some domestic support measures may take the form of "subsidies" but not necessarily all of them.[87] One could also take the view that this phrase refers only to the third category of domestic support listed in paragraph 1 of Annex 3, i.e. other non-exempt policies.[88] Moreover, the phrase "any other subsidy" in paragraph 1 of Annex 3 could also be interpreted more broadly, as referring to the second and the third category of domestic support listed in that provision (i.e., non-exempt direct payments and other non-exempt policies). A 1991 draft version of Annex 3 of the Agreement on Agriculture titled "Domestic Support: The Definition of the AMS" (MTN.GNG/AG/W/1/Add.4, pages 1 and 2) suggests that paragraph 2 of Annex 3 was included in the Agreement on Agriculture under the understanding that only non-exempt direct payments and

[82] See also the European Union's third party submission, para. 43.

[83] Appellate Body Report, *US – Gasoline*, p. 23, citing, *inter alia*, Corfu Channel Case (1949) ICJ Reports, p. 24; Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad) (1994) ICJ Reports, p. 23.

[84] As noted by Guatemala in its first written submission, the domestic support measures exempted from commitments are the "green box" measures described in Annex 2, the "development box" measures described in Article 6.2, and the "blue box" measures described in Article 6.5.

[85] Agreement on Agriculture, third recital of the preamble.

[86] See e.g. Brazil's opening statement at the first substantive meeting, para. 31. See also the European Union's third party submission, paras. 42-60, and the European Union's oral statement at the first substantive meeting, paras. 5-7.

[87] Australia's opening statement at the first substantive meeting, paras. 42-43.

[88] See Brazil's opening statement at the first substantive meeting, para. 31. See also the European Union's third party submission, paras. 42-60, and the European Union's oral statement at the first substantive meeting, paras. 5-7.

other non-exempt policies would be considered as the "subsidies under paragraph 1" of Annex 3.[89]

59. In any event, Guatemala considers that the Panel need not determine whether the three types of domestic support in paragraph 1 of Annex 3 of the Agreement on Agriculture are "subsidies" to resolve this dispute. Even assuming *arguendo* that the three different types of domestic support are "subsidies", as explained above, they are not limited to revenue foregone and budgetary outlays by government or their agents, as argued by India. This is because, the expression "shall include both" in paragraph 2 of Annex 3 does not have the limiting effect that India erroneously attributes to it. This means that MPS, one of the categories of domestic support listed in paragraph 1 of Annex 3, can exist when the government establishes an AAP to be paid by private operators. This is exactly what happens in this case: India is providing MPS by fixing an AAP – i.e. the FRP and the SAPs - and legally requiring certain entities – i.e. sugar mills – to pay it.

3. India erroneously asserts that paragraph 8 of Annex 3 is relevant only for calculating MPS, but not for determining whether a measure qualifies as MPS

60. India argues that the *existence* of MPS and the *calculation* of MPS are two distinct matters.[90] For India, the legal characterization of a measure as MPS is addressed in paragraphs 1 and 2 of Annex 3, whereas the calculation of MPS is addressed in paragraph 8 of Annex 3.[91]

61. India attempts to introduce an artificial distinction between the concepts of *existence* of MPS and *calculation* of MPS. India's claim that paragraph 8 of Annex 3 does not define MPS is undermined by paragraph 1 of Annex 4 ("Domestic Support: Equivalent Measurement of Support"), which provides that MPS is defined in Annex 3. The definition of MPS is found in paragraph 8 of Annex 3 as follows:

> 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.

62. By stipulating the manner in which MPS must be calculated, paragraph 8 of Annex 3 identifies the constituent elements of MPS and, thus, defines the measures that constitute MPS. Accordingly, MPS exists whenever a Member: (i) sets an AAP; (ii) determines the quantity of production eligible to receive that AAP; and (iii) there is a FERP which is lower than the AAP.

63. It is not unusual in the Agreement on Agriculture to find definitions based on the result of applying certain calculations. For example, Article 1(a) of the Agreement on Agriculture defines AMS as the "annual level of support, expressed in monetary terms", which means that AMS is a dynamic concept that may change from year to year, and which is expressed in monetary terms. This may be explained by the fact that the obligations imposed by the Agreement on Agriculture on domestic support are based on reduction commitments for which calculations are relevant.

64. Thus, India's argument that the legal characterization of a measure as MPS is addressed in paragraphs 1 and 2 of Annex 3, while the calculation of MPS is addressed in paragraph 8 of Annex 3, stems from an incorrect reading of Annex 3. It should, therefore, be rejected by the Panel. As established by Guatemala, by stipulating the manner in which MPS must be calculated, paragraph 8 of Annex 3 identifies the constituent elements of MPS and, thus, defines the measures that constitute MPS.

4. India's constituent data and methodology confirm that the FRP and the SAP provide MPS

65. India argues that the constituent data and methodology ("CDM") of India's Schedule is not relevant for the determination of whether the FRP and the SAPs are MPS.[92] Guatemala disagrees.

[89] See Guatemala's second written submission, paras. 37-38.

[90] India's closing statement at the first substantive meeting, paras. 14, 30. India's response to Panel's question 48.

[91] India's closing statement at the first substantive meeting, para. 14.

[92] India's closing statement at the first substantive meeting, para. 37. India's response to Panel's question 48(d).

CDM includes information that is characteristic of and essential for the understanding and calculation of a Member's AMS.[93] Indeed, the fact that India took no issue with calculating MPS for sugarcane based on an AAP paid by producers during 1986-1988 is significant as it confirms that India itself considers that the FRP and the SAPs provide MPS within the meaning of the Agreement on Agriculture.[94]

66. India further argues that "[i]f a Member's Schedule is relied upon to interpret the meaning of market price support (despite the clear provisions of paragraph [sic] 2 and 1 of Annex 3), this will lead to a situation where there will be multiple meanings of the same terminology under the AoA depending upon the Schedule of a Member"[95].

67. Guatemala considers that a Member's CDM provides relevant context to confirm that a measure provides AMS. Considering this information as context would not result in "multiple meanings of the same terminology under the AoA depending upon the Schedule of a Member".

68. If Annex 3 defines a specific term, the CDM of a Member can further elaborate on this definition to confirm that meaning but logically it cannot depart from Annex 3. As noted by the Appellate Body in *EC – Export Subsidies on Sugar*[96], Members are not authorised to include CDM in their Schedule that depart from the definitions of Annex 3. This is supported by the general rule under Article 21 of the Agreement on Agriculture, which states that this Agreement prevails over provisions of the GATT 1994. Thus, given that a Member's CDM is part of the GATT 1994,[97] in the event of a conflict between that Members' CDM and the Agreement on Agriculture, the latter would prevail. Therefore, as part of the GATT 1994, CDM cannot be used to deviate from the text of Annex 3 of the Agreement on Agriculture, and thus, there cannot exist "multiple meanings of the same terminology under the AoA depending upon the Schedule of a Member", as argued by India, and thus, India's argument should be rejected by the Panel.

VI. INDIA'S EXPORT SUBSIDIES FOR SUGAR ARE INCONSISTENT WITH ARTICLES 3.3, 8, 9.1(A) AND (C) OF THE AGREEMENT ON AGRICULTURE, AND ARTICLE 3.1(A) OF THE SCM AGREEMENT

A. Introduction

69. India has adopted measures to incentivise its sugar exports as a way to remove the excess supply of sugar from its domestic market. India's excessive domestic support for sugarcane producers generated a surplus of sugarcane and, consequently, also a surplus of sugar. This has led to yet another problem – a drop in domestic sugar prices. As recognized by Indian authorities, the "excess supply over demand for sugar has created a downward pressure on prices of sugar in the country".[98] To alleviate all these problems, India adopted programmes to provide sugar mills with subsidies conditioned on their compliance with export requirements, the ultimate goal being to allow domestic sugar prices to increase and, thus, to provide liquidity to sugar mills so they can pay sugarcane farmers the high administered prices.

70. India's export subsidies for sugar operate by virtue of various legal instruments and schemes. In 2015, India introduced the "Minimum Indicative Export Quotas" scheme (or MIEQ), which requires the Indian Government to allocate export quotas to each sugar mill in India. The Indian Government requires that sugar mills comply with their MIEQs as a condition to receive subsidies under other schemes, namely the Scheme for Assistance to Sugar Mills, the Buffer Stock Scheme 2018, and the Buffer Stock Scheme 2019, all of which envisage the provision of specified amounts of money to sugar mills. By making these subsidies conditional on compliance with export quotas, India maintains subsidies contingent on export performance.

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[93] Panel Report, *China – Agricultural Producers*, para. 7.144.

[94] G/AG/AGST/IND, pp. 3 and 28.

[95] India's response to Panel's question 48(e).

[96] Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 220-222.

[97] Pursuant to Article 1(a)(ii) of the Agreement on Agriculture, the CDM of a Member as found in the supporting table of that Member were "incorporated by reference in Part IV of the Member's Schedule". In accordance with Article II:7 of the GATT, "Schedules […] are […] an integral part of Part I of [the GATT 1994]". According to Article 3.1 of the Agreement on Agriculture, "the domestic support and export subsidy commitments in Part IV of each Member's Schedule … are hereby made an integral part of GATT 1994".

[98] Commission for Agricultural Costs and Prices ("CACP"), Price Policy for Sugarcane (2019-20 sugar season), August 2018, Exhibit JE-53, p. 2, para. 1.5.

71. In 2019, India continued promoting sugar exports by introducing yet another scheme – the "Maximum Admissible Export Quantity" scheme (or MAEQ). Similar to the other export subsidies just described, the MAEQ operates on the basis of export quotas fixed by the Government for each sugar mill in India. If sugar mills comply with these export quotas, they receive a subsidy in the form of a lump sum of INR 10'448 per metric tonne of sugar exported. The MAEQ Scheme is therefore another programme maintained by India that is contingent on export performance.

B. Operation of India's export subsidies for sugar

72. India provides, through the following schemes, subsidies to sugar mills on the condition that they export certain quantities of sugar each year:

(i) Subsidies provided to sugar mills under the Scheme for Assistance to Sugar mills, which operates in conjunction with export performance requirements under the Minimum Indicative Export Quotas ("MIEQ");

(ii) Subsidies provided to sugar mills under the Scheme for creation and maintenance of buffer stock ("Buffer Stock Scheme 2018"), which operates in conjunction with export performance requirements under the MIEQs;

(iii) Subsidies provided to sugar mills under the Scheme for creation and maintenance of buffer stock ("Buffer Stock Scheme 2019"), which operates in conjunction with export performance requirements under the MIEQs; and

(iv) Subsidies provided to sugar mills under the Maximum Admissible Export Quantity scheme ("MAEQ Scheme 2019").

73. These measures constitute export subsidies within the meaning of Articles 9.1(a) and 9.1(c) of the Agriculture Agreement. Given that India has no export subsidy reduction commitments in its Schedule of Concessions, and consequently no export subsidy entitlements, these export subsidies are inconsistent with India's obligations under Articles 3.3, 8, and 9.1 of the Agreement on Agriculture. Further, India's export subsidies also constitute export subsidies that are prohibited by Article 3.1(a) of the SCM Agreement.

1. Minimum Indicative Export Quotas (MIEQs)

74. Since 2015, India has adopted measures requiring sugar mills to export specific amounts of sugar each year. These requirements have taken the form of minimum indicative export quotas (MIEQs). India first adopted MIEQs for sugar season 2015/2016[99] and has continued doing so for subsequent seasons.[100] Under this scheme, the Indian Government first determines a global amount of sugar that must be exported by all of the sugar mills in the country in a given sugar season. For example, for season 2018/2019, this global amount was 5 million metric tonnes.[101] Thereafter, the Government converts that global export amount into individual allocations of export quotas for each sugar mill in India. These are the so-called "mill-wise allocations", which the Indian Government announces by releasing a list of hundreds of sugar mills in India along with the exact quantity of metric tonnes of sugar that each sugar mill must export in that sugar season.[102]

[99] DFPD Order of 18 September 2015, "Allocation of sugar factory-wise Minimum Indicative Export Quotas (MIEQ) under tradable export scrip schemes" (hereinafter: MIEQ Order for 2015/2016), Exhibit JE-109. This measure was withdrawn through Notice of 8 June 2016 of the Department of Food and Public Distribution on the subject "Withdrawal of order dated 18.09.2015 regarding allocation of Minimum Indicative Export Quota (MIEQ) under tradable export scrip scheme:-regarding", Exhibit GTM-32.

[100] Government of India, Ministry of Consumer Affairs, Food and Public Distribution, Department of Food and Public Distribution, Revised allocation of sugar factory-wise Minimum Indicative Export Quotas (MIEQ) under tradable export scrip scheme – Regarding, 9 May 2018 (hereinafter: MIEQ Order for 2017/2018), Exhibit GTM-33; and DFPD Order of 28 September 2018, "Allocation of sugar factory-wise Minimum Indicative Export Quotas (MIEQ) of sugar for export in sugar season 2018-19 under tradable export scrip schemes" (hereinafter: MIEQ Order for 2018/2019), Exhibit JE-108.

[101] MIEQ Order for 2018/2019, Exhibit JE-108, paragraph 2.

[102] See, for example, DFPD Order of 28 September 2018, "Allocation of sugar factory-wise Minimum Indicative Export Quotas (MIEQ) of sugar for export in sugar season 2018-2019 under tradable export scrip schemes", Exhibit JE-108.

75. The MIEQ Orders for each sugar season are adopted by the DFPD, a governmental agency that is part of the Ministry of Consumer Affairs, Food and Public Distribution.

76. The MIEQ Orders were issued pursuant to Clause 5 of the Sugar (Control) Order 1966, which gives the Central Government the power "by general or special order" to issue "directions" regarding the "maintenance of stocks, storage, sale, grading, marking, weighment, delivery and distribution" of sugar.[103] The various MIEQ instruments therefore qualify as "orders" under domestic Indian law.[104]

2. Scheme for Assistance to Sugar Mills

77. The Scheme for Assistance to Sugar Mills was first introduced by the DFPD on 2 December 2015 "with a view to offset the cost of cane and facilitate timely payment of cane price dues of farmers"[105], and given that "cane price arrears of farmers reached to an alarming level".[106] In 2015, this programme was originally labelled as the "Scheme for extending production subsidy to sugar mills", but was later re-named for seasons 2017/2018 and 2018/2019 to its current name of "Scheme for Assistance to Sugar Mills".

78. Under the Scheme for Assistance to Sugar Mills, the Indian Government provides sugar mills with direct payments that, by law, can be used for the sole purpose of paying cane arrears owed to sugarcane growers.

79. Pursuant to the Scheme for Assistance to Sugar Mills, the Indian Government establishes a fixed monetary amount provided to sugar mills per quintal of sugarcane crushed.[107] For season 2015/2016 the amount of the subsidy was INR 4.5/quintal[108]; for season 2017/2018, it increased to INR 5.50/quintal, and for season 2018/2019[109], it increased further to INR 13.88/quintal.[110]

80. The DFPD Notification establishing the subsidy for 2015/2016 requires compliance with an export performance requirement as follows:

> Those mills which have achieved at least 80% of the targets as per terms and conditions under the Minimum Indicative Export Quota (MIEQ) scheme notified on 18.09.2015 and in case of mills having distillation capacities to produce ethanol have achieved 80% of the targets notified on 16.09.2015 by the Department under the EBP shall be eligible for the above production subsidy.[111]

81. According to this provision, in order to receive the subsidy for season 2015/2016, sugar mills were required to comply with the export requirements adopted by the DFPD in the form of minimum indicative export quotas or MIEQs.

3. Buffer Stock Scheme 2018

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[103] Clause 5 of the Sugar (Control) Order 1966, Exhibit JE-44.

[104] India confirmed this understanding in its response to Panel's Question 31 (answered as Question 30).

[105] Notification No. 20(43)/2015-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 2 December 2015 (hereinafter: Notification establishing the Scheme for extending production subsidy to sugar mills for 2015/2016), Exhibit JE-76, para. 2(i). This measure was withdrawn on 19 May 2016 through Notification No. 20(43)/2015-S.P.-I of 19 May 2016 of the Department of Food and Public Distribution, Exhibit GTM-34.

[106] Press Information Bureau, Government of India, Ministry of Consumer Affairs, Food & Public Distribution; Central Government issues orders for extending assistance to clear the dues of sugarcane farmers, 9 May 2018, Exhibit GTM-35.

[107] To recall, 1 quintal equals 100 kilograms.

[108] Notification establishing the Scheme for extending production subsidy to sugar mills for 2015/2016, Exhibit JE-76, para. 2(i).

[109] Notification No. 1(5)/2018-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 9 May 2018 (hereinafter: Notification establishing the Scheme for Assistance to Sugar Mills for 2017/2018), Exhibit JE-75, para. 3(i).

[110] Notification No. 1(14)/2018-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 5 October 2018 (hereinafter: Notification establishing the Scheme for Assistance to Sugar Mills for 2018/2019), Exhibit JE-74, para. 3(i).

[111] Notification establishing the Scheme for extending production subsidy to sugar mills for 2015/2016, Exhibit JE-76, para. 2(iii)

82. On 15 June 2018, India introduced the "Scheme for the Creation and Maintenance of Buffer Stock", which seeks to reduce the supply of sugar in the domestic market and, consequently, to "stabilize the domestic sugar price" ("Buffer Stock Scheme 2018").[112] Through this voluntary scheme, India seeks to incentivize sugar mills to store a global quantity of 3 million metric tonnes of sugar. This global amount is divided into mill-wise allocations that establish the individual quantities of sugar that each sugar mill is expected to store.[113]

83. The Buffer Stock Scheme 2018 provides participating sugar mills with subsidies related to the carrying costs of maintaining sugar stocks. As this measure also seeks to address the problem of cane arrears, sugar mills must use the amount of the subsidy to pay sugarcane growers the arrears owed. Participating sugar mills undertake to "set apart the quantity allocated as buffer stock and store it in a separate and distinctly identifiable lots and stock within the mill premises".[114]

84. The Buffer Stock Scheme as established on 15 June 2018 and amended on 31 December 2018, requires, as a condition for receiving the buffer stock subsidy, that sugar mills "fully comply with all the orders/directives issued by Department of Food & Public Distribution for compliance during 2018-19 sugar season".[115] As previously established, MIEQ Orders constitute one of the "orders/directives" issued by the DFPD during the 2018/2019 sugar season. This order requires sugar mills to export specific quantities of sugar during that sugar season as a condition for receiving the buffer stock subsidy for season 2018/2019.

4. Buffer Stock Scheme 2019

85. On 31 July 2019, India adopted the "Scheme for Creation and Maintenance of Buffer Stock" ("Buffer Stock Scheme 2019"),[116] which is a continuation of the Buffer Stock Scheme 2018 already described. As will be explained below, under the rules of the Buffer Stock Scheme 2019, the amount of the eligible buffer stock subsidy is also linked to compliance with export requirements under the MIEQ Order for season 2018-2019.

86. As with the previous buffer stock schemes, the Buffer Stock Scheme 2019 provides a subsidy to sugar mills that opt to participate in this scheme by storing specific quantities of sugar allocated by the DFPD. Under the Buffer Stock Scheme 2019, the total quantity of sugar to be stored by all sugar mills is 4 million MT.[117] This represents an increase from the 3 million MT established under the Buffer Stock Scheme 2018.

87. The Buffer Stock Scheme 2019 contains a rule linking the eligible quantity of subsidized buffer stock with compliance by sugar mills with their allocated MIEQs:

> The Central Government shall make mill-wise allocation of buffer stock having regard to the stock held by it. In case a sugar mill has failed to export any quantity up to June, 2019 against the MIEQ issued vide directive dated 28.09.2018 of DFPD, its stock shall be considered after deducting the quantity equivalent to its allocated MIEQ. […] [118]

88. This means that for a sugar mill that, as of June 2019, did not export any of the quantity stated in its MIEQ allocation, its eligible buffer stock will be reduced by deducting the entire quantity of its MIEQ allocation. As the amount of the buffer stock subsidy depends on the amount of the eligible buffer stock, a smaller buffer stock means a lower subsidy. Hence, to avoid having its buffer stock quantity reduced, the sugar mill must export at least some sugar pertaining to its allocated MIEQ for season 2018/2019. The corollary is that export performance under the MIEQ is rewarded by means

[112] Notification No. 1(6)/2018-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 15 June 2018 (hereinafter: Notification establishing the Buffer Stock Scheme 2018), Exhibit JE-78.

[113] Notification establishing the Buffer Stock Scheme 2018, Exhibit JE-78, para. 2.

[114] Ibid.

[115] Notification No. 1(6)/2018-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 31 December 2018, Exhibit JE-112, para. 2.

[116] Notification No. 1(8)/2019-SP-I. of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 31 July 2019 (hereinafter: Notification establishing the Buffer Stock Scheme 2019), Exhibit JE-77.

[117] Notification establishing the Buffer Stock Scheme 2019, Exhibit JE-77, preamble.

[118] Notification establishing the Buffer Stock Scheme 2019, Exhibit JE-77, para. 2.

of a larger buffer stock subsidy under the Buffer Stock Scheme 2019.

5. Maximum Admissible Export Quantity (MAEQ)

89. On 12 September 2019, India introduced a scheme by which sugar mills receive subsidies if they comply with sugar export quotas ("MAEQ Scheme 2019").[119] Consistent with India's prior measures to incentivise exports, the MAEQ Scheme 2019 was introduced "with a view to facilitate export of sugar during the sugar season 2019-20 […] thereby improving the liquidity position of sugar mills enabling them to clear cane prices dues of farmers for sugar season 2019-20".[120]

90. Under the MAEQ Scheme 2019, sugar mills receive fixed lump sums that are ostensibly related to expenses incurred in connection with exportation of sugar:[121]

	Expense	Amount
a	Marketing, including handling, quality, up-gradation, debagging and re-bagging, and other processing costs	INR 4'400/MT
b	Internal transport and freight charges, including loading, unloading and fobbing	INR 3'428/MT
c	Ocean freight against shipment from Indian ports to the ports of destination in foreign countries	INR 2'620/MT
	Total	**INR 10'448/MT**

91. The amount of the subsidy received by sugar mills is calculated as a lump sum per metric tonne of sugar exported. According to the DFPD Notification establishing the MAEQ Scheme 2019, the amount of the subsidy is related to expenses incurred by sugar mills. However, nothing in this instrument requires that the amount of the subsidy be limited to the actual marketing or transport costs actually incurred by sugar mills. The amount of the subsidy is thus calculated simply by multiplying the prescribed lump sum by the metric tonnes of sugar exported by a sugar mill.

92. Furthermore, the MAEQ Scheme 2019 clarifies that "[t]he funds to be provided as assistance to facilitate export is [sic] to be used for payment of cane dues of farmers for the sugar season 2019-20 and cane price arrears of previous sugar seasons".[122] To this end, as with other schemes of India, the subsidy is deposited in bank accounts of sugarcane growers on behalf of sugar mills.[123]

C. India's export subsidies for sugar fall under Article 9.1 of the Agreement on Agriculture.

93. The Scheme for Assistance to Sugar Mills, the Buffer Stock Scheme 2018, and the Buffer Stock Scheme 2019, in conjunction with the MIEQ Orders, as well as the MAEQ Scheme 2019, all result in the provision of subsidies to sugar mills that are contingent on compliance with export performance requirements. These schemes constitute export subsidies for sugar under Articles 9.1(a) and 9.1(c) of the Agreement on Agriculture. As India does not have commitments in its Schedule regarding export subsidies for sugar, it is therefore acting inconsistently with its obligations under Articles 3.3, 8, and 9.1 of the Agreement on Agriculture by providing export subsidies for this product.

[119] Notification No. 1(14)/2019-S.P.-I. of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 12 September 2019 (hereinafter: MAEQ Notification 2019), Exhibit JE-114.
[120] MAEQ Notification 2019, Exhibit JE-114, preamble.
[121] MAEQ Notification 2019, Exhibit JE-114, para. 3.
[122] MAEQ Notification 2019, Exhibit JE-114, paras. 1 and 5(i).
[123] MAEQ Notification 2019, Exhibit JE-114, para. 5(ii).

1. India's sugar export subsidies constitute direct subsidies contingent on export performance under Article 9.1(a) of the Agreement on Agriculture.

94. Article 9.1(a) refers to export subsidies in the form of direct subsidies contingent on export performance that are provided by governments or their agencies to a firm, an industry, producers of an agricultural product, or an association of such producers. The type of export subsidy defined in Article 9.1(a) contains four elements: (i) existence of "direct subsidies, including payments-in-kind"; (ii) provided by "governments or their agencies"; (iii) "to a firm, an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board"; and (iv) which are "contingent on export performance".

95. With respect to the first element of Article 9.1(a), the existence of "direct subsidies", the complaining party must demonstrate the existence of a "subsidy" as a transfer of economic resources from the grantor to the recipient for less than full consideration, that is "direct", i.e. provided in a manner that is straight and immediate.

96. As noted, in the case of the Scheme for Assistance to Sugar Mills, the subsidy was first set at INR 4.5/quintal for season 2015/2016, which then increased to INR 5.50/quintal for season 2017/2018, and increased again to INR 13.88/quintal for season 2018/2019.[124] Under the Buffer Stock Scheme 2018 and the Buffer Stock Scheme 2019, sugar mills receive monies related to the costs of storing the allocated quantities of sugar. Specifically, the subsidies relate to the costs of interest, insurance and storage. Under the MAEQ Scheme 2019, the subsidy consists of a specific lump sum per metric tonne of sugar exported.[125]

97. Under the second element of Article 9.1(a), the subsidy must be provided "by governments or their agencies". In the present case, the four subsidies in question are provided by the DFPD, India's Department of Food and Public Distribution, which is a government agency that belongs to the Ministry of Consumer Affairs, Food and Public Distribution. Moreover, the introductory paragraphs of the different instruments establishing these subsidies indicate that these schemes are being notified by the "Central Government".

98. Concerning the third element of Article 9.1(a), it must be shown that the direct subsidy is provided "to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board". All four of India's subsidies at issue are provided to sugar mills, i.e. production facilities that transform sugarcane into sugar.

99. Finally, as to the fourth element of Article 9.1(a), "contingent on export performance", the contingency on export performance is expressed in the following manner:

- The Scheme for Assistance to Sugar mills establishes, as a condition for receiving the production subsidy, that sugar mills comply with the export requirements under the MIEQ Orders. The DFPD Notifications establishing the production subsidy for 2017/2018 and 2018/2019 also require that sugar mills comply with MIEQ Orders as a condition to receive the production subsidy. As already established, the export requirements under the MIEQ constitute Orders or Directives of the DFPD.[126]

- The Buffer Stock Scheme 2018 also operates in conjunction with MIEQ Orders as the subsidy is provided only to sugar mills that "fully comply with all the orders/directives issued by the Department of Food & Public Distribution for compliance during 2018-19 sugar season".[127]

- The Buffer Stock Scheme 2019 is also linked to MIEQ Orders. As explained, the quantity of sugar stock that may be subsidised can be reduced for sugar mills that fail to export any quantity of their allocated MIEQ.[128]

[124] See above para. 0.
[125] See above para. 0.
[126] See above para. 0.
[127] Notification No. 1(6)/2018-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 31 December 2018, Exhibit JE-112, para. 2.
[128] See above paras. 0-0.

- With respect to the MAEQ Scheme 2019, Guatemala notes that this scheme was introduced "with a view to facilitate export of sugar".[129] Thus, the subsidy is available only to sugar mills that "export at least 50% of [their] MAEQ",[130] and is calculated based on lump sums per metric tonne of exported sugar.

100. In summary, India's subsidies under the Scheme for Assistance to Sugar Mills, the Buffer Stock Scheme 2018, the Buffer Stock Scheme 2019, and the MAEQ Scheme 2019 qualify as export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture because they involve "direct subsidies" that are provided by the Indian Government to sugar mills and are contingent upon export performance.

2. India's sugar export subsidies constitute payments on the export financed by virtue of governmental action under Article 9.1(c) of the Agreement on Agriculture.

101. In addition to constituting export subsidies under Article 9.1(a) of the Agreement on Agriculture, India's subsidies for sugar exports under the Scheme for Assistance to Sugar Mills, the Buffer Stock Scheme 2018, the Buffer Stock Scheme 2019, and the MAEQ Scheme 2019 also fall within Article 9.1(c) as payments on the export of sugar that are financed by virtue of governmental action.

102. A measure constitutes an export subsidy under Article 9.1(c) if it meets the following elements: (i) there must be a "payment"; (ii) the payment must be "on the export"; and (iii) the payment must be "financed by virtue of governmental action, whether or not a charge on the public account is involved".

103. Concerning the first element of Article 9.1(c), the existence of a payment, as explained above, the Scheme for Assistance to Sugar Mills, the Buffer Stock Scheme 2018, the Buffer Stock Scheme 2019, and the MAEQ Scheme 2019 all involve the provision of monies to sugar mills.[131] The provision of monies under these schemes constitutes transfers of economic resources and, thus, "payments" under Article 9.1(c) of the Agreement on Agriculture.

104. India's measures also meet the second element of Article 9.1(c) as they involve payments "on the export". With respect to the Scheme for Assistance to Sugar Mills, the Buffer Stock Scheme 2018, and the Buffer Stock Scheme 2019, eligibility to receive the subsidies or the quantity thereof depend on sugar mills' compliance with the export requirements established in the MIEQ Orders. In the case of the MAEQ Scheme 2019, the subsidies are expressly made available only for sugar mills that exported at least 50% of their allocated MAEQ export quotas and are quantified in terms of metric tonne of exported sugar.

105. Finally, India's measures also meet the third element of Article 9.1(c), as the payments at issue are "financed by virtue of governmental action". The payments under the four schemes in question are financed by the Indian Government pursuant to programmes established by the Indian Government. Under all four schemes, the payments are provided by India's Department of Food and Public Distribution, in accordance with pre-established governmental programmes, namely the Scheme for Assistance to Sugar Mills, the Buffer Stock Scheme 2018, the Buffer Stock Scheme 2019, and the MAEQ Scheme 2019, all of which were implemented through instruments issued by the Department of Food and Public Distribution.

106. The above shows that India's sugar export subsidies under the Scheme for Assistance to Sugar Mills, the Buffer Stock Scheme 2018, the Buffer Stock Scheme 2019, and the MAEQ Scheme 2019 all fall within the scope of Article 9.1(c) as payments on the export financed by virtue of governmental action. Given that India does not have reduction commitments in its Schedule of Concessions concerning export subsidies, by maintaining these measures, India acts inconsistently with its obligations under Articles 3.3, 8 and 9.1 of the Agreement on Agriculture.

[129] MAEQ Notification 2019, Exhibit JE-114, preamble.
[130] MAEQ Notification 2019 Exhibit JE-114, para 2(a).
[131] See above paras. 0-0.

D. India errs in asserting that the complainants must demonstrate an "actual" financial contribution

107. India asserts that, to substantiate a claim concerning export subsidies under Article 9 of the Agreement on Agriculture, the complainants must demonstrate that the government "actually makes a financial contribution".[132] India grounds its proposition in the definition of "subsidy" of Article 1.1(a)(1) of the SCM Agreement, a provision that offers relevant context for construing the meaning of the term "subsidy" under Article 9 of the Agreement on Agriculture.[133] India notes that, pursuant to Article 1.1(a)(1) of the SCM Agreement, a subsidy shall be deemed to exist if "there is a financial contribution".[134] In India's view, "[t]he use of the operative term 'is' in Article 1.1(a)(1) indicates that a subsidy can be said to exist only where the government has *actually* made a 'financial contribution' under the challenged measures".[135]

108. Nothing in the Agreement on Agriculture or even the SCM Agreement, on which India relies as context, supports India's contention. The text of the Agreement on Agriculture contains no indication that export subsidies exist only when actual disbursements are made.

109. The SCM Agreement further contradicts India's point. The Appellate Body has clarified that a subsidy consisting of a "direct transfer of funds" encompasses a "conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient". The Appellate Body has thus clarified that what matters is whether the government makes available financial resources, not whether those financial resources have actually been paid.

110. Similarly, a prior WTO panel found that the challenged measure constituted a direct transfer of funds even though "some disbursements specifically envisaged" under the subsidy programme were yet to be made. India also fails to mention that the definition of "subsidy" under the SCM Agreement includes a "potential transfer of funds", which implies that a subsidy can exist even if the funds have not been actually disbursed. In this connection, a previous panel observed that if a subsidy were deemed to exist only when "funds had actually been effectuated, the Agreement would be rendered totally ineffective and even the typical WTO remedy (i.e. the cessation of the violation) would not be possible".[136]

111. India acknowledges that the complainants have provided "evidence to show that the government has the legal authority to provide a financial contribution under the challenged measures or the government made certain budgetary allocations".

112. Without prejudice to Guatemala's arguments above concerning the correct interpretation of Article 1.1(a)(1)(i) of the SCM Agreement, Guatemala notes that the record in these proceedings already contains evidence showing that the Indian government has made disbursements to sugar mills pursuant to the export subsidy schemes challenged by Guatemala:

- With respect to the Scheme for Assistance to Sugar Mills for seasons 2015-2016 and 2017-2018, India's national budget statements show that India disbursed INR 521 crores and INR 376 crores, respectively.[137]

- With respect to the Buffer Stock Scheme 2018, India disbursed INR 200 crores.[138]

- With respect to the Scheme for Assistance to Sugar Mills for season 2018/2019, one of India's biggest sugar mills received disbursements from the Indian government.[139]

[132] India's first written submission, para. 107.
[133] India's first written submission, para. 105.
[134] India's first written submission, para. 107 (original emphasis).
[135] Ibid.
[136] Panel Report, *Brazil – Aircraft*, para. 7.13.
[137] Notes on Demands for Grants, 2020-2021, Ministry of Consumer Affairs, Food and Public Distribution, Note 10, Exhibit JE-142.
[138] Notes on Demands for Grants, 2020-2021, Ministry of Consumer Affairs, Food and Public Distribution, Note 13, Exhibit JE-142.
[139] Annual Report 2019-20 of Dhampur Sugar Mills Limited, p. 161 (sub-note 1(i) – "Production subsidy from Government", Exhibit JE-149.

113. Thus, although not legally required under the Agreement on Agriculture or the SCM Agreements, the complainants have nevertheless produced evidence of actual disbursements by the Indian government of financial resources to sugar mills under the export subsidy schemes at issue.

E. India incorrectly asserts that the complainants have failed to demonstrate the existence of a "benefit"

114. India further argues that the complainants have failed to demonstrate the existence of a "benefit", and consequently the existence of a "subsidy".[140] India also relies on Appellate Body case law to argue that the complainants "have failed to identify any benchmark or make any comparison with a benchmark in a relevant market to demonstrate the existence of a benefit".[141]

115. India's arguments must be rejected as they are predicated on a flawed understanding of the meaning of "benefit" in respect of the facts of this dispute. India's references to prior Appellate Body findings are misplaced as they were made in relation to measures that consisted of payments-in-kind[142] and purchases of goods by the Government.[143] In both cases, the Appellate Body correctly found that a payment-in-kind and the provision of goods do not *per se* entail a benefit, and thus the determination of the existence of a benefit required a comparison with a market benchmark.

116. However, in the case of India's export subsidies, the measures are neither payments-in-kind nor purchases of goods by the government. Rather, as explained by Guatemala, the monetary amounts provided by India can be described as "grants".[144] In the case of grants, there is no need to make a comparison with a market benchmark in order to determine the existence of a benefit. In contrast to a payment-in-kind or a provision of goods, grants constitute non-reciprocal financial contributions. Thus, as previous panels have found, by receiving a grant, the recipient is "automatically placed in a better position than it would otherwise have been without the grant"[145] because no entity acting pursuant to commercial considerations would make such unremunerated payments.[146]

F. India has failed to demonstrate that the MAEQ Scheme 2019 is justified under Article 9.4 of the Agreement on Agriculture

117. India alleges that the MAEQ Scheme 2019 provides export subsidies that fall within the scope of Articles 9.1(d) and (e) and, therefore, are justified by the special and differential treatment under Article 9.4 of the Agreement on Agriculture.[147] India has further asserted that the subsidies provided under the MAEQ Scheme 2019 "have a direct relationship to the costs normally incurred towards"[148] marketing and transport and that India provides these subsidies "not exceeding the costs incurred towards these expenses".[149]

118. As the party invoking the flexibilities of Article 9.4 and asserting that the MAEQ subsidies fall under Articles 9.1(d) and (e), India bears the burden of substantiating its legal defence and its factual assertions on this issue.[150] India errs in stating that of Article 9.4 of the Agreement on Agriculture as an "autonomous right" because it is different from a "typical exception" or a "defense".[151] As India acknowledges, the language in Article 3.3 of the Agreement on Agriculture simply serves to "cross-refer[]" to Article 9.4.[152] A cross-reference does not have the effect of creating an autonomous right, as alleged by India. It simply means that, when applying the disciplines of Article 3.3, one must consider the provision of Article 9.4.

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[140] India's first written submission, para. 110.
[141] India's first written submission, para. 112.
[142] Appellate Body Report*, Canada – Dairy*, para. 87.
[143] Appellate Body Report*, Canada – Feed-in Tariff Program*, para. 5.128.
[144] Guatemala's first written submission, para. 314.
[145] Panel Report, *EC and certain Member States – Large Civil Aircraft*, para. 7.1501. See also Guatemala's first written submission, paras. 254 and 315.
[146] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.1229.
[147] India's first written submission, paras. 114-223.
[148] India's opening statement at the first substantive meeting, para. 15.
[149] India's comments of 27 April 2020, para. 55.
[150] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[151] India's opening statement at the second substantive meeting, para. 81.
[152] Ibid.

119. India has failed to discharge its burden because it has not demonstrated that the MAEQ subsidies are limited qualitatively and quantitively to the actual costs incurred for marketing and transport of exported sugar.[153]

120. First, concerning the lack of qualitative connection to costs incurred for marketing and transport of sugar exports, the design and structure of the MAEQ Scheme 2019 do not support India's claim that these subsidies are provided to allow sugar mills to offset these costs. The MAEQ Notification 2019, which is the Notification issued by India's Department of Food and Public Distribution that enacted the MAEQ Scheme 2019, clearly states that the purpose of this subsidy is to allow sugar mills to pay cane arrears.[154] The very text of the MAEQ Notification 2019 thus contradicts India's assertions about the purpose of these subsidies. The MAEQ Notification 2019 openly states that sugar mills must use these subsidies to pay cane arrears.

121. In fact, the MAEQ Notification 2019 even contains mechanisms to ensure that the subsidies are used for no other purpose than to pay cane arrears. To this end, the MAEQ Notification 2019 instructs sugar mills to first open a bank account for cane farmers' use. Thereafter, "[t]he bank shall credit the amount of assistance to the farmers' accounts on behalf of the mills against cane dues payable".[155]

122. Second, even assuming *arguendo* that the MAEQ subsidies are provided to offset costs of marketing and transport of sugar exports, the design and structure of the MAEQ Notification 2019 reveal several reasons why these subsidies are not quantitively limited to the actual costs that sugar mills incur for marketing and transport of sugar exports.

123. As noted, the subsidy under the MAEQ Notification 2019 takes the form of a lump sum provided to each sugar mill. The actual costs incurred by the sugar mills are not factored into the calculation of this lump sum. The lump sum is calculated simply by multiplying the number of exported sugar tonnes by the flat rate stated in the MAEQ Notification 2019.[156]

124. The flat rate, by definition, fails to consider the number of circumstances that can result in varying costs incurred by sugar mills when exporting sugar from India. These different circumstances, as Guatemala will explain, include the fact that: (i) sugar mills in India make sales on an ex-mill basis or on a Free on Board ("FOB") basis, such that sugar mills incur no costs at all for internal transport and/or international transport; and that (ii) sugar mills located in different parts of India logically incur different transport costs due to their different distances from the mill to the port of exportation. Guatemala will address these two issues in turn.

125. Additionally, the MAEQ Scheme 2019 provides subsidies for internal transport using a flat rate of INR 3'428 per tonne of sugar exported for all sugar mills in India. Yet, because sugar mills are located in different parts of the country, the cost of internal transport will vary greatly from one mill to another given the different distances from their premises to the port of shipment. It follows that, by applying a flat rate applicable to any sugar mill *regardless* of its actual distance between its premises and the port of shipment, the design and structure of the MAEQ Scheme 2019 make it impossible to ensure that the subsidy for internal transport is limited to the actual costs in every export shipment.

126. The export sales by sugar mills in the State of Maharashtra serve as a concrete example of the problem just described. In season 2019/2020, sugar mills located in Maharashtra accounted for 42% of all sugar exports of India, making it India's second largest exporting State in that season.[157] A significant majority of Maharashtra's exports were shipped from the ports of Jawaharlal Nehru Port (JNPT) and Jaigad.[158] The average distances from 11 selected exporting sugar mills in Maharashtra to JNPT and Jaigad ports are 431 km and 308 km, respectively.[159] For those 11 mills, the average freight rail costs to the ports of JNPT and Jaigad are INR 489 and INR 817, respectively.[160] These

[153] See Guatemala's response to Panel's question 42; Guatemala's opening statement at the first substantive meeting, paras. 4.21-4.26; Guatemala's closing statement at the first substantive meeting, paras. 3.9-3.13; and Guatemala's response to Panel's question 56(a).
[154] MAEQ Notification 2019, Exhibit JE-114, para. 1.
[155] MAEQ Notification 2019, Exhibit JE-114, para. 5(ii).
[156] Guatemala's first written submission, paras. 236-238.
[157] Green Pool Commodity Specialists, Consultancy Report, February 2021, Table 1, Exhibit JE-165.
[158] Green Pool Commodity Specialists, Consultancy Report, February 2021, Table 1, Exhibit JE-165.
[159] Green Pool Commodity Specialists, Consultancy Report, February 2021, Table 3, Exhibit JE-165.
[160] Green Pool Commodity Specialists, Consultancy Report, February 2021, Table 4, Exhibit JE-165.

costs of internal transport are significantly lower than the flat rate of INR 3'428 provided under the MAEQ Scheme 2019.

127. India's communications to certain entities inquiring about transport costs for food grains, and as well as the response by India's Ministry of Railways[161], cannot possibly indicate the actual transport costs for sugar in India. The complainants have submitted evidence showing that, contrary to India's statements, the rates indicated India's Ministry of Railways for good grains are not applicable to transport of sugar.[162]

128. India's exercise of inquiring about this information is therefore inadequate to establish the actual transport costs of sugar, let alone to show that these actual transport costs do not exceed the actual costs of the transport services described in Articles 9.1(d) and (e) of the Agreement on Agriculture.

129. For these reasons, Guatemala submits that India has failed to prove that the subsidies under the MAEQ Scheme 2019 fall within the scope of Articles 9.1(d) and (e) of the Agreement on Agriculture. Consequently, India cannot avail itself of the flexibilities afforded under Article 9.4 of the Agreement on Agriculture.

VII. INDIA'S EXPORT SUBSIDIES ARE INCONSISTENT WITH ARTICLE 3.1(A) OF THE SCM AGREEMENT

130. Guatemala claims that India's export subsidies are also inconsistent with Article 3.1(a) of the SCM Agreement, which prohibits "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance […]". India maintains subsidies contingent on export performance despite the fact that its Schedule of Concessions contains no entitlements for these subsidies.

131. Guatemala's claim under Article 3.1(a) of the SCM Agreement is largely based on the same elements already substantiated in Guatemala's claim under Article 9.1(a) of the Agreement on Agriculture given the similarity of both legal standards.[163]

132. In response to Guatemala's claim under the SCM Agreement, India has advanced one single distinct argument – that the disciplines of Article 3 of the SCM do not apply to India at the moment because India enjoys an additional transition period which allegedly ends in 2025.[164] India's contention must fail as it is based on a flawed interpretation of Article 27 of the SCM Agreement.

133. India's argument is completely without legal foundation. Its contention is evidently not supported by the text of Article 27.2 of the SCM Agreement. Article 27.2(a) states that the prohibition of Article 3.1(a) relating to export subsidies does not apply to "developing country Members referred to in Annex VII". In contrast to Article 27.2(b), no additional transition period is stipulated in Article 27.2(a) that would apply once a developing country graduates from Annex VII.

134. The only transition period stated in Article 27.2 is found in Article 27.2(b), which allowed developing countries in general (i.e. those not listed in Annex VII) to benefit from the non-application of Article 3.1(a) during a period of eight years which counted from 1995, the date of entry into force of the WTO Agreement, and was originally intended to expire in 2003. Certain developing countries sought and received extensions of this original eight-year period, something already envisaged under Article 27.4. In 2007, the General Council adopted a Decision clarifying that the final transition period under Article 27.2(b) would expire on 31 December 2015, with no possibility of any further extension.[165] Thus, even if India attempted to somehow rely on the eight-year period of Article 27.2(b), the 2007 Decision of the General Council confirmed that this period expired on 31 December 2015. Consequently, there is nothing in Article 27.2 that could support India's claim to

[161] Cost Estimates of movement of food grains to Domestic & International market, Ministry of Railways, Exhibit IND-23.

[162] Government of India, Ministry of Railways, Rates Circular No. 19 of 2018, 31 October 2018, Exhibit JE-175, Annexure II. See also Guatemala's comment to India's response to Panel's question 82.

[163] See Guatemala's first written submission, paras. 310-312.

[164] India's first written submission, para. 127.

[165] Decision of 27 July 2007 – Article 27.4 of the Agreement on Subsidies and Countervailing Measures, WT/L/691, circulated on 31 July 2007, sixth recital and paragraph 1(d).

an additional transitional period for graduating Annex VII countries.

135. As explained by Guatemala in its opening statement at the first substantive meeting,[166] India's proposed interpretation of Article 27.2 is legally untenable. In fact, it was outright rejected by the panel in *India – Export Related Measures* (DS541) after examining the same argument that India is advancing in this dispute.[167]

136. In conclusion, India's contention that it benefits from an additional eight-year phase-out period that would end in 2025 must be rejected by this Panel. India became subject to the disciplines under Article 3.1(a) of the SCM Agreement upon its graduation from Annex VII in 2017. Guatemala's view is widely supported by Canada[168], the European Union[169], Japan[170], and the United States.[171]

VIII. GUATEMALA'S REQUEST FOR LEGAL FINDINGS AND RECOMMENDATIONS

137. For the reasons stated in this submission, given that India's Schedule of Concessions does not contain domestic support commitments,[172] Guatemala requests the Panel to find that India acts inconsistently with Article 7.2(b) of the Agreement on Agriculture by providing domestic support in excess of the 10% *de minimis* level. In the alternative, if the Panel were to find that India has scheduled commitments of "zero" or "nil", Guatemala requests the Panel to find that India is providing domestic support in excess of its "zero" or "nil" commitment in violation of Articles 3.2 and 6.3 of the Agreement on Agriculture.[173]

138. Guatemala also requests the Panel to find that India's subsidies under the Scheme for Assistance to Sugar Mills, the Buffer Stock Scheme 2018, the Buffer Stock Scheme 2019, with operate in conjunction with the MIEQ Orders, and the subsidies under MAEQ Scheme 2019 constitute export subsidies under Articles 9.1(a) and (c) of the Agreement on Agriculture, for which India did not undertake reduction commitments, and thus give rise to a violation of India's obligations under Articles 3.3, 8, and 9.1 of the Agreement on Agriculture; and constitute prohibited export subsidies within the meaning of Article 3.1(a) of the SCM Agreement.

139. Pursuant to Article 19.1 of the DSU, Guatemala requests that the Panel recommend that India bring its measures into conformity with its obligations under the Agreement on Agriculture and the SCM Agreement. With respect to the measures that are prohibited subsidies under Article 3.1(a) of the SCM Agreement, Guatemala requests that the Panel, in accordance with Article 4.7 of the SCM Agreement, recommend that India withdraw its measures without delay within a time-period specified by the Panel.

[166] Guatemala's opening statement at the first substantive meeting, paras. 4.29-4.36.
[167] Panel Report, *India – Export Related Measures*, para. 7.69.
[168] Canada's oral statement at the first substantive meeting, paras. 10-11.
[169] The European Union's oral statement at the first substantive meeting, para. 22.
[170] Japan's oral statement at the first substantive meeting, paras. 10-12.
[171] The United States' third party submission, paras. 55-70.
[172] Guatemala's first written submission, paras. 109-111; see also India's response to Panel's question 46.
[173] Guatemala's responses to Panel's questions 15(a) and 23(a).

ANNEX B-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

A. EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION & OPENING STATEMENT AT THE FIRST VIRTUAL MEETING

I. INTRODUCTION

1. The Government of India has adopted certain policy tools that are aimed to address the livelihood concerns of India's largely low-income, resource-poor sugarcane farmers. Australia, Brazil and Guatemala have challenged some of India's Central and State-level measures concerning sugar and sugarcane in these disputes.

2. India in these submissions will demonstrate that the complainants failed to make a *prima facie* case with respect to their claims. India also made requests for preliminary ruling to exclude certain measures that fall outside the terms of reference of the Panel.

II. FACTUAL BACKGROUND AND THE MEASURES AT ISSUE

3. The principal legislation which forms the basis of the policy tools with respect to sugarcane and sugar is the Essential Commodities Act, 1955 ("**ECA**"). Pursuant to the ECA, the Central Government has passed the Sugar (Control) Order, 1966 and the Sugarcane (Control) Order in 1966.

4. It is also relevant to note that the Central Government does not procure or purchase any quantities of sugar or sugarcane under the ECA or under any other law.

A. Central level measures

(i) Fair and Remunerative Price

5. In 2009, the Central Government amended the Sugarcane (Control) Order, 1966 to introduce the process of prescribing the Fair and Remunerative Price ("**FRP**") for sugarcane. Section 3 (1) of the amended Sugarcane (Control) Order specifies that the "price of sugarcane is to be paid by producers of sugar or their agents for the sugarcane purchased by them". In other words, sugar mills purchase sugarcane from sugarcane producers/farmers at the FRP. There is no obligation on the Central Government to either procure the sugarcane or pay the FRP to sugarcane farmers.

6. The Central Government through the Department of Food and Public Distribution ("**DFPD**") announces the FRP through official communications for each sugar season that commences from the month of October in any given year and runs up-to the month of September in the immediately following year. The FRP amount may vary depending upon the recovery rate of the sugarcane.

(ii) Central level measures other than FRP

7. Other than FRP there are certain other Central level measures identified by the complainants that are implemented by the Central Government. These measures may enable the government to make payments to sugar mills/ sugarcane farmers:

(a) Scheme for extending production subsidy to sugar mills for the 2015–16 season

(b) Schemes for Assistance to Sugar Mills for the 2017–18 and 2018–19 sugar seasons

(c) Scheme for Extending Financial Assistance to Sugar Undertakings for the 2013–14 sugar season

(d) Scheme for Extending Financial Assistance to Sugar Undertakings for the 2014–15 and 2018-19 sugar season

(e) Scheme for Creation and Maintenance of Buffer Stock of 2018–19 and 2019 – 20 (collectively, "**Buffer Stock Schemes**")

(f) Raw Sugar Export Incentive Scheme for the 2014–15 sugar season

(g) Scheme for defraying expenditure towards internal transport, freight, handling and other charges to facilitate export" for the 2018–19 sugar season

(h) Scheme for providing assistance to sugar mills for expenses on marketing costs including handling, upgrading and other processing costs and costs of international and internal transport and freight charges on export of sugar" for the 2019–20 sugar season ("**MAEQ Scheme**")

B. State level measures

8. Certain States have enacted laws for the regulation, purchase and supply of sugarcane. Some States under such laws set an amount that may be different from FRP for the purchase of sugarcane by sugar mills. Such prices by the relevant States are referred to as the State Advised Price ("**SAP**"). Further, some States may have implemented other measures for sugar mills/ sugarcane farmers.

(i) SAP

9. Certain States may have prescribed SAP by virtue of the powers granted under the relevant State legislations. However, currently, the States that set an SAP are (i) Haryana, (ii) Punjab, (iii) Uttarakhand and (iv) Uttar Pradesh. Many other States, in particular Andhra Pradesh, Bihar and Tamil Nadu no longer set an SAP. Therefore, alleged SAP for the States of Andhra Pradesh, Bihar and Tamil Nadu do not fall within the Panel's terms of reference

(ii) State level measures other than SAP

10. Other than the SAP, some states in India have implemented certain other programs to allow the provision of support to sugar mills/ sugarcane farmers. However, it is relevant to note that many of these measures were no longer in force as of the date of the establishment of the Panel.

III. REQUEST FOR PRELIMINARY RULING

11. India submits that a number of measures that the complainants have raised or referred to in their respective requests for establishment of the Panel or in their respective first written submissions fall outside the scope of the Panel's terms of reference.

A. Legal standard with respect to Panel's terms of reference under Article 6.2 and Article 7.1 of the DSU

12. The Appellate Body in *EC – Chicken Cuts* has found that the "specific measures at issue" under Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("**DSU**") covers only those measures that were "in existence" when a panel was established and noted as follows: "The term "specific measures at issue" in Article 6.2 suggests that, as a general rule, *the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel*."[1]

13. Therefore, measures that are no longer in existence at the time of the establishment of a panel do not fall within its terms of reference. As a corollary, measures enacted after the establishment of a panel are also not within its terms of reference.

B. Measures that fall outside the scope of the terms of reference of the Panel

[1] Appellate Body Report, *EC – Chicken Cuts*, para. 115.

(i) Measures that have expired prior to the establishment of the Panel

14. All three complainants have referred to or challenged several measures pertaining to sugar seasons 2014-15 through 2019-20.

15. India submits that the FRP set for the sugar seasons 2014-15 and 2015-16 has expired and was not in force at the time of the establishment of the Panel. Accordingly, the measures notifying the FRP for the sugar seasons 2014-15 and 2015-16 fall outside the scope of the Panel's terms of reference and the Panel has no jurisdictional basis to make legal findings with respect to FRP for the said sugar seasons.

16. Additionally, India also submits that the following Central-level and State-level measures did not exist at the time of the establishment of the Panel:

(a) Scheme for extending production subsidy to sugar mills for the 2015–16 season;

(b) Scheme for Extending Soft Loan to Sugar Mills for the 2014–15 sugar season;

(c) Raw Sugar Export Incentive Scheme for the 2014–15 sugar season;

(d) SAP with respect to State of Andhra Pradesh including for the sugar seasons 2015-16 and 2016-17;

(e) SAP with respect to the State of Haryana for the sugar seasons 2014-15, 2015-16, 2017-18;

(f) SAP with respect to the State of Punjab for the sugar seasons 2014-15, 2015-16, 2017-18;

(g) SAP with respect to the State of Tamil Nadu for the sugar seasons 2014-15, 2015-16, 2017-18; and

(h) SAP with respect to the State of Uttar Pradesh for the sugar season 2015-16.

17. Further, the complainants have also challenged purchase tax remission schemes of certain States, namely, Andhra Pradesh, Bihar, Maharashtra, Telangana, and Uttar Pradesh. India submits that with the introduction of the Central Government Goods and Service Tax ("**GST"**) in 2017, the said purchase tax remission has been discontinued with effect from 14 November 2018.

(ii) Measures that were enacted after the establishment of the Panel.

18. All three complainants have challenged the MAEQ Scheme. The MAEQ Scheme was introduced by the Government of India on 12 September 2019 for the sugar season 2019-20 (i.e. 1st October 2019 to 30th September 2020). The Panel was established on 15 August 2019. Therefore, the MAEQ came into existence much after the establishment of this Panel.

IV. RESPONSE TO CLAIMS ON DOMESTIC SUPPORT UNDER THE AOA.

19. The complainants have alleged that India's FRP measures at the federal level and SAP measures in certain States constitute "market price support" under paragraph 8 of Annex 3 of the Agreement on Agriculture ("**AoA**") and that India's domestic support for sugarcane is above the applicable *de minimis* level i.e. 10% of the India's total value of sugarcane production in the relevant year.

20. Australia and Brazil have argued that India has acted inconsistently with Article 7.2 of the AoA or, in the alternative with Articles 3.2 and 6.3 of the AoA. Guatemala, on the other hand, has argued that India has acted inconsistently with its obligations under Article 3.2, 6.3 and 7.2(b) of the AoA.

A. The complainants have failed to demonstrate that India has acted inconsistently with its obligations under Articles 3.2 and 6.3 and/or Article 7.2 of the AoA.

21. India submits that the complainants have failed to demonstrate that India has acted inconsistently with its obligations under Article 3.2 and 6.3 and/or Article 7.2 of the AoA. Specifically, India submits that the complainants have not met their burden of demonstrating that the Fair and Remunerative Price/State Advised Price measures qualify as a "market price support" under Annex 3 of the AoA.

22. Annex 3, or any other provision of the AoA, does not define the phrases "market price support" or "non-exempt direct payments". That being said, paragraph 2 offers guidance on what may constitute as a market price support. Paragraph 2 delineates the scope of subsidies under paragraph 1 of Annex 3. It states that the subsidies include both budgetary outlays and revenue foregone by governments or their agents. Therefore, a market price support could be by a government or its agent only if the government or its agent pays the administered price and procures the specified product at such administered price.

23. India submits that the sugar mills that purchase sugarcane from the farmers at the Fair and Remunerative Price/State Advised Price are neither government nor its agents as they do not perform any function of a "governmental character".

B. The prior panel reports relied on by the complainants are either inapplicable or do not support the views of the complainants.

24. The complainants rely on certain previous panel reports to argue that FRP/SAP qualifies as an applied administered price ("**AAP**") under paragraph 8 of Annex 3 of the AoA.

25. India submits that there is no rule of binding precedent or *stare decisis* within the WTO dispute settlement process. Without prejudice, India submits that the panel reports relied on by the complainants do not support their claims as these reports concerned substantially different facts and none of these reports articulated the meaning of "market price support" or that "market price support" includes payments by private actors.

C. The complainants have not met their burden to demonstrate that the support through India's other domestic support measures is in excess of the de minimis limit.

26. The complainants have alleged that India maintains certain other domestic support measures in addition to the FRP/SAP measures which, when taken into account, further increase the product specific AMS with respect to sugarcane. These additional measures have been classified into two categories (i) measures aimed to maintain the price gap between the AAP and Fixed External Reference Price ("**FERP**"); and (ii) other non-exempt direct payments/ subsidies.

27. Without prejudice to India's views on characterisation of these measures, the complainants have not provided any evidence/calculation as to how the total support under these other alleged domestic support measures (i.e. other than the alleged support under FRP/SAP measures) exceeds the *de minimis* limit applicable to India.

28. In view of the above, India submits that the complainants have failed to make a *prima facie* case that India's alleged product-specific domestic support is in excess of the *de minimis* limit under the AoA.

V. RESPONSE TO CLAIMS ON EXPORT SUBSIDIES UNDER THE AOA

29. India notes that all three complainants in the present disputes have alleged that India provides subsidies to its sugar producers that are contingent upon export performance and therefore, not authorized by the AoA. The measures identified by the complainants in this regard are as follows:

(a) Funds provided through the following schemes:

(i) Scheme for extending production subsidy to sugar mills for the 2015–16 season;

Scheme for Assistance to Sugar Mills for the 2017–18 sugar season; and

(ii) Scheme for Assistance to Sugar Mills for the 2018–19 sugar season.

(iii) (Collectively, "**Schemes for Assistance to Sugar Mills**")

(b) Reimbursement of carrying costs of maintaining Buffer Stocks provided through the Buffer Stock Schemes

(c) Funds towards marketing and transport costs provided under the MAEQ Scheme.

A. Legal standard under the AOA

30. The AoA does not define the term "subsidy". However, it defines the phrase "export subsidies" as referring to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of the AoA. Given the express definition of the term "subsidy" under the SCM Agreement, it may provide relevant context in construing the meaning of the term "export subsidies" under the AoA. Hence, the twin requirements of: (i) existence of financial contribution and (ii) conferment of benefit thereby are relevant for existence of a "subsidy" in context of Article 9 of the AoA – which refers to "export subsidies".

31. In addition to the above definition, footnote 1 of the SCM Agreement, appended to Article 1, also excludes certain types of revenue foregone by the government from the definition of a "subsidy". Footnote 1 which refers to Annexes I through III of the SCM Agreement essentially stipulates the "excess remissions principle". It describes 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 of the GATT 1994 and Annexes I to III of the SCM Agreement. 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; or

(b) the remission of such duties or taxes in amounts not in excess of those which have accrued.

32. Since the concept of export subsidy under the SCM Agreement offers relevant context for understanding the term "export subsidy" under Article 9 of the AoA, the interpretation of "export subsidy" under Article 9 of the AoA cannot be any different. The existence of an export subsidy under Article 9 of the AoA must therefore, take into account that the exemption/remission of duties and taxes levied on like products destined for domestic consumption cannot be considered export subsidies, to the extent that they do not constitute an "excess remission". India submits that such an interpretation of the term export subsidy under the AoA does not lead to any conflict between the AoA and SCM Agreement under Article 9 of the AoA.

33. Turning to the specific disciplines governing export subsidies under the AoA, Article 9.1 lists out those export subsidies that are subject to reduction commitments under the AoA. However, it is important to note that Article 9.4 of the AoA provides a specific allowance to developing country Members that permits them to provide marketing cost subsidies listed under Article 9.1(d) and internal transport subsidies listed Article 9.1(e) in connection with exportation, during the "implementation period".

34. India therefore submits that, as a developing country Member, it is entitled to grant export subsidies for marketing and transportation costs in accordance with Article 9.4 of the AoA.

B. The complainants have failed to make a prima facie case that India has acted inconsistently with its obligations under Articles 3.3, 8, 9.1(a), 9.1(c) or Article 10, as the case may be.

(i) The complainants have failed to demonstrate that a subsidy exists within the meaning of the AoA.

35. First, India submits that the complainants have not met their burden to demonstrate "making" of a financial contribution such that they can show there *is* a financial contribution. Article 1.1(a)(1) provides that "a subsidy shall be deemed to exist if [inter alia] there *is* a financial contribution by a government . . ." The use of the operative term "is" in Article 1.1(a)(1) indicates that a subsidy can be said to "exist" only where the government has *actually* made a "financial contribution" under the challenged measures.

36. At most, the complainants have provided certain evidence to show that the government had the legal authority to provide a financial contribution under the challenged measures or the government made certain budgetary allocations. However, the complainants have not presented any evidence of the extent to which, if any, a government entity actually makes a financial contribution pursuant to those measures. Accordingly, the complainants have failed to demonstrate that a subsidy exists within the meaning of the AoA.

37. Second, India submits that since the complainants have failed to demonstrate the existence of a financial contribution, they have also necessarily failed to demonstrate existence of a benefit. The complainants' claim on existence of a benefit is conclusionary and they have failed to identify any benchmark or make any comparison with a benchmark in a relevant market to demonstrate the existence of a benefit. Rather, the complainants, with respect to all the challenged measures have merely assumed that a benefit exists.

38. In view of the above, India submits that the complainants have failed to demonstrate the existence of a subsidy under Article 9 of the AoA and consequently, have also failed to demonstrate a breach of Articles 3.3, 8 and/ or 10 of the AoA.

C. The MAEQ Scheme is consistent with India's obligations under the AoA and SCM Agreement

39. Assuming *arguendo* that the Panel finds the MAEQ Scheme to fall within its terms of reference, India submits that for the reasons stated above, the complainants have not met their burden to demonstrate the existence of a subsidy.

40. Without prejudice to the above, India submits that the MAEQ Scheme falls within the scope of Articles 9.1(d) and 9.1(e) of the AoA and is therefore, permitted in accordance with Article 9.4 of AoA.

41. Paragraph 3(I)(a) of the MAEQ Scheme envisages payment to sugar mills at a specified rate towards expenses incurred for the marketing including handling, quality up-gradation, debagging, re-bagging and other processing costs of sugar. The costs listed herein fall squarely within the meaning of Article 9.1(d) as specific costs incurred *as a part of* and *during* the process of selling sugar on the export market. In the same vein, paragraph 3(I)(c) of the MAEQ Scheme envisages payment to sugar mills at a specified rate towards ocean freight incurred against shipment from Indian ports to destination countries. Ocean freight is an expense that falls squarely within the meaning of "international transport and freight" mentioned in article 9.1(d). Paragraph 3(I)(c) of the MAEQ Scheme envisages payments at specified rates towards internal transport and freight charges including loading, unloading, and fobbing. This again, falls squarely within the ambit of Article 9.1(e).

42. While the complainants, particularly Brazil and Australia, have claimed that the alleged export subsidies in these disputes do not fall within Articles 9.1(d) and (e)of the AoA, they have failed to offer any particularised analysis as to why the MAEQ Scheme would not be covered under Article 9.1(d) and (e) of the AoA. India submits that nothing in the text of Article 9.1(d) and (e) sets out the manner in which a Member State may grant subsidies under the heads as specified in these provisions. The complainants have failed to provide any argument/ evidence to substantiate their claim that MAEQ Scheme does not fall under Article 9.1(d) and 9.1(e).

D. The DFIA Scheme does not constitute a subsidy under the AoA.

43. India has explained in subsequent paragraphs that the DFIA Scheme is excluded from the scope of subsidy under the SCM Agreement and accordingly, it does not qualify as a subsidy under the AoA as well.

VI. RESPONSE TO CLAIMS UNDER THE SCM AGREEMENT

A. Article 3 of the SCM Agreement is not applicable to India

44. At the outset, India submits that Article 3 of the SCM Agreement is not applicable to it. Article 27 of the SCM Agreement recognises the special & differential treatment accorded to developing country Members. India submits that Article 27.2(b) of the SCM Agreement continues to apply to members who graduate from Annex VII(b).

45. Article 27.2(b) provides a phase-out period of 8 years to the developing country Members for prohibited export subsidies under Article 3. India submits that the eight-year phase-out period in Article 27.2(b) of the SCM Agreement is to be granted to all Annex VII developing country Members when they graduate from Annex VII. Such an interpretation is required by the general rules of treaty interpretation provided in Article 31 of the Vienna Convention of the Law of Treaties ("**VCLT**") and is supported by the supplementary means of interpretation provided in Article 32 of the VCLT.

46. The principle of effectiveness has been read into Article 31(1) of the VCLT and has been recognised as a cardinal rule of treaty interpretation by all international adjudicatory bodies, including the WTO Appellate Body. Specifically, a strictly literal interpretation of Article 27.2(b), in isolation of the scheme of organization of Article 27.2, Annex VII(b), and other provisions of Article 27, deprives the Annex VII countries of the special treatment envisaged under Part VII of the SCM Agreement and negates the mandatory language of Annex VII (b), which requires that a developing country Member that graduates from Annex VII "shall be subject" to the provisions which are applicable to other developing country Members "according to" paragraph 2(b) of Article 27, i.e. an eight year phase out period. An interpretation of Article 27.2 (b) that counts the period of eight years from the entry into force of the SCM Agreement would lead to a situation wherein developing country Members listed in Annex VII are not subject to the same *treatment*.

47. India submits that its interpretation is further supported by Articles 27.4 and 27.5 of the SCM Agreement and that these provisions must be read harmoniously to give full effect to Article 27 of the SCM Agreement. Article 27.4 of the SCM Agreement accounts for the possibility of different phase out periods applying to those graduating from Annex VII at different times. This is further supported by Article 27.5 which provides Annex VII countries with an eight-year phase-out period for export subsidies where a product has reached export competitiveness.

48. Further, Article 32 of the VCLT provides for recourse to "[s]upplementary means of interpretation". Accordingly, India submits that due regard must be given to the negotiating history of Article 27 of the SCM Agreement to arrive at an interpretation that is both in line with the object and purpose of the SCM Agreement as well as the principle of effectiveness. India's interpretation is supported by the Draft Texts formulated by the Chairman of the Negotiating Group for the SCM Agreement, which demonstrate that the purpose of Article 27 was to allow developing country Members variable periods for phasing out export subsidies that were in accordance with their specific levels of development.

49. In its submissions, Australia has relied on the panel report in *India – Export Related Measures*[2] to argue that Article 3 of the SCM Agreement applies to India. However, India submits that the interpretation of Article 27 developed by the panel in that dispute is not binding and has no legal effect on the present disputes.

[2] Panel Report, *India – Export Related Measures*, para. 7.74.

B. Without prejudice, Australia and Guatemala have failed to demonstrate that a subsidy exists within the meaning of the SCM Agreement.

50. Without prejudice to the above, India submits that Australia and Guatemala have failed to meet their burden to demonstrate the existence of a subsidy within the meaning of the SCM Agreement. Article 1.1 of the SCM Agreement sets out two elements that are required to exist for a measure to be deemed a subsidy i.e. there *is* a financial contribution by a government, or any public body and a benefit thereby is conferred, which have not been demonstrated in the present case.

51. Additionally, with respect to the MAEQ Scheme, India has demonstrated that the measure is expressly authorized under the AoA. Accordingly, in view of Article 21.1 of the AoA and Article 3 of the SCM Agreement, the MAEQ Scheme is outside the scope of the SCM Agreement.

52. Furthermore, the DFIA Scheme does not constitute a subsidy within the meaning of the SCM Agreement. Footnote 1 to the SCM Agreement sets out those measures that are not deemed to be a subsidy i.e., where there is a remission of duties or taxes on exported products that are not in excess of those accrued. Footnote 1 refers to Annexes I through III of the SCM Agreement. Annex I of the SCM Agreement provides an illustrative list of export subsidies. Footnote 1 to the SCM Agreement must be read with paragraphs (g), (h) and (i) of Annex I.

53. Therefore, any remission or drawback of import charges on inputs (that are consumed in the production of the exported product) not in excess of those levied on imported inputs is not an export subsidy.

54. The DFIA Scheme provides drawback of import charges (i.e. exemption from payment of basic customs duty) levied on imported input (i.e. raw sugar) that is used in production of exported products (i.e. white sugar). Such drawback is not in excess of the basic customs duty levied on imports of raw sugar and accordingly, the DFIA Scheme does not constitute a subsidy under the SCM Agreement. For the same reasons, it also does not constitute an export subsidy under the AoA.

VII. RESPONSE TO CLAIMS ON NOTIFICATION REQUIREMENTS UNDER THE GATT 1994, THE AOA AND THE SCM AGREEMENT

55. In addition to the substantive claims set out above, Australia has separately also raised claims with respect to India's notification obligations under various WTO Agreements.

56. As India has explained above, the complainants have failed to establish that the measures at issue in these disputes meet the definition of a "subsidy" as understood under the SCM Agreement as well as the AoA. Consequently, the complainants have also failed to establish that India was obligated to notify these measures pursuant to Article 25 of the SCM Agreement and Article XVI of the GATT.

57. With respect to the AoA, India submits that Article 18 of the AoA does not place any obligations regarding notifications on Members but rather vests the Committee on Agriculture with the discretion to determine the conduct of the review process including the frequency and form of notifications. In this regard, India notes that with respect to export subsidies the Committee on Agriculture uses hortatory language in recommending notifications by Members.

58. Similarly, as India has explained above, the complainants have failed to establish that the measures at issue in these disputes meet the definition of domestic support as understood under the AoA. Nonetheless India notes that the Committee on Agriculture again, uses hortatory language making clear that the notification obligations are suggestive in nature and not a binding obligation.

59. In light of the above, India submits that it has not violated any notification requirements under the AoA, SCM Agreement or the GATT 1994.

B. EXECUTIVE SUMMARY OF INDIA's RESPONSE TO THE COMPLAINANTS' COMMENTS ON ITS REQUEST FOR A PRELIMINARY RULING

I. Introduction

60. India, in its request for a preliminary ruling, requested that the Panel find certain measures to be outside the scope of its terms of reference because these measures were not in existence at the time of the establishment of the Panel as specified under Article 6.2 and 7.1 of the DSU.

61. India notes that the complainants submitted separate comments on India's request for a preliminary ruling. In terms of paragraph 3(4) of the Working Procedures of the Panel ("**Working Procedures**"), India chose to present a single response to the comments submitted by the complainants dated 1 April 2020.

A. Measure versus legal instrument

62. The complainants have sought to create an artificial distinction between a "measure" and a "legal instrument". This artificial distinction is not only incorrect but also attempts to extricate a measure from the relevant legal instrument when the two are inextricable.

63. Article 6.2 read with Article 7.1 of the DSU which govern the terms of reference of a panel do not make any distinction between a measure and a legal instrument. Prior panel reports and the Appellate Body reports have also used references to measures and legal provisions/ instruments interchangeably.

64. Without prejudice to the above, assuming *arguendo*, that a measure is distinct from a legal instrument, a measure does not have an independent existence in absence of the underlying legal instrument, and certainly not in the facts of the present disputes. If the measure does not in itself exist without the legal instrument, the measure cannot be said to be in existence once the underlying legal instrument expires.

B. Legal standard with respect to Panel's terms of reference under Article 6.2 and Article 7.1 of the DSU

65. India reiterates its position with respect to the legal standard under Articles 6.2 and 7.1 of the DSU as it has specified in its first written submission.

66. In *EC – Selected Customs Matters*[3], the Appellate Body identified two circumstances under which a measure that was not in existence at the time of the establishment of a panel may be included within its terms of reference. India will demonstrate that the complainants have failed to establish that the measures India seeks to exclude from the terms of reference of the Panel fall within such circumstances.

(i) Measures that have expired prior to the establishment of the Panel

(a) FRP for the sugar seasons 2014-15 and 2015-16 as well as SAP for certain states.

(b) Scheme for extending production subsidy to sugar mills for the 2015–16 sugar season.

(c) Scheme for soft loan for the 2014 -15 sugar season

(d) Raw Sugar Export Incentive Scheme for the 2014–15 sugar season.

67. India disagrees with the complainants' characterization of the above measures as simply an *instrument*. As India has submitted earlier, there is no distinction between a measure and a legal instrument.

68. India submits that each of these measures were applicable for a particular sugar season and the relevant period of such sugar season has already lapsed and that none of the complainants

[3] Appellate Body Report, *EC – Selected Customs Matters*, para. 184.

have demonstrated the above measures were in existence at the time of establishment of the Panel or continue to be in effect impairing the benefits of the complainants under a covered agreement. The legislative provisions under which these measures are issued are merely enabling statutes/ laws and their existence cannot be the basis to argue that the identified measure in itself is in force. In any event, the complainants' issue is not with these legislative provisions that India has in place; rather the complainants allege that the amount of product-specific domestic support provided by India is above the *de minimis* level applicable to India under the AoA.

(e) Purchase Tax Remission Schemes Andhra Pradesh, Bihar, Maharashtra, Telangana, and Uttar Pradesh.

69. The complainants have not questioned that the Purchase Tax Remission Schemes have been subsumed by the GST. The fact that these measures have been subsumed by the GST is itself evidence of these measures having lapsed.

70. With respect to the Andhra Pradesh Purchase Tax Scheme, the only evidence that the complainants adduce is the State of Andhra Pradesh's Budget Estimates which reveal that no amounts were budgeted for this scheme in the Revised Estimate for 2017-18 and for the Budget Estimate 2018-19. Therefore, the evidence adduced by the complainants confirms that the Andhra Pradesh Purchase Tax Scheme had expired at the time of the establishment of the Panel and that no payments were possible thereafter.

(ii) Measures that were enacted after the establishment of the Panel.

(a) *The MAEQ Scheme does not fall within the scope of successor instruments or amendments to instruments, providing for export subsidies for sugarcane or sugar.*

71. The MAEQ scheme, does not *amend* any measure identified in the complainants' panel requests. Furthermore, it is also not a "successor" of any of the measures listed in the complainants' panel requests, as the complainants allege. Merely because the MAEQ has chronologically been enacted after certain measures as identified in the complainant's panel requests, the same does not *ipso facto* designate it as an "amendment" or "successor" thereof, particularly because it is not of the same essence as such other measures.

(b) The MAEQ Scheme is not of the "same essence" as measures identified in the complainants' panel requests.

72. The MAEQ Scheme is a separate and distinct measure from those identified by the complainants in their requests for establishment of a panel. The MAEQ Scheme is distinct from these measures on at the very least three accounts: (i) the nature of assistance provided; (ii) eligibility criteria for obtaining assistance; and (iii) the amount of assistance provided and the methodology to determine such amount.

73. The Schemes for Assistance to Sugar Mills and the Buffer Stock Schemes provide assistance based on the amount of cane crushed and costs of maintaining buffer stocks, respectively. While the MAEQ Scheme has been introduced specifically with the view of providing WTO-consistent payments to offset transport and marketing costs incurred by sugar mills carrying out the export of sugar. Furthermore, eligibility requirements under all these schemes differ greatly. Lastly, the amount of assistance provided and the methodology to determine such amount under the MAEQ Scheme varies greatly from those under the schemes identified by the complainants in their requests for establishment of a Panel.

(c) Inclusion of the MAEQ Scheme within the Panel's terms of reference is not necessary to secure a positive solution to the dispute.

74. India considers that the inclusion of the MAEQ Scheme within the Panel's terms of reference is neither necessary nor warranted for the purposes of securing a positive solution to the dispute. Assuming any of the measures alleged to constitute export subsidies in the present dispute are however found to be inconsistent with the covered agreements, measures taken thereafter that share some similar characteristics may be appropriately addressed during the stage of compliance.

C. EXECUTIVE SUMMARY OF INDIA's SUBMISSIONS ON NOMINATION/ APPOINTMENT OF THE CHAIRPERSON TO THE MPIA

75. On 09 June 2020, the Chairperson of the Panel, Mr. Thomas Cottier issued a communication to the parties to the dispute citing the Code of Conduct on Rules and Procedures Governing the Settlement of Disputes, disclosing his nomination by Switzerland to serve as an arbitrator under the Multi Party Interim Appeal Arbitration Arrangement ("**MPIA**"). Mr. Cottier invited the parties to raise any questions in the context of his participation in the MPIA arbitrator selection process and register their views, if any.

76. As India is not a party to the MPIA, it sought to receive certain clarifications on the MPIA arbitrator selection process by its letter dated 18 June 2020. In the said communication, India also invited the complainants (who are parties to the MPIA) to offer responses to the questions. India did not receive a response from the complainants.

77. On 28 August 2020, India once again requested clarifications from the complainants. Based on the responses provided by the complainants on 15 September 2020 and assurances provided by the chairperson through various letters, India communicated on 30 September 2020 that it did not take issue with Mr. Cottier's function as chairperson of the Panel despite his nomination, participation in the selection process, and subsequent appointment as an MPIA arbitrator.

D. EXECUTIVE SUMMARY OF INDIA's SUBMISSIONS ON THE CONDUCT OF A VIRTUAL MEETING

78. On 02 October 2020, the Panel communicated to the parties that in light of the continuing health risks caused by the COVID-19 outbreak and the restrictive immigration measures taken by Switzerland and other countries in response thereto, it appeared unlikely to the Panel that it would be able to hold face-to-face meetings in the near future, with all the parties and the third parties physically present at the WTO premises. The Panel then proposed two options for conducting the first substantive meeting, i.e. either conducting two substantive meetings in a hybrid format (i.e. partially through video conferencing a) or a single substantive meeting in a possible hybrid format.

79. India disagrees with the proposals of the Panel. While the DSU allows panels a certain margin of discretion, it does not permit panels to unilaterally alter fundamental aspects of the dispute settlement procedures, in the absence of the agreement of the parties to the dispute. A right to an oral hearing in physical presence of the parties and the Panelists is a fundamental due process right which cannot be truncated by the Panel unless the parties to the present disputes agree.

80. Further, India considers that the conduct of a hearing through video conferencing does not effectively take into account the geographical and technological disparities and limitations of all the participants in the present disputes. The present disputes concern various measures that are implemented by several different States in India necessitating the participation of, as well as coordination with, several State Government representatives and officials scattered across the country. In the event that video conferencing is adopted, the varied distribution of delegates across the country, each with varied infrastructural, institutional and technological support, would not permit a uniform and meaningful level of engagement from all participants. These geographical and logistical difficulties would significantly impair India's ability, as a developing country respondent, to prepare and present its case. Further there is no way to guarantee the confidentiality of the proceedings in such a format.

81. Accordingly, video conferencing can in no manner substitute a substantive meeting which requires physical presence of the parties and the Panelists. India emphasises that the objective of prompt settlement of disputes contained in article 3.3 of the DSU cannot be interpreted so as to compromise the due process rights guaranteed to all parties, which in the present case would be irrevocably undermined if the opportunity for a physical substantive meeting in the presence of all parties is denied.

E. EXECUTIVE SUMMARY OF INDIA's RESPONSES TO THE PANEL'S QUESTIONS PRIOR TO THE FIRST VIRTUAL MEETING

RESPONSE TO PANEL QUESTION 15

82. Articles 3.2 and 6.3 of the AoA apply to Members that have undertaken commitments under Section I of Part IV of their Schedules. Article 7.2(b) of the AoA applies to Members that have no Total AMS commitments in Part IV of their Schedule. Therefore, where there exists no Total AMS commitment (i.e. a Member has not undertaken any commitment), Article 7.2(b) of the AoA would be the appropriate framework to determine such Member's compliance with domestic support obligations. India submits that a finding under Article 3.2 and 6.3 of the AoA is not necessary in the event, the Panel concludes that India has acted inconsistently with Article 7.2(b) of the AoA.

RESPONSE TO PANEL QUESTION 18 (a)

83. The term "subsidy" under paragraph 1 of Annex 3 includes "market price support". This is evident from the phrase "each basic agricultural product receiving market price support, non-exempt direct payments, *or any other* subsidy not exempted from the reduction commitment". The usage of the phrase "any other" before subsidy supports the view that market price support is also a subsidy.

RESPONSE TO PANEL QUESTION 18 (c)

84. The second sentence of paragraph 8 of Annex 3 to the AoA stipulates that any budgetary payment (other than the payment towards AAP) to maintain the gap between the AAP and FERP shall not be included in calculation of AMS. These budgetary payments may be towards costs of buying-in or storage. The second sentence does not elucidate when a market price support may be said to exist within the meaning of Annex 3 of the AoA.

RESPONSE TO PANEL QUESTION 35

85. Articles 9.1(d) and (e) of the AoA do not restrict a Member with respect to the manner in which any payments are made for the purposes as identified in these provisions. To the extent that the payments made are not in excess of the costs incurred, there is no requirement that the payments be equal to the costs incurred or be provided as a reimbursement.

86. The complainants speculate that the amount of the subsidy *may* not correspond to the actual expenses on transportation, freight and marketing without adducing any evidence to support their statement. If the complainants consider these payments to be in excess of the costs incurred, they should have adduced relevant evidence. In absence of evidence, the statements by the complainants are mere speculation and conjecture.

RESPONSE TO PANEL QUESTION 37

87. To the extent that Article 9.1 (a) of the AoA may be argued to include revenue foregone as a direct subsidy, the same must also be necessarily informed by the scope of the term revenue foregone which excludes certain types of revenue foregone, namely remission of duties and taxes on exported products not in excess of those accrued from the scope of the term subsidy. India therefore submits that to the extent that the Panel considers Article 9.1 (a) of the AoA to include revenue foregone, the same cannot include the remission of duties or taxes, which are not in excess of those levied or accrued.

F. EXECUTIVE SUMMARY OF INDIA's RESPONSES TO THE PANEL'S QUESTIONS FOLLOWING THE FIRST VIRTUAL MEETING

RESPONSE TO PANEL QUESTION 47

88. In India's view, "buying-in" costs refer to costs associated with the procurement of the product concerned (other than the AAP) incurred or paid by a government. These are not to be included in the AMS calculation.

RESPONSE TO PANEL QUESTION 48 (a)

89. The second sentence of paragraph 8 of Annex 3 has no bearing on India's arguments that a market price support only exists where a government or its agent pays the AAP and procures the product. The second sentence of paragraph 8 only seeks to rightfully exclude certain payments made by a government towards costs associated with implementing an AAP, from the AMS calculation. The second sentence offers two examples of such costs i.e. costs associated with buying-in or storage.

RESPONSE TO PANEL QUESTION 48 (b)

90. Paragraph 8 in no way clarifies when a market price support can be said to exist within the meaning of Annex 3. In particular, this also does not clarify who must pay the AAP. This issue is addressed under paragraph 2 read with paragraph 1 of Annex 3. India's arguments, in its prior submissions, are not concerned with the methodology provided in paragraph 8 of Annex 3. The issue of calculation of market price support and the methodology for such calculation will arise only after determining that a market price support exists. The complainants have not demonstrated the existence of a market price support in these disputes.

RESPONSE TO PANEL QUESTION 48 (c)

91. A Member's Schedule may not be relevant in defining "market price support". The issue that the Panel needs to address is whether a "market price support" can be said to exist if a government or its agents do not purchase a concerned product from the agricultural producers and pay or promise to pay a price for the product. This issue is addressed under paragraph 2 read with paragraph 1 of Annex 3 of the AoA.

RESPONSE TO PANEL QUESTION 52

92. While the definition of subsidy under the SCM Agreement may provide relevant context to construe the meaning of "export subsidies" under Article 9 read with Article 1(e), this does not mean that the definition of "subsidy" under the SCM Agreement is interchangeable with the usage of the term "subsidy" under the AoA in all contexts. The scope and purpose of both these agreements are different, and a governmental action that may qualify as a "subsidy" under the SCM Agreement may not necessarily always qualify as subsidy under the AoA. Further, measures that do not qualify as an "export subsidy" under the SCM Agreement cannot be qualified as an "export subsidy" under Article 9 of the AoA

RESPONSE TO PANEL QUESTION 58

93. The DFIA Scheme provides drawback of import charges (i.e. exemption from payment of basic customs duty) levied on imported input (i.e. raw sugar) that is used in production of exported products (i.e. white sugar). Such drawback is not in excess of the basic customs duty levied on imports of raw sugar, and accordingly, the DFIA Scheme does not constitute a subsidy under the SCM Agreement.

94. The duty-free imported input, i.e. raw sugar, is physically incorporated in exported products, i.e. white sugar and falls under the scope of footnote 61 of Annex II and also footnote 1 of the SCM agreement.

G. EXECUTIVE SUMMARY OF INDIA'S SECOND WRITTEN SUBMISSION

I. Response to Claims on Domestic Support

A. Response to the claims on domestic support

(i) Market price support is a subsidy which does not include private expenditures.

95. The complainants have failed to demonstrate that the alleged domestic support measures i.e. FRP and SAP measures constitute market price support under Annex 3 of the AoA. Contrary

to the complainants' assertions, the text, context as well as object and purpose of the AoA do not support the complainants' views.

96. Paragraph 1 of Annex 3 identifies two specific forms of domestic support (i.e. "market price support" and "non-exempt direct payments") which are then followed by a general phrase "or any other subsidy . . .". The phrase "or any other subsidy" only means that in addition to the two subsidies expressly identified in paragraph 1, i.e. market price support and non-exempt direct payments, other subsidies not exempted from reduction commitments shall also be included in the AMS calculation.

97. Since the phrases "market price support" and "non-exempt direct payments" under paragraph 1 are followed by the phrase "or any other subsidy . . .", it clearly implies that "market price support" or "non-exempt direct payments" are of the same kind or nature as "any other subsidy . . ." Therefore, market price support is a subsidy under paragraph 1 of Annex 3.

98. Paragraph 2 of Annex 3 delineates the scope of subsidy. Specifically, it does not include measure involving private expenditures. Paragraph 2 identifies the givers of the subsidies. The phrase "by governments or their agents" limits the categories of givers to: (i) governments; or (ii) their agents. Therefore, any measure falling within the scope of the term "include" can only be in the nature of governmental expenditure. Paragraph 2 of Annex 3 does not include private expenditures. Unlike the provisions of Article 9.1(c) of the AoA which pertains to payments financed by virtue of governmental action, whether or not a charge on the public account is involved, paragraph 2 of Annex 3 limits subsidies that include both budgetary outlays and revenue foregone by governments or their agents. The usage of the phrases "by virtue of governmental action" and "whether or not a charge on the public account is involved" in one of the provisions of the AoA, and the omission of such wide language in another provision clearly establishes that paragraph 2 of Annex 3 does not include private expenditures.

99. Since FRP/ SAP measures do not involve government expenditures, they do not qualify as subsides and therefore, consequently they do not constitute market price support under Annex 3 of the AoA.

(ii) Response to the complainants' arguments on ordinary meaning, context, object and purpose of the AoA, second sentence of paragraph 8 of Annex 3 and India's supporting tables.

100. Contrary to the complainants' assertions, the text, context as well as object and purpose of the AoA do not support the complainants' views. Article 6 alone is not determinative of what is disciplined under the AoA. Article 6 read with paragraph 1 and paragraph 2 of Annex 3 identifies the scope of domestic support that goes into the calculation of AMS. Paragraph 2, which uses the phrase "[s]ubsidies under paragraph 1", by its plain reading is linked to paragraph 1. Therefore, Brazil's ostensible "ordinary meaning" approach, without taking into account the significance of paragraph 2 of Annex 3, is incomplete and thus incorrect.

101. Guatemala's interpretation of the term "include" ignores the import of the term "both" immediately following the term "include". Even if the term "include" were to be interpreted overlooking the term "both" (which will be erroneous), an unlisted type of subsidy must have a "commonality" with those specifically listed i.e. budgetary outlays and revenue foregone. Since budgetary outlays and revenue foregone relate to government expenditures or public accounts, any other measure falling within the scope of the term "include" must also have the characteristics of governmental expenditure or expense from a public account.

102. The second sentence of paragraph 8 of Annex 3 only seeks to exclude certain budgetary payments from the calculation of AMS and does not undermine India's views on paragraph 2 of Annex 3. All that the second sentence of paragraph 8 seeks to do is exclude certain budgetary payments that are made to maintain the gap between the AAP and the FERP i.e. implement the market price support architecture. The second sentence of paragraph 8 also provides certain illustrations of such budgetary payments such as costs towards "buying-in" or "storage". The second sentence of paragraph 8 rightfully excludes such payments made by a government towards the additional costs from the calculation of the AMS. The exclusion of

such costs for "buying-in" or "storage" from the AMS calculation has no bearing on India's arguments that a market price support only exists where a government or its agent pays the AAP and procures the product.

103. A Member's Schedule is not relevant in defining "market price support". The question as to when a market price support can be said to exist within the meaning of Annex 3 must be determined in the light of the specific provisions of the AoA. As India has stated above, market price support is a subsidy under paragraph 1 of Annex 3 and paragraph 2 of Annex 3 clearly sets out what subsidies under paragraph 1 comprise.

B. Response to the claims on export subsidy under the AoA and the SCM Agreement

(i) Article 3 of the SCM Agreement does not apply to India.

104. India reiterates that Article 3 of the SCM Agreement is not applicable to it for the reasons stated in its First Written Submission. India emphasizes that the interpretation of Article 27 developed by the panel in *India – Export Related Measures* is not binding and has no legal effect on the present disputes. The panel report in *India – Export Related Measures* has not been adopted, and is in fact, under appeal before the Appellate Body. The specific issue of the panel's interpretation of Article 27 of the SCM Agreement is also under appeal. Therefore, reliance on this panel report is inconsequential.

(ii) Actual transfers of funds are required for a subsidy to exist under the AoA and SCM Agreement.

105. In context of the AoA, Article 9.1(a) refers to "subsidies" which requires both (i) a financial contribution and (ii) conferment of a benefit. Indeed, a "benefit" does not exist in the abstract but must be received and enjoyed by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. In the case of grants (which are what have been alleged to exist by the complainants in the present disputes), an intended beneficiary or recipient could not have "in fact received the grants" unless the grants are actually transferred to such intended beneficiary or recipient. Since benefit cannot exist in abstract and a beneficiary must receive something (i.e., grants), a subsidy (receipt of a benefit being an integral part of a subsidy) cannot exist unless there is an actual transfer of funds.

106. Turning to the SCM Agreement, the complainants do not engage with the text of the provisions of Article 1.1(a)(1) i.e. "there is a financial contribution . . ." and thus fail to respond to India's arguments set out in its First Written Submission.

107. Instead, the complainants' sole argument is based on the phrase "potential direct transfer of funds" under Article 1.1(a)(1)(i) of the SCM Agreement and the observations in a few panel and Appellate Body reports.

108. The complainants' attempt to equate "potential transfer of direct funds" under Article 1 of the SCM Agreement with "direct transfer funds" is wholly misplaced. They conflate two distinct concepts. Article 1.1(a)(1)(i) of the SCM Agreement identifies two forms of governmental practice: (i) one that involves direct transfer of funds (e.g. grants, loans, and equity infusion); and (ii) the other that involves potential direct transfer of funds (e.g. loan guarantees). The two are not the same. The second category, by the plain text of the provision, is a financial contribution in itself. For example, if a government guarantees a loan, this in itself is a financial contribution. The creditor need not default, and the guarantor need not fulfil the obligations of the guarantee by paying off the loan to qualify as a "financial contribution". Article 1.1(a)(1)(i) identifies the act of guaranteeing (which may involve a transfer of funds in the future and hence, potential direct transfer of funds) as a financial contribution. This is different from the cases involving "direct transfer of funds".

109. Indeed, there cannot be a "transfer" unless the funds are actually transferred to the recipient. The term "transfer" means "move, take or convey from one place, person, situation, time of occurrence etc., to another"; "transmit"; "give or hand over from one to another"; "convey or make over (title, right, or property) by deed or legal process". Meanings that are relevant in

the context of Article 1.1(a)(1)(i) are "convey from one person to another", "transmit", or "give or hand over from one to another". Therefore, "a direct transfer of funds", by the ordinary meaning of the term "transfer" requires transmission of funds or giving or handing over of funds from a giver to a recipient.

110. None of the complainants have alleged that India's alleged export subsidy measures constitute a "potential direct transfer of funds", rather the complainants argue that the challenged measures are a "direct transfer of funds" in the form of grants. In fact, Guatemala even goes as far as to state that a "grant" is understood as a transaction in which "money or money's worth is given to a recipient…", thereby implying that a transfer is in fact, effectuated.

111. Therefore, to the extent that evidence has not been placed before this Panel with respect to actual disbursement of funds with respect to a challenged measure, it can be concluded that the complainants have failed to prove that there is a financial contribution with respect to that measure.

(iii) The complainants have not demonstrated that the challenged measures grant a benefit to sugar mills.

112. The complainants have failed to demonstrate the second element of existence of a subsidy i.e., that a benefit is conferred. The complainants, on one hand, claim that India's sugar and sugarcane market is heavily distorted; and, on the other, also argue that a benefit is automatically conferred on the sugar mills in the very same market which they claim to be distorted. Both these claims cannot be true at the same time. The complainants' claim that India's sugar and sugarcane market is heavily distorted requires them to identify an undistorted market separate from the market in which the transaction between the government and sugar mills is executed. It also requires that they then demonstrate that the sugar mills in the allegedly distorted market are better-off or receive a competitive advantage compared to what they would have received had the transaction between the government and the sugar mills occurred in such undistorted market. The complainants have not done so.

113. The complainants' arguments also ignore the cost of availing such alleged financial contribution. The complainants claim that the prices of sugarcane (i.e., raw material for sugar) is exorbitantly high in India. By their own claim, it is evident that the cost of production of sugar for the sugar mills is very high making them uncompetitive in the export market. The sugar mills undertake "loss-making transactions" in the export market to receive the alleged financial contribution from the government. In such a case, a benefit cannot be automatically deduced as claimed by the complainants without taking into account the cost to the sugar mills. Therefore, the complainants have failed to demonstrate the existence of a benefit.

(iv) The DFIA scheme does not constitute a subsidy under the AoA and the SCM Agreement.

114. India does not agree with Australia's conclusion which is based on an incorrect understanding of the requirements of footnote 1 read with Annex 1 (i) of the SCM Agreement. While the DFIA Scheme may provide remission of import charges on a post-export basis, such remission is nevertheless provided commensurate to inputs already consumed in exported products. In other words, an exporter is only entitled to claim an exemption on import duty for future imports of raw sugar to the extent of the raw sugar that was in fact consumed in the production of exported white sugar. Further, there exists a verification mechanism to ensure that only the specific inputs actually consumed in the export product are allowed duty free import under DFIA. Thus, the DFIA scheme provides a remission of import charges already paid in respect of inputs consumed in the production of exported products in the form of duty-free import of future raw sugar. Nothing in the text of footnote 1 or paragraph (i) of Annex 1 of the SCM Agreement requires that remissions on import duty cannot be granted on a post-export basis.

H. EXECUTIVE SUMMARY OF THE OPENING STATEMENT IN THE SECOND VIRTUAL MEETING

115. For the most part, the complainants raise common flawed arguments in their second written submissions except for a few variances and some limited new, but equally flawed arguments.

116. The so-called negotiating history documents relied by the complainants make an upfront disclosure: (i) these documents were prepared by the Chairman pursuant to his own responsibility; (ii) the documents are not exhaustive; and (iii) they are without prejudice to participants' positions on these or other issues which may also need to be considered further. These disclosures are revealing of the relevance that the Panel may accord to the cited negotiating history documents relied upon by the complainants.

117. In any event, the cited negotiating history documents neither support the complainants' views on paragraphs 1 and 2 of Annex 3, nor do they dislodge India's reading of these paragraphs. Paragraphs 5 and 6 of the Chairman's Note are analogous to paragraphs 10 and 13 of Annex 3 respectively and not to paragraph 2 of Annex 3. Indeed, under paragraph 10 and 13, under certain circumstances one may use budgetary outlays (which includes revenue foregone) to measure/ calculate the subsidy in question. Paragraphs 5 and 6 of the Chairman's Note do not say anything more in this respect. India has not disputed this. Paragraphs 5 and 6 of the Chairman's Note do not state that paragraph 2 of Annex 3 does not apply to market price support or that market price support is not a subsidy under paragraph 1.

118. Brazil's reading of the phrase "[S]ubject to the provisions of Article 6" in paragraph 1 of Annex 3 is flawed. The phrase "[S]ubject to the provisions of Article 6" only means that the AMS calculation must exclude those items expressly exempted under Article 6. It does not mean that there are no other implied or express exclusions in Annex 3. Nor does it diminish the plain meaning of paragraph 1 which excludes measures that are not subsidies within the meaning of paragraph 2 of Annex 3.

119. Brazil selectively places emphasis on the word "any" and again commits the same error of reading provisions in an isolated fashion. Article 7.2(a) cannot be read in a manner to ignore the clear and unambiguous text of paragraphs 1 and 2 of Annex 3. Indeed, Article 7.2(a) itself also recognises that measures may be exempt from reduction commitments by reason of any other provision of the AoA. Paragraphs 1 and 2 of Annex 3 are provisions of the AoA which do not include the FRP and SAP measures that involve private expenditures.

120. With respect to the claims on MAEQ Scheme, the complainants have not discharged their burden of proof of demonstrating the affirmative of their claims.

121. The complainants' claims with respect to MAEQ Scheme is based on Article 3.3 read with Article 9.1 of the AoA. Article 3.3 of the AoA reads as follows:

> "Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule." (Emphasis supplied)

122. Article 3.3 expressly cross-refers to Article 9.4 of the AoA. Article 9.4 allows developing country Members to adopt measures that, subject to certain conditions, may be inconsistent with Article 3.3 read with Article 9.1 of the AoA during a transition phase i.e., the implementation period. This is similar to the relationship between Articles 2.2 and 5.7 of the SPS Agreement that the Appellate Body examined. Article 9.4 is also a special and differential treatment provision designed to address particular needs and conditions of developing country Members in line with the objectives of the AoA. Article 9.4 is critical to enable the developing country Members to have an equitable share in the benefits of trade liberalisation, development and economic growth. Article 9.4 is, therefore, an autonomous right, and not a typical "exception" or "defense" such as Article XX of the GATT 1994.[4] Contrary to what the complainants seem to argue, India has not invoked a defense or exception.

123. Therefore, the complainants bore the burden to demonstrate that the MAEQ Scheme is inconsistent with Article 9.4. They did not do so in their first written submission. Paragraph

[4] Appellate Body Report, *EC - Hormones*, para. 104.

3(1) of the Working Procedures required the parties to submit their first written submission containing facts of the case and their arguments before the first substantive meeting. Indeed, Paragraph 3(1) of the Working Procedures required the complainants to set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. Guatemala did not make any mention of Article 9.4 in its first written submission. Australia made a cryptic statement that its "claims in this dispute do not concern export subsidies of these [Article 9.4] kinds". Brazil simply stated that it "does not consider that the exemptions provided by Article 9.4 are relevant in this dispute". The cryptic statements by Australia and Brazil fell far below the standard of elaboration containing an explicit articulation[5] of its claims that MAEQ Scheme did not fulfil conditions of Article 9.4. In fact, they found it simply not relevant. This failure is critical in view of the due process considerations as observed by the Appellate Body.[6] Given the complainants have failed to discharge their burden, the burden of proof did not shift to India. India, therefore, does not bear any burden to demonstrate that the MAEQ is covered under Article 9.4 read with Articles 9.1(d) and 9.1(e) of the AoA.

124. The complainants, in their second written submission, have made delayed claims on the MAEQ Scheme not complying with the requirements of Article 9.1(d) and 9.1(e). This does not rectify the critical flaw of demonstrating *prima facie* case in the first instance i.e., the first written submissions and undermines due process rights of India.

I. EXECUTIVE SUMMARY OF INDIA'S CLOSING STATEMENT IN THE SECOND VIRTUAL MEETING

125. India notes that the complainants' positions are fraught with inconsistencies. At times, they chose to emphasize on the absence of a word, at other occasions they find such omission irrelevant; at one point they find so-called negotiating history document relevant (India has demonstrated that those documents say nothing more than what we know from Annex 3), in some other context, they ignore it as a "labyrinthine" process; at one point they find paragraph 2 of Annex 3 as a "calculation methodology" that applies only to paragraph 13, at another point they find that paragraph 2 applies to both paragraphs 10 and 13; at one point they find non-exempt direct payment *may* be subsidies but does not follow that it must be subsidies, at another point they discover the syntax of paragraph 1 of Annex 3 and find non-exempt direct payment as a subsidy.

126. This is a classic Hobbesian "self-interest" at display here. In other words, rules (*read* treaty text) do not matter, what matters is what the complainants want. If a position suits the complainants, they must take such a position, no matter how inconsistently that is taken, and no matter what is written in the rules. How did the complainants get caught in this position? It is because the complainants first made an *a priori* conclusion that the FRP/ SAP measures are equal to AAP and they *then* started finding support from the treaty text. A treaty interpreter does not interpret the treaty to reach a predetermined conclusion. It is for this error that the complainants have struggled to go to every nook and corner of the AoA, and yet failed to find support for their arguments.

127. If the Panel were to agree with India's arguments, the Panel will only report what the text of the AoA unambiguously states. The complainants have, on the other hand, urged the Panel to ignore the text and rather consider systemic concerns. For complainants, India's interpretations must be rejected (despite the clear textual provisions) and rather the treaty must be read what ought to be the reading or else there will be a "loophole". India will address if there is any loophole.

128. But first, the complainants are encouraging the Panel to engage in "normativism" and India is deeply concerned with that, as this will set the Panel on a dangerous path. WTO panels do not and must not supply or omit words from a treaty. If that is allowed, it will lead to a slippery slope where the panels will usurp the powers of the Ministerial Conference and the General Council who have exclusive authority to adopt interpretations of the covered agreements or negotiate and arrive at new rules on subject matters that are not currently addressed under the covered agreements. Indeed, there are no agreed conceptions of what "policy

[5] Appellate Body Report, *EC – Tariff Preferences*, para. 113.
[6] Appellate Body Report, *EC – Tariff Preferences*, para 113.

considerations" or "systemic concerns" constitute among the WTO Membership. Invocation of such undefined, unagreed and vague concepts into treat interpretation will defeat the very objective of a treaty - which is to achieve certainty based on the consent of the sovereign parties to such a treaty. It will lead to "legislation" or revisions in the treaty text by entities who simply do not have such authority.

129. Further, what Australia refers to as a "loophole", India finds it as a delicate balancing exercise. If a few wealthier countries can enjoy implementing blue box subsidies which are product-specific and not decoupled with production, equally, it is only fair that countries at a lower stage of economic development have some level of flexibility within their policy space to address their particular needs. It is this balance which the AoA has sought to achieve by excluding measures such as the FRP/ SAP measure from the scope of AMS calculation.

J. EXECUTIVE SUMMARY OF INDIA's RESPONSES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND VIRTUAL MEETING

RESPONSE TO PANEL QUESTION 61

130. While the SCM Agreement provides relevant context for interpreting the existence of a subsidy under the AoA, this does not mean that the definition of a subsidy under the SCM Agreement is interchangeable with the usage of the term subsidy under the AoA in all contexts.

131. In the present disputes, the issue at hand is when a measure may qualify as "market price support" within the meaning of Annex 3 of the AoA. The phrase "income or price support" appearing in Article XVI of the GATT 1994 and Article 1.1(a)(2) of the SCM Agreement has not been defined therein. These agreements do not offer any guidance on when income or price support may be said to exist. Nor do these agreements provide any calculation methodology or identify the ingredients of measuring "income or price support". Therefore, the phrase "income or price support" appearing in Article XVI of the GATT 1994 and Article 1.1.(a)(2) of the SCM Agreement is not relevant in addressing the issue of when a market price support can be said to exist within the meaning of Annex 3 of the AoA.

132. Annex 3 of the AoA unambiguously sets out the scope of a measure that may be classified as market price support i.e. in paragraphs 1 and 2 of Annex 3. Hence these are relevant for addressing the issue of when a measure may be classified as a market price support under Annex 3 of the AoA.

133. Without prejudice, India notes that in any case the phrase "income or price support" in Article 1.1(a)(2) of the SCM Agreement or in Article XVI of GATT 1994 does not include measures that do not involve government expenditure.[7]

RESPONSE TO PANEL QUESTION 63 (b)

134. India reiterates that India's Schedule is neither relevant in interpreting what constitutes market price support under the AoA, nor does it define what is market price support. Indeed, the Appellate Body in *Chile — Price Band System*[8] noted that the 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. Therefore, India does not consider that the above question is relevant for the Panel to resolve the present disputes

RESPONSE TO PANEL QUESTION 81

135. India notes that the question of whether there is excess payment is now moot as the complainants, to begin with, have not discharged their burden with respect to the MAEQ Scheme in their first written submissions.

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[7] L/1160, adopted on 24 May 1960, 9S/188, 191, para. 11 (noting that "[I]n such a case there would be no loss to the government, and the measure would not be governed by Article XVI. . .").
[8] Appellate Body Report, *Chile — Price Band System*, para. 272.

136. Guatemala's arguments on the textual differences between Article 3.3 of the AoA and Article 2.2 of the SPS Agreement are inconsequential. In fact, the panel's observations in *EC - Approval and Marketing of Biotech Products (US)* despite the usage of the phrase "except as provided in paragraph 7 of Article 5", the panel did not find Article 5.7 of the SPS Agreement as an "exception" or "defense".[9]

137. India also does not accept that the complainants have discharged their burden of proof as Brazil seeks to argue India's choice to offer its comments on merits of the MAEQ Scheme does not automatically shift the burden which the complainants did not discharge to begin with.

RESPONSE TO PANEL QUESTION 86 (a) & (b)

138. The DFIA can be transferred from one entity to another. The transferability of the DFIA has no relevance to the Panel's analysis under footnote 1 read with Annex I of the SCM Agreement. India reiterates that the DFIA allows for a remission on import charges that is equivalent to what has already been paid on inputs which have in fact, been consumed in the process of production of exported products. This falls squarely within the requirements of footnote 1 of the SCM Agreement.

RESPONSE TO PANEL QUESTION 88

139. India's Foreign Trade Policy read with the Handbook of Procedures addresses the issue of any excess remission.

140. Specifically, an applicant seeking to avail of the DFIA is required to make an application in a prescribed form i.e. Form ANF-4G, including details of the items exported, details of items sought to be imported, details of other materials to be used in the export product and sought to be imported etc.

141. Further, paragraph 4.56 of the Foreign Trade Policy Handbook of Procedures requires the original DFIA holder to maintain a true and proper account of consumption and utilisation of duty free imported/domestically procured goods against each authorisation as prescribed in Appendix 4H which are sent to the Regional Authority concerned along with a request for bond waiver/redemption/discharge of export obligation/transferability to be vetted along with verification by a practicing accountant (as licensed by the relevant regulatory body).

142. Thereafter, according to para 4.53 read together with 4.49(f), the Regional Authority compares the relevant portion of Appendix 4H with that of norms allowed in Authorisation(s) and actual quantity consumed /utilised imported against Authorisation(s) in the beginning of licensing year for all such Authorisations redeemed in the preceding licensing year. In this verification process, in case it is found that the Authorisation holder has consumed a lesser quantity of inputs than imported, the Authorisation holder shall be liable to pay customs duty on the unutilized value of imported material, along with interest thereon as notified, or affect additional export within the export obligation period.

143. Therefore, the DFIA Scheme does not allow any excess remission. An exporter is only entitled to claim an exemption on import duty for future imports of raw sugar to the extent of the raw sugar that was in fact consumed in the production of exported white sugar.

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[9] Panel Report, *EC – Approval and Marketing of Biotech Products (US)*, para. 7.2966.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. PARAGRAPH 2 OF ANNEX 3 OF THE AOA DOES NOT REQUIRE THE ADMINISTERED PRICE TO BE PAID BY A GOVERNMENT OR ITS AGENT FOR SUPPORT TO BE CONSIDERED "MARKET PRICE SUPPORT"

1. First, Canada addresses India's reliance on paragraph 2 of Annex 3 of the AoA to support its argument that the Fair and Remunerative Price and State Advised Price measures are not "market price support" because they are not paid by a government or its agents.[1] In Canada's view, India's reliance on paragraph 2 of Annex 3 to support this position is misplaced.

2. Paragraph 1 of Annex 3 of the AoA identifies three types of domestic support that must be included in a product-specific AMS: "market price support", "non-exempt direct payments" and "any other subsidy not exempted from the reduction commitments". Paragraphs 2 through 13 of Annex 3 provide guidance on how to calculate support in each of these categories.

3. Canada shares India's view that market price support is a form of subsidy.[2] Thus, the guidance provided by paragraph 2 of Annex 3 is applicable to market price support.

4. However, paragraph 2 of Annex 3 does not limit the types of support considered "subsidies" to budgetary outlays and revenue foregone by governments or their agents. The use of the term "include" in paragraph 2 indicates that "budgetary outlays" and "revenue foregone" by governments or their agents are examples of the types of support that would be considered "subsidies" under paragraph 1, rather than an exhaustive list.

5. Thus, paragraph 2 does not provide a basis to conclude that the administered price must be paid by a government or its agent for support to be considered "market price support" as India argues.

II. RELATIONSHIP BETWEEN THE SCM AGREEMENT AND THE AOA

6. Second, Canada addresses the issue of the order of analysis of export subsidy claims brought under both the SCM Agreement and the AoA, and the role of the text and jurisprudence arising out of the SCM Agreement in interpreting obligations found in the AoA.

7. With respect to the order of analysis, Canada considers that the Panel's analysis must start with the obligations found in the AoA before considering those in the SCM Agreement for measures that are covered by both Agreements.

8. Article 21.1 of the AoA establishes that the obligations in the AoA supersede the obligations found in other WTO multilateral trade agreements, including the SCM Agreement. It provides: "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement". This hierarchy rule is also reflected in Article 3.1 of the SCM Agreement, which prohibits import substitution subsidies and export subsidies "[e]xcept as provided in the Agreement on Agriculture". Appellate Body jurisprudence also recognizes the primacy of the AoA when examining the WTO-consistency of an export subsidy for agricultural products.[3]

9. As a result, the Panel must first analyze claims of export subsidization for agricultural products under the AoA, and then under the SCM Agreement if necessary.

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[1] India's first written submission, paras. 61-63.
[2] See India's response to Panel question No. 18, p. 13.
[3] Appellate Body Reports, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 123; *US – Upland Cotton*, paras. 570.

10. With respect to the role of the SCM Agreement in interpreting obligations found in the AoA, Canada considers that, in addition to the context provided by other provisions of the AoA, the SCM Agreement may provide relevant context to interpreting these obligations. In particular, Article 1 of the SCM Agreement may provide relevant context for interpreting the term "subsidy" in the AoA.[4] However, the use of Article 1 of the SCM Agreement as context must not result in a conflict between the provision being interpreted and other provisions of the AoA.

III. EXPORT SUBSIDIES DISCIPLINES UNDER ARTICLE 3.1(A) OF THE SCM AGREEMENT NOW APPLY TO INDIA

11. Third, Canada addresses India's claim that export subsidy disciplines under Article 3.1(a) of the SCM Agreement do not apply to it.

12. In its first written submission, India argues that it is not subject to export subsidy disciplines because it is still covered by the eight-year period of Article 27.2 of the SCM Agreement.[5] India's view is that the eight-year period started on the date of its graduation from Annex VII(b).[6]

13. Canada disagrees with India's interpretation.[7] The ordinary meaning of Article 27.2(b) of the SCM Agreement is clear: the eight-year exemption period began on the date of entry into force of the WTO Agreements, that is, on 1 January 1995, and ended eight years later, on 1 January 2003.

14. Pursuant to Annex VII and Article 27.2, if a developing Member graduated from Annex VII before 1 January 2003, it would have become subject, upon graduation, to the special and differential treatment of non-Annex VII developing Members; as set out in Article 27.2(b), it would have had until 1 January 2003 to phase out export subsidies. However, because India graduated from Annex VII after the expiry of the eight-year period, this phase-out mechanism is no longer applicable. As a result, India became subject to disciplines on export subsidies under Article 3.1(a) of the SCM Agreement upon its graduation from Annex VII in 2017.

IV. THE RESPONDENT HAS THE BURDEN TO PROVE THAT ITS MEASURES MEET REQUIREMENTS TO BE EXEMPTED FROM THE CURRENT TOTAL AMS

15. Fourth, Canada addresses the question of whether it is the complainant or the respondent who bears the burden to demonstrate that a measure should be excluded from a Member's current total AMS.

16. In response to question 26(b) from the Panel, Brazil and Australia submit that the respondent bears the burden to prove that certain measures should be excluded from the respondent's current total AMS.[8] To the contrary, India claims that since the complainants have made an affirmative claim of market price support, they bear the burden to prove each element thereof, including exclusions.[9]

17. In Canada's view, where the complainant claims that the domestic support of the respondent exceeds its permissible level of support under the AoA, it is up to the respondent to raise any exemption and to demonstrate that the measures meet the applicable criteria for that exemption.

18. This interpretation is consistent with general Appellate Body guidance on the burden of proof in WTO dispute settlement proceedings. The Appellate Body has held that the burden of proof rests upon the party, whether the complainant or the respondent, who asserts the affirmative of a particular claim or defense.[10]

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[4] See Panel Report, *US – FSC*, para. 7.150; Appellate Body Report, *Canada – Dairy*, para. 87.

[5] India's first written submission, paras. 132 and 145.

[6] Ibid. para. 133.

[7] See Canada's third-party submission, paras. 26-38.

[8] Brazil's response to Panel question No. 26, para. 41; Australia's response to Panel question No. 26, paras. 65 and 68.

[9] India's response to Panel question No. 26, p. 18.

[10] Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 14; *US – Tuna II (Mexico)*, para. 216; see also Panel Reports, *EU – Footwear (China)*, para. 7.10; *China – Electronic Payment Services*, para. 7.5; *China – Broiler Products*, para. 7.6; *US – Carbon Steel (India)*, para. 7.7; *US – Countervailing Measures (China)*, para. 7.11; and *Peru – Agricultural Products*, para. 7.13.

19. If the respondent considers that certain measures targeted by the complainant should be exempted from its current total AMS, the respondent bears the burden to demonstrate that the measures at issue meet the exemption criteria. The respondent bears this burden when it claims an exemption arising in Annex 2 of the AoA or when it claims that the measure is a budgetary payment made to maintain the price gap within the meaning of paragraph 8 of Annex 3.

20. Requiring the complainant to prove that certain exemptions do not apply, as proposed by India, would be tantamount to requiring the complainant to demonstrate the *negative* of a claim. This is inconsistent with applicable jurisprudence.

V. NOTIFICATION REQUIREMENTS

21. Finally, Canada considers that the notification requirements contained in the WTO Agreements are important to ensuring transparency[11] and the effective monitoring of the implementation of a WTO Member's commitments. Notifications submitted by WTO Members to the relevant WTO committees support and underpin the proper operation of these committees. Therefore, WTO Members must, in good faith, notify their measures in accordance with their WTO obligations.

22. With respect to the content of these obligations under the AoA, Canada considers that: (1) Article 18 of the AoA imposes a mandatory obligation on WTO Members to notify their measures; and (2) Members must in good faith notify all domestic support in favour of agricultural producers, including market price support, under Article 18 of the AoA.

A. Article 18 of the AoA imposes a mandatory obligation on WTO Members to notify their measures

23. Although Article 18 is not explicit in setting out a mandatory obligation on WTO Members to notify their measures, a careful reading of its provisions nonetheless establishes that a mandatory obligation to notify exists.

24. First, Articles 18.1 and 18.2 require the Committee on Agriculture to review Members' progress in the implementation of their commitments in part on the basis of Members' notifications. If Members were not required to submit notifications, there would be little basis on which to conduct this review and therefore little ability for the Committee on Agriculture to meet its obligation under Article 18.1.

25. Further, Article 18.3 provides that "[i]n addition to the notifications to be submitted under paragraph 2, any new domestic support measure, or modification of an existing measure, for which exemption from reduction is claimed shall be notified promptly".[12] Use of the phrase "to be submitted" suggests that notifications under paragraph 2 are mandatory. Moreover, use of the term "shall" clearly indicates that Members have a mandatory obligation to notify new or modified measures for which they are claiming an exemption from reduction commitments. It stands to reason that if Members have a mandatory obligation to notify these new or modified measures, they would also have a mandatory obligation to notify measures that are subject to reduction commitments.

26. Finally, if the notification of a Member's measures was not mandatory, there would be no basis for another Member to consider that those measures "ought to have been notified" in Article 18.7. Interpreting Article 18 as only recommending that Members notify their measures under the AoA would render Article 18.7 inutile.

B. Notifications under Article 18 of the AoA must include "all domestic support in favour of agricultural producers", including market price support

27. Canada considers that, under Article 18 of the AoA, Members must in good faith notify "all domestic support in favour of agricultural producers", including market price support. This obligation is established through a careful reading of the provisions of the AoA.

[11] See Appellate Body Report, *Brazil – Aircraft*, para. 149.
[12] AoA, Article 18.3. (emphasis added)

28. Under Articles 3.1 and 3.2 of the AoA, Members commit not to provide domestic support or export subsidies in excess of the levels specified in their Schedules. Members' commitments concerning domestic support apply to "all its domestic support measures in favour of agricultural producers" except those exempt from reduction commitments.[13] "Domestic support measures in favour of agricultural producers" include modifications to existing measures as well as new measures that are not exempt from reduction commitments.[14] As all non-exempt domestic support measures in favour of agricultural producers form part of a Member's commitments under the AoA, a Member must notify these measures under Article 18.

29. Annex 3, paragraph 1 specifies that market price support is a type of non-exempt domestic support.[15] Market price support must therefore also be included in a Member's notifications under Article 18.

30. Only when Members submit timely and high quality notifications concerning all non-exempt domestic support in favour of agricultural producers, including market price support, can the Committee on Agriculture properly review whether there has been progress on the implementation of commitments negotiated under the Uruguay Round reform programme.

[13] AoA, Article 6.1.
[14] Ibid. Article 7.2(a).
[15] Ibid. Annex 3, para. 1.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA*

I. INTRODUCTION

1. China thanks the Panel for this opportunity to present its views on the proper legal interpretation of certain key provisions of the Agreement on Agriculture in relation to the applied administered price and the constitution of market price support. In particular, China would like to offer some clarification on the findings of the Panel in *China –Agricultural Producers* cited by the parties.

II. CLAIMS REGARDING APPLIED ADMINISTERED PRICE AND CONSTITUTION OF MARKET PRICE SUPPORT

2. In their submissions, Australia, Brazil and Guatemala complained that India maintains a variety of market price support and other product-specific support measures for sugarcane farmers, and that the sum total of such domestic support exceeds the *de minimis* level as applicable to India under the Agreement on Agriculture. In particular, they argued that India has provided excessive market price support through its Fair and Remunerative Price ("FRP") and State Advised Price ("SAP") programs, and the prices set by Indian government under those programs are applied administered prices for the purposes of the Agreement on Agriculture.

3. India argued, however, that the measures at issue do not qualify as market price support measures and should not be included in its AMS calculation. Specifically, India argued that in light of paragraph 2 of Annex 3 of the Agreement on Agriculture, a market price support could be by a government or its agent, only if the government or its agent pays the administered price and procures the specified product at such administered price.[1] Since the sugar mills that purchase sugarcane from the farmers at FRP and SAP are neither government nor its agents, those programs do not qualify as a subsidy by the government or its agents under Annex 3 and consequently as a market price support.[2]

4. China does not hold any position on either the facts of these disputes or whether India's measures constitute market price support. However, China has concerns on the misleading summary by India of the fact and legal finding of *China – Agricultural Producers*.

5. In paragraph 69 of its first written submission, India seems to suggest that the interpretation of the phrase "applied administered price" by the Panel in *China – Agricultural Producers* was somehow informed by, or conditioned on, the alleged context of that case, i.e. source of finance for purchase and ownership of the purchased products. However, in that dispute, the parties have never argued and the Panel has never mentioned the source of finance or ownership of purchased products in interpreting the term "applied administered price". To the contrary, the Panel in *China – Agricultural Producers* adopted the ordinary meaning approach presented by both parties, and found that the "applied administered price" is the price set by the government at which specified entities will purchase certain basic agricultural products.[3]

6. That being said, we agree that in *China – Agricultural Producers*, the Panel's finding on the connection between "applied administered price" and "market price support" is limited. It basically found that applied administered price is a constituent element of a market price support measure,[4] and the removal of the applied administered price means the expiration of the market price support measure.[5] However, that panel did not address the question of what would constitute as "market

* China requested that its oral statement serves as its executive summary.
[1] India's First Written Submission, para. 62.
[2] India's First Written Submission, paras. 63-64.
[3] Panel Report, China –Agricultural Producers, para. 7.177.
[4] *Id.*, para. 7.173.
[5] *Id.*, para. 7.80.

price support" or whether the applied administered price is the sole prerequisite to a market price support measure. These are key questions this Panel may need to address.

III. CONCLUSION

7. China thanks the Panel for its attention and looks forward to answering any questions the Panel may have.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COSTA RICA

I. CHARACTERIZATION OF THE FRP/SAP AS DOMESTIC SUPPORT MEASURES UNDER THE AOA

1. The complainants have argued that India maintains a variety of measures at the federal and state-level that constitute domestic support for sugarcane, and that total sum of such domestic support exceeds the de minimis level, as applicable to India under the AoA. In particular, they allege that India's *Fair and Remunerative Price* ("FRP") for sugarcane and the State Advised Price ("SAP") applied by certain Indian States, constitute *"market price support"* under paragraph 8 of Annex 3 of the AoA.

2. India has claimed that the complainants have failed to demonstrate that India has acted inconsistently with its obligations under article 3.2 and 6.3 and/or article 7.2 of the AoA, since the complainants have not met their burden of proof of demonstrating that the FRP/SAP measures qualify as a *"market price support"* under Annex 3 of the AoA.[1]

3. In particular, India considers that as neither Annex 3 nor any other provision of the AoA define the concept of *"market price support",* paragraph 2 of such Annex do offer guidance on what may constitute a market price support and that in accordance with that provision, in order for a particular measure to qualify as a *"market price support",* such measure shall include both budgetary outlays and revenue forgone by *"governments or their agents".* India argues that since the sugar mills that purchase sugarcane from the farmers at FRP/SAP are neither the government nor its agents, the FRP/SAP cannot therefore be characterized as a "market prices support" under Annex 3 of the AoA. India therefore concludes that since the complainants have not taken this issue into consideration, they have failed to demonstrate that the FRP/SAP constitute market price support under the AoA.

4. Costa Rica is of the view that in order to assess if a Member has acted inconsistently with its obligations under articles 3.2, 6.3 and/or 7.2 of the AoA by providing domestic support that exceeds its *de minimis* levels, it is necessary that the challenged measures (in this case the FRP/SAP) be characterized as domestic support measures in the first place. Only then could a possible quantification of these measures be made.

5. The Parties to this dispute agree that there is not a definition in the AoA of what constitutes domestic support and/or market price support. As stated above, India relies on the guidance provided by other provisions such as paragraph 2 of Annex 3 of the AoA to present its views on how these terms should be interpreted and/or assessed.

6. Costa Rica notes that complainants have provided a detailed description of the FRP/SAP in their written submissions and that their characterization of these measures as domestic support measures (in this particular case as market prices support) relies mostly on the particular characteristics of the measures themselves and how they would fit within the required elements to quantify the market price support, as established by paragraph 8 of Annex 3 of the AoA. In doing so, they have also relied on previous panel reports, in particular on *China – Agricultural Producers*, *Korea – Various Measures on Beef*, and *China – GOES.*

7. While Costa Rica agrees with India that there is no rule of binding precedent or *stare decisis* within the WTO dispute settlement process, Costa Rica believes that previous WTO panel reports may provide valuable guidance in assessing the characterization of the measures in question, in particular given the lack of definitions under the AoA.

8. Costa Rica believes that the characterization of the FRP/SAP as domestic support measures would depend on different elements, which if taken together, would provide the necessary guidance to determine if there has been a violation of articles 3.2, 6.3 and/or 7.2 of the AoA.

[1] India's first written submission, para 59.

II. INTERPRETATION OF ARTICLE 1.1 (A) (1) OF THE SCM AGREEMENT AND ITS RELATIONSHIP WITH THE EXPORT SUBSIDY CLAIMS UNDER ARTICLE 9 OF THE AOA.

9. The Complainants allege that India provides subsidies to its sugar producers that are contingent upon export performance and since India has no reduction commitments for export subsidies, it is not entitled to provide these types of subsidies for any agricultural product. Therefore, by maintaining export subsidies for sugar, India has acted inconsistently with its obligations under Articles 3.3, 8, and 9.1 of the Agreement of Agriculture.[2]

10. India considers that complainants have failed to make a prima facie case that India has acted inconsistently with its obligations under Articles 3.3, 8, 9.1 or Article 10, since the complainants have failed to demonstrate that a subsidy exists within the meaning of the AoA.

11. Costa Rica notes that all Parties to the dispute seem to agree that one of the elements required as part of the legal standard applicable to Article 9.1 (a) of the AoA is the existence of *"direct subsidies"*[3]*,* and that given the absence of the terms *"subsidies"* and *"direct subsidies"* within article 9.1 (a) of the AoA, the SCM Agreement would be relevant in the interpretation and application of that provision of the AoA, in particular article 1.1 of the SCM Agreement, which defines what a subsidy means.

12. Costa Rica believes that article 1.1 of the SCM Agreement is in fact relevant in the interpretation and application of article 9.1 (a) of the AoA. However, and without prejudice of the complainants' views regarding the actual implementation of the challenged measures under their export subsidies complaints, Costa Rica disagrees with India's interpretation that the requirement established in article 1.1 (a)(1) of the SCM Agreement requires a demonstration that the financial contribution has *"actually"* been made, in order to assess the existence of a subsidy.

13. According to India, the complainants have not provided any evidence of actual financial contribution with respect to the challenged measures and therefore have failed to demonstrate the existence of a financial contribution, and hence the existence of a subsidy within the meaning of article 9 of the AoA.[4]

14. In Costa Rica's view, India's interpretation of Article 1.1 (a) (1) of the SCM Agreement goes beyond the same rules of interpretation that India relies on when it responds to the claims regarding export subsidies under the SMC Agreement.[5]

15. According to Article 31 (1) of the Vienna Convention, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose.

16. Costa Rica believes that the main purpose of the SCM Agreement is to discipline the use of subsidies that may have adverse effects on international trade. An interpretation as the one suggested by India will go against the object and purpose of the SCM Agreement since it would have the effect of placing and extraordinary burden on WTO Members that wish to challenge subsidies under the SCM Agreement and/or the AoA. In fact, India's position implies that a measure is inconsistent with the SCM Agreement and the AoA only if actual financial contribution, income or price support has taken place. Under this reading, a subsidy scheme contained in the law could not be challenged if actual government assistance has not been given in practice. Thus, to challenge a

[2] Guatemala's first written submission, para 242, Australia's first written submission, para 251, Brasil's first written submission, *inter alia*, para 233. Australia also alleges as an alternative, a violation of articles 8 and 10.1 of the AoA.

[3] India's first written submission, para 100, Guatemala's first written submission, para 262-266, Australia's first written submission, paras 256, 261-272, Brazil's first written submission, paras 190-272. Costa Rica believes that the full legal standard applicable to article 9.1 (a) of the AoA, is the one set up by the panel report in *Canada – Dairy,* para 7.38 that requires the existence of the following four elements: a) the existence of "direct subsidies, including payments in kind"; b) provided by "governments or their agencies"; c) "to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board"; and d) which are "contingent on export performance".

[4] India's first written submission, para 109.

[5] India's first written submission, Section VII, paras 129-145.

subsidy, any complainant would have to demonstrate that a disbursement of funds have actually taken place.

17. The ordinary meaning of the word "is" in this given context simply refers to the existence of a measure *"within the territory of a Member"*. Ascribing the temporal meaning that India gives to this term would deprive the SCM Agreement of its object and purpose.

18. It is worth recalling that the complainants have challenged different measures as part of this dispute settlement procedures and that according to past WTO rulings, *"…any act or omission attributable to a WTO Member can be a measure of that Member for purpose of dispute settlement proceedings."*[6]

19. This interpretation would be in line with the same language expressed in Article 3.3 of the DSU, which refers to situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member.

20. Certainly, the export subsidies challenged by the complainants would qualify as measures attributable to India, and these measures could potentially impair the benefits accruing to them directly or indirectly under the AoA, regardless of the fact that the export subsidies have been *"actually"* provided, as India suggests.

III. APPLICABILITY TO INDIA OF ARTICLE 3.1 OF THE SMC AGREEMENT.

21. Costa Rica notes that both Guatemala and Australia have claimed that certain measures applied by India related to export subsidies are inconsistent with India's obligations under Articles 3.1 (a) and Article 3.2 of the SCM Agreement.

22. In response to these claims, India argues that article 3 of the SCM Agreement is not applicable to India since it considers that, upon graduating from Annex VII (b) of the SCM Agreement in 2017, India is entitled to the eight year phase out period of export subsidies provided to other developing countries under Article 27.2 (b) of the SCM Agreement.

23. Costa Rica disagrees with India's interpretation. In Costa Rica's view, Article 27.2 (b) of the SCM Agreement is clear in that the eight year phase out period was counted from the date of entry into force of the WTO Agreement, and this period initially expired in 2003. Therefore, India already was entitled to the same treatment that *"other developing country Members"* were entitled to under that provision.

24. In fact, taking into consideration that many developing countries had to phase out their export subsidies by 2003 and that India was able to maintain them until it graduated under Article 27 (b) of the SCM Agreement in 2017, India actually was provided a more favourable treatment that these *"other developing country Members".*

25. Costa Rica takes note that this same issue has already been addressed in *India – Export Related Measures,* as pointed out by Australia in its first written submission.[7] Even though the panel report in that case has not yet been adopted by the DSB, Costa Rica shares the views and conclusion expressed by the panel in their report that *"…Article 27 no longer excludes India from the application of Article 3.1 (a) of the SCM Agreement."*[8]

[6] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 81.
[7] Australia's first written submission, para. 539.
[8] Panel report, *India – Export related measures,* para. 7.74.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF EL SALVADOR*

I. INTRODUCTION

1. El Salvador is participating in the present dispute given its systematic interest in application of the General Agreement on Tariffs and Trade 1994 and the Agreement on Agriculture. It considers that any domestic support for the production of agricultural products outside legally established limits, as well as export subsidies for agricultural products, distort international trade. The former undermine commitments to market access made by Member countries, giving advantages to their domestic industries that compete with imports, while the latter lead to unfair competition *vis-à-vis* third-party countries.

2. El Salvador considers that sugar and sugarcane are strategic products for industries such as its own, hence the need to ensure legal certainty and guarantee the principle of transparency in the trade rules on which commercial operators of this type of product depend. That is why our country considers its participation in this procedure to be timely.

3. El Salvador will express its opinion on the preliminary objection brought by India and will then refer to the main complaints brought by the complaining parties. Lastly, it will present its conclusions regarding the alleged measures and their non-compliance with the covered agreements.

II. FACTUAL BACKGROUND

4. In accordance with the complaining parties' contentions, India provides domestic support measures for sugar and sugarcane through a "fair and remunerative price" granted at the federal level and a "State advised price" at the state level, as well as other support measures to maintain the gap between prices and other non-exempt payments.

5. Furthermore, India provides principally export subsidies for sugar in the form of direct payments, according to the complaining parties, through different modalities, including direct payments, direct payments related to regulated stocks, among others, all contingent on export yield.

6. The measures adopted by India have affected commercial sugar and sugarcane operations in Brazil, Guatemala and Australia. On 15 August 2019, this led to the formation of the Panel.

7. On 19 March this year, India submitted a written reply to the allegations made in the present dispute by the complaining parties, which included the requirement of a preliminary objection for the procedure, stating that some of the measures alleged by the Parties had since had lapsed and for that reason, are outside the scope of the Panel's terms of reference.

III. PRELIMINARY OBJECTION

8. With regard to the objection made by India, El Salvador considers it relevant to revert to what was established in the Panel *China – Domestic support for agricultural producers,* to the extent that "instead of assessing whether the underlying legal instruments were formally terminated, a panel has to examine whether the challenged measure still affects the operation of the covered agreements".[1] The foregoing implies that the termination of a legal instrument is not the same as the termination of a measure.

9. Hence the reason why El Salvador considers that the Panel would be entitled, as part of its mandate, to examine the instruments implemented by India with regard to the sugar- and

* El Salvador requested that its written submission, which was in Spanish, serves as its executive summary.

[1] Panel report, *China – Domestic support for agricultural producers*, WT/DS511/R, para 7.70.

sugarcane-related measures; as well as to verify the effect of said measures on the operations of the complaining parties.

IV. ALLEGED MEASURES

10. The complaining parties have indicated that India has taken the following measures:

- domestic support for sugar and sugarcane;
- export subsidies for sugar and sugarcane; and
- failure by India to notify the above-mentioned support and subsidies.

11. Based on the facts mentioned above, India has taken a series of measures which, according to the complaining parties, run contrary to the Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the transparency obligations stipulated in the covered agreements and in GATT 1994.

V. LEGAL BASIS

5.1 Domestic Support

12. In accordance with the provisions of the Agreement on Agriculture, specifically Articles 3.2, 6.3, 7.2(b) and 8, where no Total AMS commitment exists in a Member's Schedule, the Member shall not provide support in excess of the relevant *de minimis* level.

13. Considering that India is a developing country, in accordance with Article 6.4(b) of the Agreement on Agriculture, the *de minimis* percentage for product-specific domestic support is 10% of the value of total agricultural production.

14. Therefore, when domestic support is provided, it should be under the terms of the Agreement on Agriculture. Consequently, El Salvador considers that all WTO Members should guarantee compliance with the obligation set out therein.

5.2 Export Subsidies

15. The complaining parties contended that India grants export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture as they are direct subsidies provided by governments or their agencies to a firm or to an industry, to producers of an agricultural product, to a cooperative or other association of such producers or to a marketing board, contingent on export performance.

16. Similarly, the complaining parties allege that India grants exports subsidies within the meaning of Article 9.1(c) of the Agreement on Agriculture as these are payments for the export of sugar financed through governmental measures.

17. The complaining parties thus add that the subsidies conditional on exports granted by India are prohibited subsidies by virtue of the provisions of Article 3 of the SCM Agreement.

18. El Salvador maintains that it is imperative for Members to refrain from granting prohibited subsidies in accordance with the provisions of Article 3 of the SCM. Therefore, these export subsidies are incompatible with the Article 9.1 of the Agreement on Agriculture.

VI. CONCLUSIONS

El Salvador observes that India did not establish any domestic subsidy reduction commitment in Section I, Part IV of the Schedule of Concessions, hence by virtue of the provisions of Article 6.4 of the Agreement on Agriculture, the measures in question cannot exceed the *de minimis* level of 10%.

El Salvador also wishes to indicate that India did not establish any export subsidy reduction commitment in Section II, Part IV of its Schedule of Concessions related to sugar or sugarcane which would allow it to make use of export subsidies.

El Salvador considers that the measures taken by India related to domestic support and export subsidies for sugar and sugarcane, should be implemented in accordance with the provisions of the WTO Agreements. The importance of fulfilling the obligation to notify each Member of the measures implemented in its country, based on the principle of transparency, should be underscored.

Based on the foregoing, El Salvador requests that the Panel review carefully the scope of the complaints in the light of this communication and those submitted by Guatemala, Brazil and Australia in their respective briefs as complaining parties.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION*

1. INTRODUCTION

1. The European Union is grateful for this possibility to express its views.

2. INDIA'S PRELIMINARY RULING REQUEST

2. On 9 November 2020 the Panel communicated to the Third parties its decision as regards India's preliminary request to the effect that certain measures where falling outside the Panel's terms of reference.

3. The European Union's share the Panel's conclusion and therefore it does not consider it appropriate to deal with this matter any further.

3. OBSERVATIONS OF THE EUROPEAN UNION

1. MARKET PRICE SUPPORT AND APPLIED ADMINISTERED PRICE

4. The European Union would like to briefly reiterate its position according to which the notion of applied administered price (AAP), which is one of the elements for the calculation of market price support, does not require payments (or revenue foregone) from the government or its agent.

5. India's opposite view tends to limit the scope of the AoA's domestic support commitments to support granted in the form of subsidies (or in any event measures that require a budgetary outlay or revenue foregone by the government or its agent).

6. The preamble of the AoA, however, refers to the objective of achieving substantial progressive reductions in agricultural support, and not only progressive reduction of subsidies for agricultural production. Hence, the objective of the AoA is broader than that of limiting domestic subsidies. Subsidies are just a means of granting support but do not exhaust the means by which government can support agricultural production.

7. The text of paragraphs 1 and 2 of Annex 3 of the AoA (entitled Domestic Support: Calculation of the Aggregate Measurement of Support) suggests that domestic support does not require budgetary outlays or revenue foregone by governments or their agents. Paragraph 1 of Annex 3 of the AoA lists three forms of domestic support: market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitments. That listing shows that there are three different forms of domestic support, which should have different characteristics; otherwise there would be no reasons for using three different expressions to identify them. Paragraph 2 refers to just one of those forms of domestic support and clarifies that "subsidies" under paragraph 1 include both budgetary outlays and revenue foregone by governments or their agents.

8. Moreover, according to paragraph 1 of Annex 2 of the AoA, domestic support measures which provide support through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers may be exempt from the reduction commitments. Hence, when the support is not provided through a publicly-funded government programme the domestic support measure is not exempt from the reduction commitments, but it is still a form of domestic support falling within the purview of the AoA.

9. Furthermore, paragraph 8 of Annex 3 states that Market Price Support shall be calculated using the gap between a fixed external reference price and the applied administered price. The second sentence of that paragraph adds that:

* The European Union requested that its oral statement serves as its executive summary.

Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.

10. Hence, where there are budgetary outlays the price support calculation should only take into account the difference between the AAP and the FRP. This clarification strongly confirms that budgetary outlays are not an essential element of market price support measures.

11. Finally, the WTO jurisprudence has constantly confirmed that the applied administrative price does not require budgetary outlays or revenue foregone from the government or its agent. The EU refers to the Panel Reports in *China - Agricultural producers* and in *Korea – Various Measure on Beef,* which have been discussed in its written submissions.

12. The EU is aware that there is no formal rule of precedent under WTO law. However, that does not imply in any way that continuity and consistency in the jurisprudence is less important. Continuity and consistency in the jurisprudence serve to provide security and predictability to WTO Members and the multilateral trading system as a whole, which is key to the attainment of the objectives mentioned in the preamble of the Marrakesh Agreement establishing the WTO and the GATT (all the more so in this times of pandemic where certainties melts like ice under the sun). WTO Members have recognised in Article 3.2 of the DSU that The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system and that it serves to clarify the existing provisions of the covered agreements. Therefore, departures from the legal clarifications contained in previous adopted reports should be avoided unless there are cogent reasons for doing so.

13. The EU does not see any valid reason to depart from the consistent jurisprudence mentioned above.

2. WHETHER THE MAEQ SCHEME IS PERMITTED BY ARTICLE 9(4) OF THE AOA

14. India has submitted, in the alternative, that the MAEQ Scheme falls within the scope of Articles 9.1(d) and 9.1(e) of the AoA and is, therefore, permitted in accordance with Article 9.4 of AoA. India argues that the period referred to in Article 9.4 was further extended by WTO Members through the Nairobi Ministerial Decision on Export Competition.

15. The Complainants do not appear to contest that India is entitled, in principle, to rely on Article 9.4 of the AoA, despite the expiry of the implementation period mentioned therein. Instead, the Complainants seem to argue that Article 9.4 is not available to India in this case because the subsidies at issue do not fall within the scope of Articles 9.1(d) and 9.1(e) of the AoA.

16. The European Union does not take position on the question of whether the subsidies at issue fall within the scope of Articles 9.1(d) and 9.1(e) of the AoA. The European Union, nevertheless, would invite the Panel to examine very carefully this issue. The mere fact that a granting authority describes a subsidy as aimed at covering transport or marketing expenses cannot be sufficient to consider that such subsidy falls within the scope of Article 9.1 (d) or (e) of the AoA for the purposes of Article 9.4. Instead, it must be shown that there is some link, either in law or in fact, between the granting of the subsidies and those types of expenses. Otherwise, it would be all too easy for a developing country Member to evade its obligations under the AoA simply by labelling all their subsidies as transport or marketing subsidies, regardless of their intended or actual use, and relying on Article 9.4.

17. Furthermore, even if the subsidies at issue fell within the scope of scope of Article 9.1 (d) or (e) of the AoA, the European Union recalls that the exception granted by Article 9.4 is subject to the express condition that the export subsidies listed in those provisions *"are not applied in a manner that would circumvent reduction commitments*."

3. WHETHER THE EXEMPTION OF IMPORT DUTIES UNDER THE DFIA SCHEME CONSTITUTES A SUBSIDY WITHIN THE MEANING OF THE AOA AGREEMENT AND THE SCM AGREEMENT

18. The European Union agrees with India that the definition of subsidy in the SCM Agreement is relevant for the interpretation of the term of subsidy in the AoA. The European Union further agrees

with India that the remission of import duties in accordance with footnote 1 of the SCM Agreement cannot be considered as an export subsidy within the scope of Article 9.1 (a) of the AoA.

19. The European Union understands that Australia's position is that the exemption of import duties under the DFIA Scheme does not comply with the requirements of footnote 1, in conjunction with paragraph (i) of Annex I of the SCM Agreement. The European Union does not take position on this question, which involves the assessment of factual elements beyond the EU's knowledge. The European Union, nevertheless, would invite the Panel to ascertain very carefully whether, as alleged by India, the exemption of import duties under the DFIA Scheme is in accordance with footnote 1 of the SCM Agreement, in conjunction with paragraph (i) of Annex I.

4. WHETHER ARTICLE 27 OF THE SCM AGREEMENT EXCLUDES INDIA FROM THE SCOPE OF THE SCM AGREEMENT

20. Australia and Guatemala have submitted that certain measures applied by India are export subsidies prohibited under Article 3.1(a) of the SCM Agreement and that, in providing those subsidies, India acts inconsistently with its obligation under Article 3.2 of the SCM Agreement

21. India states that Article 3 of the SCM Agreement does not apply to India by virtue of Article 27.2 of the SCM Agreement. The issue before the Panel is whether, in the case of India, the 8 year period mentioned in Article 27.2 (b) of the SCM Agreement commenced on the date of entry into force of the WTO Agreement or on the date of India's graduation from Annex VII(b).

22. The European Union recalls that the same issue was raised in *India – Export Related Matters*. In that case, the panel concluded that the 8 year period mentioned in Article 27.2 (b) commenced in all cases on the date of entry into force of the WTO Agreement and, therefore, that India was not excluded from the scope of application of Article 3 of the SCM Agreement. The panel report in *India – Export Related Matters* is subject to appeal. Nevertheless, the European Union finds the legal reasoning of the panel in *India – Export Related Matters* highly persuasive and sees no reason why the Panel should reach a different conclusion in this dispute.

23. The EU thanks the Panel for its attention and for taking into account its views in solving this dispute.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Japan has a systemic interest in ensuring the coherent interpretation of the WTO covered agreements, including the provisions of the DSU, the Agreement on Agriculture and the SCM Agreement. Since India is a top exporter and consumer of sugar, its measures may have substantial impacts on global supply of, and demand for, raw sugar, including New York raw sugar market. As an importer of raw sugar, Japan is interested in these proceedings particularly from the viewpoint of transparency. Japan limits its comments to four issues: (i) the concept of market price support under the Agreement on Agriculture; (ii) "financial contribution" requirement issues arising from the complainants' export subsidy claims; (iii) Article 27 and Annex VII(b) of the SCM Agreement, and (iv) India's preliminary ruling request.

II. MARKET PRICE SUPPORT UNDER THE AGREEMENT ON AGRICULTURE

2. Japan now turns to the complainants' claim that India provides market price support to sugarcane producers in excess of India's 10 per cent *de minimis* limit under the Agreement on Agriculture. The complainants have demonstrated that India exceeds the 10 per cent *de minimis* level through market price support provided under the FRP and SAP measures.

3. India, relying on paragraph 2 of Annex 3 to the Agreement on Agriculture, contends that those measures do not constitute "market price support" and should not be included in the calculation of its AMS. According to India, "Paragraph 2 delineates the scope of subsidies under paragraph 1",[1] such that the subsidies that must be included in a Member's AMS are only "budgetary outlays and revenue forgone by *governments or their agents*."[2] India contends that because the "sugar mills that purchase sugarcane from the farmers at FRP/SAP are neither government nor its agents[,]" the FRP and the SAP programs do not qualify as "a subsidy by the government or its agents under Annex 3."[3]

4. Japan disagrees with India's interpretation of paragraph 2 of Annex 3. Paragraph 2 does not limit the types of support to be included in a Member's AMS to only "budgetary outlays and revenue foregone by governments or their agents". Paragraph 2 expressly states that "[s]ubsidies under paragraph 1 shall include both budgetary outlays and revenue foregone by governments or their agents".[4] Therefore, by its express terms, paragraph 2 does not exhaustively prescribe the types of financial transfers to be included in a Member's AMS calculation. Japan further points out that Article XVI:1 of the GATT 1994 refers to the granting or maintaining of "any subsidy, including any form of income or price support". This provides contextual support for the view that market price support under the Agreement on Agriculture is not limited in the manner argued by India. In addition, Sugarcane Order which set out the purchase price for sugarcane was introduced in 1966, and India's Schedules (G/AG/AGST/IND) stipulates a market price support. The claim in India's Submission that the current FRP does not constitute the market price support is inconsistent with those facts.

5. For the foregoing reasons, Japan disagrees with India's view that paragraph 2 of Annex 3 to the Agreement on Agriculture limits the types of support to be included in a Member's AMS to only "budgetary outlays and revenue foregone by governments or their agents".

III. "FINANCIAL CONTRIBUTION" REQUIREMENT OF EXPORT SUBSIDY CLAIMS

6. Next, Japan turns to address the claims that India maintains export subsidies in breach of the Agreement on Agriculture and the SCM Agreement. In relation to all of the alleged export subsidies, India argues that, absent specific evidence of the "extent to which, if any, a government entity

[1] India's first written submission, paras. 61-62.
[2] India's first written submission, para. 62. (emphasis original)
[3] India's first written submission, paras. 63-64.
[4] Emphasis added.

actually makes a financial contribution", there is no proof that a subsidy exists.[5] For India, a complainant must provide direct evidence that payments have actually been made under a measure to demonstrate the existence of a subsidy.

7. Japan does not agree with the approach of India, not only because it is inconsistent with the text of the SCM Agreement, but also because it would set an unduly burdensome evidentiary requirement on complainants to establish the existence of a subsidy. First, subparagraph (i) of Article 1.1(a)(1) of the SCM Agreement identifies, as one type of financial contribution, a government practice involving "a direct transfer of funds". As endorsed by the Appellate Body a few times, the term of "funds" implies not only money, but also financial resources and other financial claims more generally.[6] "Financial contribution" therefore covers conduct of the government by which money, financial resources, and/or financial claims are made available to a recipient,[7] the provision of which could automatically place the recipient in a better position than it would otherwise have been in the marketplace.[8]

8. Second, the approach of India could lead to circumvention of the disciplines under the Agreement on Agriculture and the SCM Agreement by shielding non-transparent export subsidy programs from scrutiny. If India's approach were adopted, it could provide an incentive for Members granting export subsidies not to provide all relevant data on the actual operation of their programs. Moreover, India's approach would also preclude WTO Members from making a claim that a measure "as such" constitutes an export subsidy under the Agreement on Agriculture and the SCM Agreement. While Japan does not take any position regarding the facts in this dispute, in Japan's view, a legislative measure that sets out legal elements of an export subsidy may be found to constitute an export subsidy "as such", without further direct evidence of actual making of a financial contribution under that measure.

IV. ARTICLE 27 AND ANNEX VII(B) OF THE SCM AGREEMENT

9. Next, regarding the applicability of Article 3 of the SCM Agreement, Japan maintains that the text of Article 27.2(b) of the SCM Agreement does not leave any scope for ambiguity in respect of the end date of the transition contained therein. Japan then believes that Article 27.2(b) provides for a transition of "eight years from the date of entry into force of the WTO Agreement" which ran from 1 January 1995 to 1 January 2003 during which the prohibition in Article 3.1(a) of the SCM Agreement did not apply to developing country Members or Annex VII(b) graduates.

10. Furthermore, Japan views that a harmonious interpretation of Article 27.5 in connection with Article 27.2 of the SCM Agreement leads to the conclusion that Article 27.5 only applies to a developing country Member that is either in Annex VII(a) (least-developed countries) or to a developing country Member that has not yet graduated from Annex VII(b), and can no longer apply to developing countries that graduated from Annex VII(b).

11. Therefore, India is now subject to Article 3 of the SCM Agreement, as confirmed by the panel in *India – Export Related Measures*.[9] Although the panel report in that dispute is still subject to appeal, Japan is of the opinion that it well addressed India's arguments which were mostly identical, and then provides helpful interpretative guidance on this issue.

V. INDIA'S PRELIMINARY RULING REQUEST

12. Japan considers that measures not in existence at the time of the Panel's establishment does not *necessarily* fall outside of the Panel's terms of reference. The Panel's terms of reference are defined by the complainants' panel requests, which must meet the requirements of Article 6.2 of the DSU. However, Article 6.2 does not "set out an express temporal condition or limitation on the measures that can be identified in a panel request".[10] As such, it does not "categorically" prohibit

[5] India's first written submission, paras. 107 and 147. (emphasis original)

[6] Appellate Body Reports, *Japan – DRAMs (Korea)*, para. 250; *US – Large Civil Aircraft (2nd complaint)*, para. 614.

[7] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614.

[8] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1501-7.1502; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, footnotes 22-23.

[9] Panel Report, *India – Export Related Measures*, para. 7.18.

[10] Panel Report, *US – Washing Machines*, paras. 7.248-7.249.

"the inclusion, within a panel's terms of reference, of measures that come into existence or are completed after the panel is requested".[11]

13. Regarding the alleged expired measures, Japan considers that a critical distinction must first be drawn between, on the one hand, the measures at issue and, on the other hand, the legal instruments embodying them. It is the former, rather than the latter, which must fall within the Panel's terms of reference.[12] If the Panel finds that the measures at issue have in fact expired, the Panel must consider whether to make findings on them in light of the objective of securing a positive solution to the dispute. The nature of the domestic support commitments under the Agreement on Agriculture weighs in favor of examining the WTO-consistency of the measures alleged to have expired. The Panel's analysis under Articles 3.2 and 6.3 of the Agreement on Agriculture is retrospective as it entails a determination of whether India was in compliance with its domestic support reduction commitments in years preceding the establishment of the Panel. If the expiry of a legal instrument could shield a Member's provision of domestic support from later scrutiny, this would lead to easy circumvention of the domestic support commitments and obligations under the Agreement on Agriculture. Relevant considerations include whether the effects of the measures continue to impair the benefits accruing to the complainants under the Agreement on Agriculture, as well as the possibility of India reintroducing the alleged expired measures.[13]

14. Regarding the post-establishment measures at issue, Japan also considers that post-establishment measures does not necessarily fall outside of a panel's terms of reference. Panel's terms of reference may include post-establishment measures if: (i) the terms of reference are broad enough and (ii) "the new measure does not 'change the essence' of the original measures included in the [panel] request".[14] Japan notes that the complainants' panel requests appear to contain language broad enough to cover the so-called MAEQ scheme, and the MAEQ Scheme is in essence the same as the measures described in the complainants' panel requests.

15. In this respect, Japan supports the preliminary ruling of the Panel issued on the 9th of November 2020.

[11] Panel Report, *US – Washing Machines*, para. 7.248.

[12] Panel Report, *Argentina – Footwear*, paras. 8.40-8.41. See also Appellate Body Report, *US – Upland Cotton*, paras. 262 and 270.

[13] Panel Reports, *China – Agricultural Producers*, para. 7.86; *China – Electronic Payment Services*, para. 7.228.

[14] Panel Report, *EC – IT Products*, para. 7.139.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

1. The United States welcomes the opportunity to present its views to the Panel on the proper legal interpretation of certain provisions of the *Agreement on Agriculture* ("Agriculture Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") as relevant to certain issues in this dispute.

2. In their submissions, Australia, Brazil, and Guatemala (the "Complainants") calculated India's Aggregate Measurement of Support ("AMS") for sugarcane based on, amongst other measures, India's market price support programs: the Fair and Remunerative Price ("FRP") and relevant State Advised Price ("SAP").

3. India may, like other Members of the WTO, maintain domestic support programs, including market price support programs, as long as the domestic support provided under those programs does not exceed the Member's fixed commitment levels. The Agriculture Agreement provides that each Member's "domestic support . . . commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization," and that "a Member shall not provide support in favour of domestic producers [of agricultural products] in excess of the commitment levels specified in Section I of Part IV of its Schedule."

4. India's consistency with this commitment is measured in terms of its Current Total Aggregate Measurement of Support ("Current Total AMS"), which is the sum of the AMS provided to each basic agricultural product. Pursuant to Article 1(a) of the Agriculture Agreement, the AMS for each basic agricultural product must 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 tables of supporting material incorporated by reference in Part IV of the Member's Schedule." Article 1(h), in turn, provides that a Member's "Current Total AMS" for a given year refers to "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support[,] and all equivalent measurements of support for agricultural products." Pursuant to Article 6.4 of the Agriculture Agreement, a Member's Current Total AMS does not include product-specific AMS values that do not exceed the relevant *de minimis* level of support.

5. India, however, does not provide an AMS commitment level in Section I of Part IV of its Schedule of Concessions on Goods.

6. For this scenario, Article 7.2(b) of the Agriculture Agreement provides: "Where no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in paragraph 4 of Article 6." Article 6.4(b) of the Agriculture Agreement sets out the *de minimis* level for developing countries at 10 percent. The parties agree this is the applicable *de minimis* level for India.

7. Therefore, to determine India's Current Total AMS for each year, the Panel first must calculate the product-specific AMS for each basic agricultural product, and compare that value to the total value of production for that agricultural product. To the extent that the product-specific AMS for a basic agricultural product exceeds India's *de minimis* level of 10 percent, the full value of that product-specific AMS would be included in India's Current Total AMS. Because India has not made a Total AMS commitment in Part IV of its schedule, in the event the product-specific AMS for any basic agricultural product exceeds the *de minimis* level of 10 percent, India will have breached Articles 3.2 and 6.3 of the Agriculture Agreement.

8. Annex 3, paragraph 1 of the Agriculture Agreement sets out methodologies for calculating the value of a Member's "product-specific" AMS "for each basic agricultural product receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitments ('other non-exempt policies')."

9. With respect to "market price support," while the Agriculture Agreement does not expressly define this term, the ordinary meaning of the constituent terms reflect the scope of domestic support programs contemplated by this term. A "market" is the physical or geographic place where commercial transactions take place, or the business of buying and selling, including the rate of purchase or sale, of a particular good or commodity. "Price" is defined as "a sum in money or goods for which a thing is or may be bought or sold." "Support" is defined as "the action of holding up, keeping from falling, or bearing the weight of something" or "the action of contributing to the success of or maintaining the value of something."

10. Relevant to the consideration of the term "market price support," the dictionary also supplies a number of definitions of compound terms. The *Shorter Oxford English Dictionary*, defines "market price" as "the current price which a commodity or service fetches in the market." Further, it defines "price support" as "assistance in maintaining the levels of prices regardless of supply and demand."

11. Thus, the ordinary meaning of the constituent terms, as well as the compound phrases indicates that "market price support" is the provision of assistance in holding up or maintaining the price for a product in the market, regardless of supply and demand. In the context of Annex 3, paragraph 1, an AMS for "each basic agricultural product" includes the provision of assistance in holding up or maintaining a market price for that agricultural product. As such, this assistance can be provided directly by the Government or through consumer purchases.

12. The panel in *Korea –Beef* reached the same understanding of the meaning of "market price support" under Annex 3, paragraph 8. The panel noted that the "quantification of market price support in AMS terms is not based on expenditures by government," and that it "can exist even where there are no budgetary payments." Further, it stated that "all producers of the products which are subject to the market price support mechanism enjoy the benefit of an assurance that their products can be marketed at least at the support price."

13. Paragraph 8 of Annex 3 provides the methodology for calculating the specific type of support at issue in this dispute – market price support. Paragraph 8 states that "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." The paragraph goes on to provide that "[b]udgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS."

14. Thus, the calculation of market price support is based on the price gap between the "applied administered price" identified in the domestic support measure and the "fixed external reference price," multiplied by the quantity of eligible production. Based on the text of the Agriculture Agreement and the ordinary meaning of the terms:

- The "applied administered price" is the price the Indian measures *provide* for each of the basic agricultural products and is *identified* for each product and each year in the Indian legal instruments implementing the program.

- The "fixed external reference price" is a *static reference value* defined by the Agriculture Agreement in Annex 3, paragraph 9. This states that the price "shall be based on the years 1986 to 1988" and "may be adjusted for quality differences as necessary."

- Finally, the "quantity of production eligible" to receive the applied administered price is the amount of the product *fit or entitled* to receive the price, not the amount of agricultural product actually purchased. Because under India's programs all production is entitled to receive either the FRP or a higher SAP, the "quantity of production eligible" is the total sugarcane production volume for that year.

15. That is, "market price support" requires a comparison between the "applied administered price" and the "fixed external reference price." An "applied administered price" is the price "set by the government at which specified entities will purchase certain basic agricultural products." The difference between these prices is then multiplied by the "quantity of production eligible to receive the applied administered price." The Annex 3, paragraph 8 methodology thus indicates that a "market price support" measure would include an "applied administered price" that is available to

some quantity of "eligible" production; and that such support for each unit of the product can be measured through comparison of the administered price to a fixed, external "reference" price.

16. The calculation methodology provide in Annex 3, paragraph 8, for market price support is reflected in the following equation:

*(Applied Administered Price – Fixed External Reference Price) * Quantity of Production Eligible = Value of Market Price Support*

As described above, the value of market price support for a basic agricultural product should be summed along with any other non-exempt product-specific support in favor of that product to calculate the AMS for that product.

17. The Complainants' arguments in this dispute are consistent with the calculation methodology set out in the Agriculture Agreement and as recognized by the panels in *China – Domestic Support* and *Korea –Beef*.

18. India attempts to argue that its market price support measures do not quality as domestic support at all, and therefore should not be included in its AMS calculation. India mistakenly points to the text of Annex 3 to the Agricultural Agreement to make this argument.

19. India's interpretation of Annex 3 is a misreading of the text. Paragraph 2 does not limit paragraph 1. Rather, paragraph 2 specifies two forms of financial transfers that must be included in the list of support outlined in Paragraph 1. Paragraph 2 sets out this relationship with Paragraph 1 through the use of the term "shall include." "Shall" is defined as "a command, promise, or determination" and "include" is defined as "[t]o contain as a member of an aggregate, or a constituent part of a whole; to embrace as a sub-division or section; to comprise; to comprehend." Therefore, the ordinary meaning of "shall include" indicates that measures involving budgetary outlays and revenue forgone must be included as a part of the domestic support programs listed in Paragraph 1. The paragraph does not mean, as India argues, that the domestic support programs must be limited to only the type of transfers identified in Paragraph 2. In other words, budgetary outlays and revenue forgone form a subset, and not an outer boundary, of the kinds of support that must be included in a Member's AMS calculation.

20. Furthermore, Annex 3 is subject to Article 6 of the Agriculture Agreement, which sets out Members' "Domestic Support Commitments". While the term "domestic support" is not specifically defined in the Agriculture Agreement, the ordinary meaning of the words making up this phrase reveal the broader nature of the term. "Domestic" is defined as "[o]f or relating to one's own country or nation; not foreign, internal, inland, 'home'." "Support" is defined as "[t]he action or an act of helping a person or thing to hold firm or not to give way; provision of assistance or backing." India's proposed interpretation artificially limits the scope of such "assistance or backing" in a manner not supported by the ordinary meaning of the term "domestic support."

21. Moreover, India's proposed limitation on programs qualifying as market price support ignores the method for calculating market price support as set out in Paragraph 8 of Annex 3. Nothing in the calculation of market price support set out in Paragraph 8 necessarily involves payments by a government or its agents. In fact, the methodology of Paragraph 8 expressly excludes from the calculation of market price support budgetary payments made to maintain the price gap. Under India's reading, there would be no domestic support for market price support because Paragraph 2 *limits* domestic support *to* budgetary outlays, while Paragraph 8 *excludes* budgetary payments.

22. Therefore, the AMS calculation is intended to measure the total amount of support a WTO Member provides in favour of its domestic agricultural producers. In the case of market price support programs, the level of support provided must be included in that calculation whether or not it involves budgetary outlays by the government. Consequently, the Complainants correctly include the support provided through India's FRP and SAP measures within their AMS calculations.

23. The Complainants claim that India maintains export subsidies in breach of Articles 3.3, 8, and 9 of the Agriculture Agreement and Article 3 of the SCM Agreement.

24. Article 3.3 of the Agriculture Agreement sets out two categories of commitments for export subsidies: a commitment on scheduled agricultural products and a commitment on unscheduled agricultural products. Section II of Part IV of India's Schedule does not list any commitments on sugar, therefore, sugar is an unscheduled agricultural product. Consequently, India has committed not to provide export subsidies for sugar of the type listed in paragraph 1(a) of Article 9 of the Agriculture Agreement.

25. India also has committed not to provide sugar subsidies contingent on export through Articles 1 and 3 of the SCM Agreement. Where a Member has granted a subsidy as defined in Article 1.1 of the SCM Agreement, it will be prohibited as an export subsidy if the subsidy is inconsistent with the prohibitions in Articles 3.1(a) and 3.2 of the SCM Agreement.

26. Like Article 9.1(a) of the Agriculture Agreement's restrictions on subsidies "contingent on export performance", Article 3.1(a) of the SCM Agreement prohibits subsidies that are "contingent … upon export performance." There is nothing in these texts to suggest that "contingent on" and "contingent upon" have different meanings. The relevant dictionary definition of "contingent" is "[c]onditional; dependent on, upon; [d]ependent for its existence on something else." In the export subsidy context, "the grant of a subsidy must be 'tied to' export performance." Therefore, to find that a subsidy is an export subsidy under either the Agriculture Agreement or the SCM Agreement, the subsidy must be conditioned, solely or as one of several other conditions, on export performance. This export contingency can be demonstrated "in law" (*de jure*) or "in fact" (*de facto*).

27. India sets out two broad defences, both inadequate to rebut challenges to subsidy measures under the Agriculture Agreement and the SCM Agreement.

28. First, India fails to recognize that export subsidies under the Agriculture Agreement are measured based on amounts "allocated or incurred" by a government. Under the Agriculture Agreement, India has a zero commitment level for export subsidies. The export subsidy commitments India made in the Agriculture Agreement are measured based on allocation or incurrence, not solely on actual payments made. If the Panel finds that Complainants are correct that India has granted legal authority for the provision of export subsidies and has made budgetary allocations to local authorities for the payment of those subsidies, then those facts would provide a sufficient basis for the Panel to determine that India has provided export subsidies within the meaning of the Agriculture Agreement.

29. Second, India also fails to acknowledge that, under the SCM Agreement, the burden for showing that an export subsidy exists does not require specific evidence demonstrating that a direct transfer of funds, for example, has in fact been made to, or received by, a recipient entity. A measure setting out the legal elements of an export subsidy, on its face, provides sufficient evidence to demonstrate the existence of such a subsidy. India's arguments would mean that a complainant would be prevented from demonstrating the existence of a subsidy because it did not have access to specific evidence of payment information, such as proof of bank transfers or other payment activity. Such an evidentiary standard would shield respondents from potential liability under the WTO agreements and only incentivize non-transparency.

30. The United States is not aware of any dispute in which a panel or the Appellate Body has imposed such an evidentiary burden as India suggests on a complainant. For example, the panel in *India –Export Related Measures* found the existence of subsidies based on an examination of the measures themselves, and did not find that additional evidence of actual payments was required. Instructive in this dispute is the panel's analysis of the Merchandise Exports from India Scheme ("MEIS").

31. India's attempt to interpret the Agriculture and SCM Agreements as requiring direct, evidentiary proof of actual government transfers to demonstrate the existence of a *de jure* export subsidy finds no support in the text of the agreements, and must be rejected.

32. Although Article 27 of the SCM Agreement provides a limited exception to Article 3.1(a), India no longer qualifies for that limited exception. As acknowledged by India in this dispute, India's GNP per capita has already reached $1,000 for three consecutive years (2013, 2014, and 2015). Accordingly, India is no longer a developing country Member referred to in Annex VII and therefore

paragraph 2(a) of Article 27 of the SCM Agreement no longer applies to India. Paragraph 2(b) of Article 27 also does not apply to India. For "other developing country Members" not listed in Annex VII, subparagraph (b) provided a phase-out "for a period of eight years from the date of entry into force of the WTO Agreement." The WTO Agreement entered into force on January 1, 1995, and the "period of eight years" expired on January 1, 2003. Thus, because January 1, 2003 has passed, paragraph 2(b) does not apply to India, and India must terminate its export subsidies. As a result, India is now subject to Article 3 of the SCM Agreement. India's status vis-à-vis Article 3 of the SCM Agreement was confirmed by the panel in *India – Export Related Measures*.

33. Properly interpreted, the SCM Agreement provides different end dates for the exemption of the prohibition in Article 3.1(a). India was an Annex VII(b) developing country Member. An Annex VII(b) Member that graduated before January 1, 2003, may provide export subsidies until January 1, 2003. Those Annex VII(b) Members that graduate after January 1, 2003, like India, are not obligated to end their export subsidies until the date of their graduation. Thus, those Annex VII(b) Members that graduate after January 1, 2003, like India, would have had a *longer* period to provide export subsidies than a non-Annex VII developing country Member, described in Article 27.2(b), whose time to grant export subsidies ended on January 1, 2003.

34. In other words, a Member graduating from Annex VII(b) after January 1, 2003, would receive *better* treatment (in the sense of a longer implementation period) than the Members originally within the scope of Article 27.2(b).

35. In sum, Article 27 of the SCM Agreement does not provide India with an additional eight years to phase out its export subsidies; therefore, India is subject to the obligations of Article 3.1(a) and 3.2 of the SCM Agreement.

36. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the Agriculture Agreement and the SCM Agreement.

ANNEX D

COMMUNICATIONS BY THE PANEL REGARDING THE FIRST SUBSTANTIVE MEETING

ANNEX D-1

PANEL'S COMMUNICATION TO THE PARTIES CONVEYING ITS DECISION TO HOLD TWO SUBSTANTIVE MEETINGS, WITH THE FIRST SUBSTANTIVE MEETING TO BE HELD IN A "HYBRID" FORMAT, AS WELL AS PROPOSING THE DATES, AND THE ADOPTION OF DRAFT ADDITIONAL WORKING PROCEDURES, FOR THE FIRST SUBSTANTIVE MEETING, DATED 16 OCTOBER 2020

Dear representatives of the parties,

The Panel thanks the parties for submitting, on 9 October 2020, their comments on the two proposed modalities for holding the Panel's first substantive meeting with the parties and third parties.

Having carefully reviewed the parties' comments, the Panel considers it appropriate to hold two substantive meetings, as provided for in its Working Procedures. In light of the commitments of the panelists and the availability of meeting rooms in CWR, the Panel intends to hold its first substantive meeting with the parties and third parties during the week of 23 November 2020.

As for the format of the first substantive meeting, the Panel, in its communication of 2 October 2020, proposed to hold the meeting in a hybrid form, whereby representatives of the parties and third parties could participate either physically, in a meeting room at the WTO premises, or virtually, through video conferencing technology. The complainants agree with the proposed approach. India, however, disagrees with the Panel's proposal, arguing that permitting representatives to connect to the meeting remotely would undermine India's due process right to a fair opportunity to make its defences. According to India, the physical presence of the panelists and representatives of the parties is an indispensable part of the WTO dispute settlement process. While recognizing the objective of prompt settlement of disputes, enshrined in Article 3.3 of the DSU, India contends that such objective should not be interpreted in a way that undermines India's due process rights.

The Panel notes that the DSU does not address the issue of the format of panel meetings. India has not identified any provision of the DSU precluding a panel, explicitly or implicitly, from holding a substantive meeting in the hybrid format proposed by the Panel. Article 12.1 of the DSU allows panels to deviate from the Working Procedures in Appendix 3 to the DSU, "after consulting the parties to the dispute". As recognized by India, the Panel has been consulting the parties on the format of its first meeting for a couple of months now. The Panel does not agree with India's view that modification of the Working Procedures requires agreement of the parties.

Furthermore, in the view of the Panel, the proposed hybrid format addresses the concerns identified by India. First, the proposed format would not require any party or third party to attend the meeting remotely – parties' and third parties' representatives could attend the meeting physically or remotely, as they prefer. The proposed Additional Procedures would allow the parties and third parties an adequate opportunity to fully present their claims and make out their defences, as indicated in the Working Procedures adopted by the Panel on 5 December 2019. Due process rights and equal treatment can be fully assured. The Panel also notes that the proposed hybrid format is in accordance with past practice in WTO dispute settlement. For instance, in *Australia – Tobacco Plain Packaging*, the Appellate Body allowed a member of one of the complainants' delegations to participate in the appellate hearing via video conference.[1] Further, we also note that, due to the constraints imposed by the pandemic, a number of WTO panels have recently held their meetings in the hybrid form proposed by this Panel. It is also public knowledge that a number of international tribunals and domestic courts are now holding virtual hearings.

The Panel recalls that the outbreak has already caused a delay of five months in these proceedings. Further, the current scientific information is far from allowing the Panel to predict when it may be able to hold an exclusively physical meeting. While the Panel acknowledges the benefits of holding an exclusively physical meeting, given the continued travel restrictions and health risks caused by

[1] See e.g. Appellate Body Reports, *Australia – Tobacco Plain Packaging (Dominican Republic)*, para. 1.21; *Australia – Tobacco Plain Packaging (Honduras)*, para. 1.21.

the pandemic, on balance, the Panel finds it appropriate to hold its first substantive meeting with the parties and third parties in a hybrid form.

To this end, the Panel proposes to the parties the adoption of the attached Additional Working Procedures of the Panel Concerning Meetings with Remote Participation. Parties are invited to submit comments on these proposed Additional Working Procedures, as well as the proposed date of the first substantive meeting, by 5:00 p.m. (Geneva time) on Friday 23 October 2020.

Finally, the Panel wishes to inform the parties that, since the Chairman is in Switzerland, he intends to attend the first substantive meeting physically at the WTO premises, subject to further developments.

ANNEX D-2

PANEL'S COMMUNICATION TO THE PARTIES CONVEYING ITS DECISION REGARDING THE FORMAT AND THE CONDUCT OF THE FIRST SUBSTANTIVE MEETING AND ADOPTING THE ADDITIONAL WORKING PROCEDURES FOR THE PANEL'S FIRST SUBSTANTIVE MEETING TO BE HELD BY REMOTE MEANS, DATED 2 NOVEMBER 2020

Dear representatives of the parties,

The Panel recalls its communication, dated 16 October 2020, indicating its intention to hold the first substantive meeting with the parties and third parties in a hybrid format during the week of 23 November 2020, and proposing the adoption of the draft Additional Working Procedures Concerning Meetings with Remote Participation.

On 28 October 2020, the parties submitted their comments on the proposed Additional Working Procedures and the dates of the first substantive meeting. The complainants agreed with the proposed dates as well as the Additional Procedures, subject to one minor addition. India stated that it is unable to agree to a hybrid procedure because such a procedure does not qualify as a substantive meeting under the DSU. According to India, a hybrid procedure would constitute a violation of India's due process rights because it is inequitable and would not allow India to sufficiently prepare and present its case. India also pointed to a number of concerns related to the confidentiality of the procedure.

The Panel is mindful of the disruptions caused by the COVID-19 pandemic and the difficulties faced by the parties in their work. The continuous public health crisis has already caused a significant delay in these proceedings. The Panel further recalls that, pursuant to Article 3.3 of the DSU, "prompt settlement" of disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". The Panel therefore does not intend to alter its decision to proceed with the first meeting. Nonetheless, taking into account the comments provided by the parties, and in particular those by India, as well as the recent decisions by the Swiss authorities restricting physical meetings, the Panel has made certain modifications to the proposed format of the meeting.

First, India argues that a "hybrid" meeting would be inequitable. India submits that, due to the travel restrictions imposed by the Swiss authorities, its legal representatives and external counsel will be unable to travel to Geneva, unlike certain representatives of the parties and third parties in this dispute. In India's view, the outcome would be advantageous to the complainants and contrary to the letter and spirit of Article 12.10 of the DSU. As the parties are aware, following receipt of India's comments, the authorities of the Canton of Geneva announced additional restrictions on physical meetings of more than five people in public buildings, including within international organizations, as from 7 p.m. 2 November 2020. In light of this decision, **the Panel has now decided to conduct its first meeting in a fully virtual manner**, via Cisco WebEx videoconferencing technology. This will allow representatives of all parties and third parties to attend the meeting remotely. The Additional Working Procedures for the Panel's First Substantive Meeting to be Held by Remote Means, adopted today by the Panel, are provided in the attachment to this communication.

India further submits that a hybrid (or virtual) meeting would not qualify as a substantive meeting within the meaning of the DSU. The Panel notes that the DSU does not address the issue of the format of panel meetings.[1] The Panel is not precluded from amending its Working Procedures and conducting meetings in the format it deems appropriate, after consulting with the parties to the dispute, as provided for in Article 12.1 of the DSU. According to paragraph 11 of the Working Procedures adopted on 5 December 2019, in the interest of full transparency and harmonization of the timetable, the parties agreed that the substantive meetings will take place *in the presence* of the parties to all three disputes. The proposed format of the first meeting will allow all the parties, as well as third parties, to participate in the meeting via videoconferencing technology. All parties

[1] Appendix 3 to the DSU refers to a "substantive meeting of the panel", without specifying a particular format.

and third parties will be connected with, and heard by, each other and the Panel. The virtual format will also allow the Panel to conduct the meeting in the manner envisaged in the Panel's adopted Working Procedures and in a way that will respect the parties' and third parties' due process rights: each party will be invited to present its opening and closing statements; third parties will be invited to present their views at the third-party session; and the parties will be given an opportunity to make comments or ask the other parties or third parties questions. In sum, the Panel considers that such a meeting conducted through videoconferencing technology does qualify as a substantive meeting under the DSU.

India also claims that the Panel has failed to accord India a sufficient opportunity to prepare for, and effectively present, its case, contrary to Article 12.10 of the DSU. The complainants, on the other hand, have requested the Panel to send questions in advance of the meeting. In order to accommodate the parties' concerns and allow the parties time to effectively prepare and present their respective claims and defenses, the Panel has decided to send advance questions to the parties, 10 working days before the start of the meeting. The questions will convey the Panel's key points of interest and allow the parties to coordinate between their relevant authorities well in advance of the meeting. The Panel has also decided that it will not pose any additional questions at the meeting, in order to provide maximum clarity as to the scope of the discussions at the meeting. The Panel may, if necessary, send additional written questions to the parties and third parties following the conclusion of the meeting.

According to India, the Panel has also overlooked concerns regarding the protection of confidentiality in the proposed proceedings. The Panel disagrees. The Panel notes, first, that the obligation to respect the confidentiality of the meetings with the Panel applies regardless of the format of the meeting. As indicated in paragraphs 12(2) and 19(2) of the Working Procedures, each party and third party shall ensure that members of their delegations act in accordance with the DSU, in particular with regard to the confidentiality of the proceedings. Further, participants in the virtual meeting have to respect the confidentiality and security rules specified in the Additional Working Procedures. Article 3.10 of the DSU sets forth WTO Members' understanding that "if a dispute arises, all Members will engage in these procedures in good faith and in an effort to resolve the dispute". The Panel has no reason to doubt that the parties will observe such fundamental obligations in these proceedings. Further, the Panel is of the view that the end-to-end encryption that Webex provides for will protect the confidentiality of the Panel's meeting with the parties and third parties.

Regarding the logistical and technical concerns raised by India, the Panel will provide further guidelines in due course, covering issues such as the manner of document sharing, which has also been highlighted by the complainants. As reflected in the Additional Working Procedures, the Panel has asked the Secretariat to test the platform with each delegation prior to the meeting, so as to demonstrate the use of the platform and detect any issues in advance of the meeting. Finally, the Panel will run a test with all participants, providing another opportunity for the parties and third parties to test and experience, in advance, all aspects of the virtual meeting.

Taking into account the time differences among the parties and third parties, as well as panelists in this dispute, the Panel has decided to proceed with the meeting as follows:

- On Monday, 23 November at 12:00-15:00 (Geneva time), the Panel will convene a test session with all participants from the parties and the third parties.

- On Tuesday/Wednesday, 24-25 November at 12:00-15:00 (Geneva time), the Panel will begin its first meeting with the parties. The Panel will first invite the parties to deliver their opening statements. After the conclusion of the opening statements, the Panel will invite each party to comment or ask questions to the other parties. The Panel will also invite the parties to orally present their answers to the advance questions.

- On Thursday, 26 November at 12:00-15:00 (Geneva time), the Panel will hold the third-party session. The Panel will not pose questions to any third party. The Panel will give the parties an opportunity to ask third parties questions about their submissions or statements. If necessary, the Panel will dedicate an appropriate amount of time to finalize this session on the following day.

- On Friday, 27 November at 12:00-15:00 (Geneva time), the Panel will invite the parties to orally present their answers to any remaining advance questions. The Panel will also invite

the parties to deliver their closing statements. Thereafter, the Panel will end the first substantive meeting.

The Panel invites the parties to fill in the attached Registration form and return it to the Panel by 5 p.m. (Geneva time) on Monday, 9 November 2020.

The details of the third-party session will be communicated to the third parties in due course.

ANNEX D-3

PANEL'S COMMUNICATION TO THE PARTIES ADDRESSING INDIA'S CONFIDENTIALITY QUERIES AND REQUEST FOR POSTPONEMENT OF THE FIRST SUBSTANTIVE MEETING, DATED 6 NOVEMBER 2020

Dear all,

The Panel thanks India for its communication of 4 November 2020. In the communication, India seeks clarification on two issues with respect to the confidentiality of the Panel's first substantive meeting with the parties and third parties, scheduled for the week of 23 November 2020. Further, India points out that several key officials from the central and state authorities will be unavailable in the period preceding the first substantive meeting, due to a national festival. India also states that a key member of its delegation has contracted the COVID-19 virus and is in the process of recovery. Therefore, India requests that the Panel reconsider the dates for the first substantive meeting and to reschedule it for the week of 7 December 2020.

With respect to the confidentiality of the meeting, India inquires, first, what safeguards, if any, the Panel has adopted to ensure that the parties to the dispute respect the obligation to preserve the confidentiality of the meeting. As the Panel noted in its communication of 16 October 2020, all participants are under the obligation to respect the confidentiality of the proceedings, as reflected in the DSU, the Panel's Working Procedures adopted on 5 December 2019, as well as the Additional Working Procedures adopted on 2 November 2020. The Panel also indicated that it has no reason to doubt that all participants will act in good faith and observe their fundamental obligations in the present proceedings. The Panel therefore continues to expect the parties to abide by these confidentiality provisions, and act accordingly during the meeting.

India also asks the Panel whether the WTO has entered into any formal agreement with Cisco Webex, to ensure that the platform maintains the confidentiality of the meeting. The Panel understands that there is no formal agreement between the WTO and Cisco Webex regarding confidentiality since such an agreement would be unnecessary. The Panel further understands that the IT security officers in the WTO Secretariat have assessed the security features of Cisco Webex and found it to be a suitable platform to hold virtual panel meetings. The WTO Secretariat has therefore purchased a number of licences from Cisco Webex, necessary for scheduling and hosting meetings with end-to-end encryption. Based on the foregoing, and considering that Cisco Webex has been used by several WTO panels as well as other international tribunals so far, the Panel trusts that this platform should be able to protect the confidentiality of the Panel's first substantive meeting with the parties and third parties.

India bases its request for the rescheduling of the meeting on two grounds. First, India points out that due to the Diwali festival, and other festivals following Diwali, several key officials dealing with these proceedings will be on leave. The Panel notes that the Diwali festival is an official public holiday across India and that, this year, it will be celebrated on 14-15 November. The Panel's first substantive meeting is scheduled for the week of 23 November, one week after the Diwali celebrations. The Panel recalls that it first indicated its intention to hold the meeting towards the end of November, in its communication to the parties dated 2 October 2020. Subsequently, in its communication of 16 October 2020, the Panel specified its intention to hold the meeting during the week of 23 November 2020 and invited the parties to provide their comments thereon. On 28 October 2020, the complainants confirmed their availability to attend the meeting on the proposed dates. India, however, did not provide any comments on the proposed dates, in its response to the Panel's communication.

Second, India states that a key member of its delegation has caught COVID-19 and will need time to fully recover in order to attend the meeting. The Panel regrets to hear that the Indian colleague has been infected by the virus. The Panel notes that, unfortunately, the nature of the virus is such that it is impossible to predict whether any of the participants who are assigned to represent their

delegations at the meeting might contract the virus prior to the meeting. Indeed, it is this uncertainty that has urged the Panel to hold its first substantive meeting virtually.

Finally, in this regard, the Panel wishes to emphasize that the scheduling conflicts of the members of the Panel precludes the Panel from holding this meeting at any other time before the end of the year.

Therefore, the Panel is not in a position to reschedule its first substantive meeting.

ANNEX D-4

PANEL'S COMMUNICATION TO THE PARTIES AND THIRD PARTIES REGARDING THE POSTPONEMENT OF THE FIRST SUBSTANTIVE MEETING, DATED 18 NOVEMBER 2020

Dear all,

On 17 November 2020, India informed the Panel that a key member of its delegation has contracted COVID-19 and will not be able to participate in the first substantive meeting scheduled for 23-27 November 2020. India states that the delegate's participation in the first substantive meeting and in the preparation of India's responses to the Panel's questions is indispensable, both in terms of substantive aspects of the dispute as well as the logistics and organization of the meeting. India also states that several other delegates have gone into mandatory quarantine, further compromising its delegation's ability to prepare for the meeting. Therefore, India requests the Panel to postpone its first substantive meeting to December 2020, or to a later date on which all panelists would be available.

The Panel regrets to hear that another member of India's delegation has been infected by the virus and is unable to participate in the first substantive meeting. The Panel wishes this delegate a speedy recovery. The Panel understands the difficulties posed by this delegate's absence to India's preparation for the meeting. Therefore, in order to allow India to make alternative arrangements for the full participation of its delegation in the meeting, the Panel has decided to postpone its first substantive meeting with the parties and third parties to **7-11 December 2020**.

The Panel finds it important to underline that the reason for the postponement of the meeting is not to provide time for the recovery of the affected Indian delegate. Rather, this extension is granted so that India can make alternative arrangements in case the delegate at issue, or any other delegate, is unable to participate in the meeting due to health reasons. The Panel considers two weeks to be sufficient to make such arrangements.

Unfortunately, the outbreak continues affecting the flow of business in all corners of the world. All members of the delegations of the parties and third parties involved in this dispute, as well as the Panel and the Secretariat team, run the risk of contracting the virus prior to the date of the meeting. The Panel cannot grant extensions each time a member of a delegation is infected and unable to attend the meeting. In order to allow these proceedings to proceed, and to ensure that delegations make full use of their right to present views to the Panel, the Panel invites all the parties and third parties to make the necessary alternative arrangements that would allow their delegations to attend the meeting even if some delegates are unable to participate for health reasons. Parties and third parties should note that the new dates for the Panel's first meeting are firmly set, and delegations should refrain from requesting the Panel to grant further extensions on health or other grounds.

In light of the foregoing, the Panel will proceed with its first substantive meeting with the parties and third parties as follows:

- On Monday, 7 December, at 12h00-15h00 (Geneva time), the Panel will convene a test session with all participants from the parties and the third parties.

- On Tuesday-Wednesday, 8-9 December, at 12h00-15h00 (Geneva time), the Panel will begin its first meeting with the parties. The Panel will first invite the parties to deliver their opening statements. After the conclusion of the opening statements, the Panel will invite each party to comment or ask questions to the other parties. The Panel will also invite the parties to orally present their answers to the advance questions.

- On Thursday, 10 December, at 12h00-15h00 (Geneva time), the Panel will hold the third-party session. The Panel will not pose questions to any third party. The Panel will give the parties an opportunity to ask third parties questions about their submissions or statements. If necessary, the Panel will dedicate an appropriate amount of time to finalize this session on the following day.

- On Friday, 11 December, at 12h00-15h00 (Geneva time), the Panel will invite the parties to orally present their answers to any remaining advance questions. The Panel will also invite the parties to deliver their closing statements. Thereafter, the Panel will end the first substantive meeting.

The Panel understands that the individual test sessions on Webex have been completed, and invites those delegations that still need to resolve certain technical issues prior to the meeting to remain in touch with the designated person from the Secretariat. The Panel will be in further contact with the parties and third parties in order to finalize the remaining issues in advance of the meeting.

ANNEX E

PRELIMINARY RULING

ANNEX E-1

1 PRELIMINARY RULING BY THE PANEL CONCERNING INDIA'S ALLEGEDLY EXPIRED MEASURES DATED 9 NOVEMBER 2020

1.1 Introduction

1.1 In its first written submission, India sought an early preliminary ruling from the Panel[1] that certain measures challenged by the complainants in their panel requests fall outside the Panel's terms of reference because they either expired before, or were enacted after, the Panel's establishment.[2]

1.2 Specifically, India considers that, pursuant to Article 6.2 of the DSU, the measures at issue are only those measures that are in existence at the time of the panel's establishment.[3] India contends that 11 measures identified in the complainants' panel requests expired before the establishment of the Panel and therefore fall outside its terms of reference.[4] These are the Fair and Remunerative Price (FRP) for certain sugar seasons, the State Advised Price (SAP) for certain states in certain sugar seasons, purchase tax remission schemes of certain states, and certain subsidy schemes. Moreover, India points out that the "Scheme for providing assistance to sugar mills for expenses on marketing costs including handling, upgrading and other processing costs and costs of international and internal transport and freight charges on export of sugar" (Marketing and Transportation Scheme), challenged by the complainants, was introduced on 12 September 2019, while the Panel was established on 15 August 2019. Thus, according to India, the Marketing and Transportation Scheme came into existence after the establishment of the Panel and therefore is outside the Panel's terms of reference.[5] India requests the Panel to address India's request in an early ruling such that the Panel process is efficient and does not require consumption of the parties' resources on issues that are clearly outside the Panel's terms of reference.[6]

1.3 With respect to the allegedly expired measures, the complainants submit that India inaccurately characterizes as "measures" certain legal instruments identified in the complainants' panel requests.[7] With respect to India's request regarding the Marketing and Transportation Scheme, the complainants submit that, although it was introduced after the Panel's establishment, the Marketing and Transportation Scheme is within the Panel's terms of reference.[8] Regarding the timing of the preliminary ruling, the complainants submit that since the Panel would be required to make factual findings in addressing India's request, it would not be appropriate to address India's request through an early ruling.[9]

1.4 In this preliminary ruling, the Panel considers it appropriate to address India's request concerning the allegedly expired measures identified in the complainants' panel requests. The Panel will address India's request regarding the Marketing and Transportation Scheme later in the proceedings.

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[1] The Panels in DS579, DS580, and DS581 are herein collectively referred to as "the Panel".

[2] India's first written submission, para. 32; India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 4.

[3] India's first written submission, para. 37 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 156).

[4] India's first written submission, paras. 40-42.

[5] India's first written submission, para. 44.

[6] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 61.

[7] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 28; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 6; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 10.

[8] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 59; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 65; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 44.

[9] Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 22; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 67.

1.2 Article 6.2 of the DSU

1.5 Article 6.2 of the DSU sets out the requirements applicable to a panel request. It provides, in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

1.6 This provision requires, *inter alia*, that a panel request (i) identify the specific measures at issue, and (ii) provide a brief summary of the legal basis of the complaint. Together, these two elements constitute the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[10] The requirements under Article 6.2 are "central to the establishment of the jurisdiction of a panel".[11] A panel request governs a panel's terms of reference and delimits the scope of the panel's jurisdiction.[12] In addition, by establishing and defining the jurisdiction of the panel, "the panel request also fulfils a due process objective" by providing the respondent and third parties with notice regarding the nature of the complainant's case and enabling them to respond accordingly.[13]

1.7 In assessing whether a panel request is sufficiently precise to meet the requirements of Article 6.2 of the DSU, panels must "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".[14] Whether a panel request complies with the requirements of Article 6.2 must therefore be determined on the face of the panel request[15], on a case-by-case basis.[16] Defects in the request for the establishment of a panel cannot be cured in the subsequent submissions of the parties during the panel proceedings. However, "in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, … may be consulted in order to confirm the meaning of the words used in the panel request".[17]

1.8 Pursuant to Article 6.2, the measures at issue, together with the legal basis of the complaint, define the jurisdiction of a panel. We recall, in this respect, that a "measure" is "any act or omission attributable to a WTO Member".[18] The "specific measure at issue" under Article 6.2 is the "object of the challenge, namely, the measure that is alleged to be causing a violation of an obligation contained in a covered agreement".[19]

1.9 Measures are usually reflected in legal instruments, which constitute evidence of the existence or operation of a particular measure. A measure can be contained in one or several legal instruments. It can also be contained in parts of a legal instrument (e.g. specific sections or provisions of a law), or in different parts of various legal instruments which, when read together, reveal the existence of the relevant act or omission. The conceptual distinction between measures and legal instruments does not necessarily preclude the possibility that some measures may be coterminous with a single

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[10] Appellate Body Reports, *EU – PET (Pakistan)*, para. 5.13; *US – Countervailing Measures (China)*, para. 4.6; *US – Carbon Steel*, para. 125; *Guatemala – Cement I*, paras. 69-76.

[11] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.6.

[12] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.12. See also Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.4; *EC and certain member States – Large Civil Aircraft*, para. 640; *US – Countervailing Measures (China)*, para. 4.6; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

[13] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *Chile – Price Band System*, para. 164; *Thailand – H-Beams*, para. 88; *US – Continued Zeroing*, para. 161).

[14] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU*), para. 5.13 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 562 (fn omitted)).

[15] Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.5; *US – Carbon Steel*, para. 127; *China - HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13.

[16] Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.5; *Korea – Dairy*, para. 127; *China - Raw Materials*, para. 220; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17.

[17] Appellate Body Report, *US – Carbon Steel*, para. 127 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 95). See also Appellate Body Reports, *China – Raw Materials*, para. 220; *China – HP-SSST (Japan) / China – HP-SSST (EU*), para. 5.13.

[18] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[19] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

legal instrument.[20] In a dispute, a Member may thus challenge a legal instrument as such and identify it as a measure at issue.[21] However, such exact identity between the challenged measure and the legal instrument containing it does not alter the conceptual difference between a measure and a legal instrument. As a general rule, to be within a panel's terms of reference, the measure identified in the complainant's panel request must be in force at the time of the panel's establishment.[22] By contrast, legal instruments implementing the challenged measure may be withdrawn, amended or newly introduced over time.

1.10 Accordingly, a distinction can be drawn between measures at issue and evidence produced in support of a claim of inconsistency.[23] While there are temporal limitations on the measures that may be within a panel's terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates the panel's establishment. A panel enjoys a margin of discretion in determining the relevance and probative value of a piece of evidence that pre-dates or post-dates its establishment.[24] A panel may consider a piece of evidence that expired before, or came into existence after, the panel's establishment to be relevant to its assessment of whether the measure at issue was inconsistent with the relevant provisions of the covered agreements at the time of the panel's establishment.

1.3 Whether certain elements in the complainants' panel requests are measures that have expired

1.11 India submits that, pursuant to Article 6.2 of the DSU, the measures within a panel's terms of reference are those identified in the panel request.[25] India considers that the measures at issue under Article 6.2 of the DSU are only those measures that were in existence when the panel was established.[26]

1.12 India argues that there is no distinction between a measure and a legal instrument reflecting that measure.[27] In India's view, the following measures expired before the establishment of the Panel and thus are outside the Panel's terms of reference[28]:

Regarding domestic support to sugarcane	Regarding export subsidies to sugar
1. "[M]easures notifying the FRP for the sugar seasons 2014-15 and 2015-16"	10. Scheme for Extending Production Subsidy to Sugar Mills for the 2015-16 sugar season
2. Scheme for Extending Soft Loan to Sugar Mills for the 2014-15 sugar season	11. Raw Sugar Export Incentive Scheme for the 2014-15 sugar season
3. SAP with respect to state of Andhra Pradesh including for the sugar seasons 2015-16 and 2016-17	

[20] As the panel in *US – Shrimp (Viet Nam)* noted, "a measure may be identified either by its form (e.g. name, number, date and place of promulgation of a law or regulation, etc.) or by its substance (e.g. by providing a narrative description of the nature of the measure)." (Panel Report, *US – Shrimp (Viet Nam)*, para. 7.50)

[21] For instance, in *EC – Fasteners (China)*, one of the challenged measures was a specific provision of a legal instrument adopted by the European Union, namely, Article 9(5) of the EU's Basic Anti-Dumping Regulation, which contained rules on the calculation of dumping margins for exporters from what were considered non-market economy countries. (Panel Report, *EC – Fasteners (China)*, para. 2.1)

[22] However, measures that have expired or have been amended after the panel's establishment may also fall within the panel's terms of reference. (Appellate Body Reports, *Chile – Price Band System*, paras. 139-144; *EU – PET (Pakistan)* paras. 5.19 and 5.51)

[23] Panel Report, *China – Agricultural Producers*, para. 7.89.

[24] Appellate Body Report, *EC – Selected Customs Matters*, para. 188. As the panel in *China – Agricultural Producers* noted, "evidence reflects the operation of the measures within a given time-period". (Panel Report, *China – Agricultural Producers*, para. 7.89)

[25] India's first written submission, para. 36.

[26] India's first written submission, para. 37 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 156).

[27] India's comments regarding its request for a preliminary ruling, 27 April 2020, paras. 10-11, 19, and 27.

[28] India's first written submission, paras. 40-42.

Regarding domestic support to sugarcane	Regarding export subsidies to sugar
4. SAP with respect to the state of Haryana for the sugar seasons 2014-15, 2015-16, 2017-18	
5. SAP with respect to the state of Punjab for the sugar seasons 2014-15, 2015-16, 2017-18	
6. SAP with respect to the state of Tamil Nadu for the sugar seasons 2014-15, 2015-16, 2017-18	
7. SAP with respect to the state of Uttar Pradesh for the sugar season 2015-16	
8. SAP with respect to the State of Bihar[29]	
9. Purchase tax remission schemes of certain states, namely, Andhra Pradesh, Bihar, Maharashtra, Telangana, and Uttar Pradesh	

1.13 With respect to the purchase tax remission schemes of certain states, India relies on the on Gazette of India, Notification No. 1/2018 (Goods and Services Tax Compensation), G.S.R. 1116(E), Ministry of Finance, Department of Revenue of 14 November 2018 and submits that, with the introduction of the Central Government Goods and Service Tax (GST) in 2017, the purchase tax remission has been discontinued with effect from 14 November 2018.[30] India also refers to the Communication F. No. 21(3)/2019-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 18 March 2020 to demonstrate that the FRPs for the 2014-15 and 2015-16 sugar seasons have expired and were not in force at the date of the Panel's establishment and that the state of Bihar does not have an SAP.[31]

1.14 The complainants respond that India erroneously equates the measures at issue with the legal instruments through which the measures are implemented.[32] The complainants argue that their panel requests identify the measures at issue (as, for example, FRPs, SAPs, and other non-exempt domestic support measures) that are consistently imposed by India. According to the complainants, the legal instruments identified in their panel requests are evidence or manifestations of the challenged measures.[33] According to the complainants, even if some of the legal instruments have expired, this does not mean that the measures have ceased to exist.[34] Brazil additionally submits that, even assuming *arguendo* that certain legal instruments constituted measures and had expired, the Panel should still make a finding regarding such measures to prevent their re-introduction and circumvention of WTO rules by India.[35]

[29] While India does not refer to the SAP in the state of Bihar in Section IV of its first written submission titled "Request for Preliminary Ruling", paragraph 30 of India's first written submission states that "alleged SAP for the States of Andhra Pradesh, Bihar and Tamil Nadu do not fall within the Panel's terms of reference." In addition, footnote 49 to India's first written submission states that "[t]he State of Bihar does not announce SAP". In responding to Panel question No. 2, India points out that "Australia has failed to identify that India has also sought to exclude SAP for the state of Bihar". In light of these statements, we understand India to argue that the SAP for the state of Bihar is also outside the Panel's terms of reference. (See India's first written submission, para. 30 and fn 49 to para. 47; response to Panel question No. 2)

[30] India's first written submission, para. 43 (referring to Notification from the Ministry of Finance of 14 November 2018 (Goods and Services Tax Compensation) (Exhibit IND-5)).

[31] India's first written submission, para. 41 and fn 49 to para. 47 (referring to Communication from the Government of India of 18 March 2020 (Exhibit IND-4)).

[32] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 28-29; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 20-21 and 23; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 10.

[33] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 30-31; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 21-22; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 15-17.

[34] Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 12-13; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 23.

[35] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 39-46.

1.15 Brazil and Australia point out that the Communication from the Government of India of 18 March 2020, which India refers to in support of its assertion that certain measures have expired, was prepared on 18 March 2020, i.e. one day before India submitted its first written submission and the preliminary ruling request, and "is nothing more than [an] unsupported assertion".[36] Guatemala submits that the Communication reflects India's erroneous view that a legal instrument is "'no longer in force' when payments under the relevant instruments have been fully made by the Government to sugar mills, or when sugar mills have no pending dues *vis-à-vis* sugarcane farmers".[37]

1.16 India's request for a preliminary ruling and the complainants' counter-arguments raise the issue of the relationship between measures and legal instruments. Thus, we start by examining whether the elements in the complainants' panel requests identified by India are, as India argues, measures that have expired. In doing so, we will examine the complainants' panel requests, on their face, read as a whole, and on the basis of the language used.[38]

1.17 As a preliminary observation, we note Brazil's argument that India's selection of elements in the complainants' panel requests, which India considers to be measures that have expired, is somewhat inconsistent. India does not refer to all the elements in the complainants' panel requests that have expired. Rather, as Brazil points out, "[w]hile India objects to Panel review of certain legal instruments in some sugar seasons, it does not object to review of other instruments pertaining to the *same* sugar season, or to equivalent instruments in all seasons."[39] Indeed, while India argues that FRPs for the sugar seasons 2014-15 and 2015-16 are outside the Panel's terms of reference, India does not take issue with the FRPs for the sugar seasons 2016-17 and 2017-18. Likewise, India considers to be outside the Panel's terms of reference the SAPs provided by the states of Haryana and Punjab for the sugar seasons 2014-15, 2015-16, 2017-18, but not for the sugar season 2016-17. In response to the complainants' argument regarding this alleged inconsistency in its arguments, India states that it does not take issue with the Panel's terms of reference with respect to the measures concerning the 2018-19 sugar season.[40]

1.18 We now turn to examine how the elements identified by India are reflected in each of the complainants' panel requests.

1.3.1 Brazil's panel request

1.19 Sections II and III of Brazil's panel request are titled "Domestic Support Measures for Sugarcane and Sugar" and "Export Subsidies Pertaining to Sugar and Sugarcane", respectively. Section II of Brazil's panel request, titled "Domestic Support Measures for Sugarcane and Sugar", identifies "[t]he domestic support measures and programs for sugarcane and sugar" as, *inter alia*:

> 8. Federal-level domestic support for sugarcane in the form of a mandatory minimum "Fair and Remunerative Price" that Indian sugar mills are required to pay sugarcane producers for any production delivered to the mill. This domestic support is provided under, including but not limited to, the following legal instruments:
>
> …
>
> 9. State-level domestic support for sugarcane in the form of a mandatory minimum "State Advised Price" that sugar mills located in the respective Indian State are required to pay sugarcane producers in that State for any production delivered to the mill. For

[36] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 40 (referring to Exhibit IND-4). See also Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 33.

[37] Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 27.

[38] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 562 (fn omitted)).

[39] Brazil's comments regarding India's request for a preliminary ruling, 4 May 2020, para. 9. (fns omitted, emphasis original)

[40] According to India, the fact that these measures were in existence at the time of the Panel's establishment has no consequence for those measures that India has identified to have expired at the time of the establishment of the Panel. (India's response to Panel question No. 2, p. 6)

> each of the identified States, this domestic support is provided under, including but not limited to, the following legal instruments:
>
> …
>
> 11. Federal-level and State-level domestic support for sugarcane and sugar in the form of various measures by the Federal and State governments in India to support the production of sugarcane and sugar under, including but not limited to, the following legal instruments[.][41]

1.20 We understand that the underlined parts refer to what Brazil considers to be the measures at issue. India does not take issue with the overall description of the measures indicated above. The identification of each of these measures is followed by a list of legal instruments that implement them.[42] The elements in the complainants' panel requests identified by India as "measures" that have expired are listed in Brazil's panel request under the rubric of "legal instruments" in which the relevant measure is allegedly reflected.

1.21 As noted, India identifies certain elements in the complainants' panel requests as "measures notifying the FRP for the sugar seasons 2014-15 and 2015-16" that have expired. Brazil's panel request classifies the legal instruments that reflect the federal-level domestic support for sugarcane in the form of an FRP into three categories: (i) the legal basis for the FRP (Essential Commodities Act (1955) and Sugarcane (Control) Order (1966)[43]; (ii) annual communications fixing the FRP[44]; and (iii) notifications fixing the FRP to be paid for sugarcane on a mill-specific basis.[45] Communications introducing the FRP for the sugar seasons 2014-15 and 2015-16 are listed as legal instruments under the second category, i.e. annual communications fixing the FRP.[46] Accordingly, as regards the FRP, the elements that India identifies as "measures" that have expired are identified in Brazil's panel request as "legal instruments" that reflect the federal-level domestic support for sugarcane in the form of an FRP.

1.22 India further identifies SAPs with respect to certain states and for certain sugar seasons as "measures" that have expired.[47] As noted, the relevant measure identified in Brazil's panel request is the state-level domestic support for sugarcane in the form of an SAP.[48] According to Brazil's panel request, the legal instruments that reflect this measure include, *inter alia*, the: (i) SAP with respect to the state of Andhra Pradesh including for the sugar seasons 2015-16 and 2016-17[49]; (ii) SAP with respect to the state of Bihar[50]; (iii) SAP with respect to the state of Haryana for the sugar seasons 2014-15, 2015-16, and 2017-18[51]; (iv) SAP with respect to the state of Punjab for the sugar seasons 2014-15, 2015-16, and 2017-18[52]; (v) SAP with respect to the state of Tamil Nadu for the sugar seasons 2014-15, 2015-16, and 2017-18[53]; and (vi) SAP with respect to the state of Uttar Pradesh for the sugar season 2015-16.[54] Consequently, as regards the SAPs, the elements that India identifies as "measures" that have expired are identified in Brazil's panel request as "legal instruments" implementing the SAPs in certain states for certain sugar seasons.

1.23 As regards the Scheme for Extending Soft Loan to Sugar Mills for the 2014–15 sugar season, it is listed as a legal instrument implementing the measure identified as federal-level and state-level domestic support for sugarcane and sugar.[55] With respect to the purchase tax remission schemes,

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[41] Request for the establishment of a panel by Brazil, WT/DS579/7 (Brazil's panel request), paras. 8, 9, and 11. (underlining original)

[42] These legal instruments are identified by reference to their title, as well as, in most cases, the date of adoption and the issuing authority.

[43] Brazil's panel request, paras. 8.a and b.

[44] Brazil's panel request, para. 8.c.

[45] Brazil's panel request, para. 8.d.

[46] Brazil's panel request, para. 8.c.

[47] See para. 1.12 above.

[48] Brazil's panel request, para. 9.

[49] Brazil's panel request, para. 9.a.

[50] Brazil's panel request, para. 9.b.

[51] Brazil's panel request, para. 9.d.

[52] Brazil's panel request, para. 9.h.

[53] Brazil's panel request, para. 9.i.

[54] Brazil's panel request, para. 9.l.

[55] Brazil's panel request, para. 11.b.

Brazil's panel request refers only to the one granted by the state of Andhra Pradesh.[56] Brazil's panel request lists the purchase tax remission scheme of Andhra Pradesh as a legal instrument implementing federal-level subsidized loans for the production of sugarcane or sugar.[57]

1.24 With regard to the alleged export subsidies for sugar, we recall that India identifies the Scheme for Extending Production Subsidies to Sugar Mills for the sugar season 2015-16 and the Raw Sugar Export Incentive Scheme for the 2014–15 sugar season as expired "measures". We note that Section III of Brazil's panel request, titled "Export Subsidies Pertaining to Sugar and Sugarcane", identifies as measures, *inter alia*, federal-level export subsidies pertaining to sugar or sugarcane.[58] This is followed by an illustrative list of legal instruments that reflect this measure, which includes the Scheme for Extending Production Subsidies to Sugar Mills for the sugar season 2015-16.[59] Finally, we note that Brazil's panel request does not refer to Raw Sugar Export Incentive Scheme for the 2014–15 sugar season.

1.25 In light of the above, we do not agree with India that the elements in Brazil's panel request identified by India constitute the "measures" challenged by Brazil. Rather, our examination of Brazil's panel request reveals that the elements identified by India have been presented in Brazil's panel request as legal instruments containing the challenged measures.

1.26 The fact that some of these legal instruments may have expired does not mean that the Panel cannot rely on them as evidence of the existence of the measures identified in Brazil's panel request. As noted above, a panel enjoys a margin of discretion in determining the relevance and probative value of a piece of evidence that expired before its establishment.[60] In any event, it is the measures at issue as identified in the panel request, not the legal instruments containing such measures, that define the terms of reference of a panel. In this regard, we note that India does not claim that any of the measures identified in Brazil's panel request are outside the Panel's terms of reference.

1.27 Consequently, we reject India's argument that the elements in Brazil's panel request identified by India fall outside the Panel's terms of reference.

1.3.2 Australia's panel request

1.28 Sections II and IV of Australia's panel request are titled "Domestic support for sugarcane and sugar" and "Export subsidies for sugar and sugarcane", respectively. Section II of Australia's panel request identifies "the specific measures through which India provides domestic support in favour of producers of sugarcane and sugar".[61] This is followed by a list of eight measures, which include: (i) "[f]ederal-level domestic support for sugarcane provided through a federal administered price, the 'Fair and Remunerative Price' (FRP)"[62]; (ii) "[s]tate-level domestic support for sugarcane provided through a state administered price, the 'State Advised Price' (SAP)"[63]; and (iii) other non-exempt domestic support measures (including federal-level support through subsidised loans and state-level support involving tax rebates or exemptions).[64] India does not take issue with the overall description of the measures indicated above. Annex A to Australia's panel request contains a "List of instruments and documents reflecting the measures at issue".[65]

1.29 With respect to the elements in the complainants' panel requests that India identifies as "measures notifying the FRP for the sugar seasons 2014-15 and 2015-16" that have expired, we note that those elements are listed as legal instruments implementing the FRP identified in

[56] As noted by India, Brazil has not put forward any specific arguments with respect to the purchase tax remission schemes. (India's comments regarding its request for a preliminary ruling, 27 April, para. 39)
[57] Brazil's panel request, para. 11.d.
[58] Brazil's panel request, para. 14.
[59] Brazil's panel request, para. 14.a.
[60] See para. 1.10 above.
[61] Request for the establishment of a panel by Australia, WT/DS580/7 (Australia's panel request), para. 7.
[62] Australia's panel request, para. 8. (underlining original)
[63] Australia's panel request, para. 9. (underlining original)
[64] This category comprises six measures listed in paragraphs 11-15 of Australia's panel request. (See Australia's panel request, paras. 11-15) We note that, like in that of Brazil, the underlined parts in Australia's panel request refer to what Australia considers to be the measures at issue.
[65] Annex A to Australia's panel request, paras. 1-8. These instruments are identified by reference to their title, as well as, in most cases, the date of adoption and the issuing authority.

paragraph 1 of Annex A to Australia's panel request.[66] Similar to that of Brazil, Australia's panel request classifies the legal instruments that reflect the federal-level domestic support for sugarcane in the form of an FRP into three categories: (i) the legal basis for the FRP (the Essential Commodities Act (1955) and Sugarcane (Control) Order (1966))[67]; (ii) annual communications fixing the FRP[68]; and (iii) notifications fixing the FRP to be paid on a mill-specific basis.[69] Communications introducing the FRP for the sugar seasons 2014-15 and 2015-16 are listed as legal instruments under the second category, i.e. annual communications fixing the FRP.[70]

1.30 With respect to the SAPs for certain states in certain sugar seasons, which India identifies as "measures" that have expired, we note that paragraph 2 of Annex A to Australia's panel request contains the list of legal instruments implementing the state-level domestic support in the form of SAPs.[71] The elements India identified are listed in Australia's panel request among the legal instruments implementing the SAPs. These are the: (i) SAP with respect to state of Andhra Pradesh including for the sugar seasons 2015-16 and 2016-17[72]; (ii) SAP with respect to the state of Bihar[73]; (iii) SAP with respect to the state of Haryana for the sugar seasons 2014-15, 2015-16, and 2017-18[74]; (iv) SAP with respect to the state of Punjab for the sugar seasons 2014-15, 2015-16, and 2017-18[75]; (v) SAP with respect to the state of Tamil Nadu for the sugar seasons 2014-15, 2015-16, and 2017-18[76]; and (vi) SAP with respect to the state of Uttar Pradesh for the sugar season 2015-16.[77]

1.31 With respect to the Scheme for Extending Soft Loan to Sugar Mills for the 2014–15 sugar season, we note that it is listed among "instruments and documents" that reflect the measure that Australia identified as "[f]ederal-level domestic support for sugarcane and sugar provided through subsidised loans".[78]

1.32 With respect to the purchase tax remission schemes of Andhra Pradesh, Bihar, Maharashtra, Telangana, and Uttar Pradesh, we note that they are listed among the "instruments and documents" implementing the measure identified as "[s]tate-level domestic support for sugarcane and sugar".[79]

1.33 With regard to the alleged export subsidies for sugar, we note that Section IV of Australia's panel request, titled "Export subsidies for sugar and sugarcane", identifies the measures at issue as "[f]ederal-level measures pertaining to sugar or sugarcane which provide subsidies contingent upon export performance, through, operating individually, collectively, or in combination with each other".[80] This is followed by a list of five categories of measures.[81] Australia's panel request further

[66] Annex A to Australia's panel request, para. 1(c)(iv)-(v).
[67] Annex A to Australia's panel request, paras. 1(a) and (b).
[68] Annex A to Australia's panel request, para. 1(c).
[69] Annex A to Australia's panel request, para. 1(d).
[70] Annex A to Australia's panel request, para. 1(c)(iv)-(v).
[71] Annex A to Australia's panel request, para. 2.
[72] Annex A to Australia's panel request, para. 2(a)(ii).
[73] Annex A to Australia's panel request, para. 2(b).
[74] Annex A to Australia's panel request, para. 2(c)(iv) and (v). We note that paragraph 2(c)(iv) of Annex A refers only to the SAPs in the State of Haryana for the sugar seasons 2014-15, 2015-16, and 2016-17. Paragraph 2(c)(v) of Annex A refers to "any other documents, state-level legal instruments, including successor instruments, and any amendments thereto, that provide for a mandatory minimum price for sugarcane that is higher than the FRP in the State of Haryana for the [sugar season] … 2017-18".
[75] Annex A to Australia's panel request, para. 2(f)(iii) and (iv). We note that paragraph 2(f)(iii) of Annex A refers only to the SAPs in the State of Punjab for the sugar seasons 2014-15, 2015-16, and 2016-17. Paragraph 2(f)(iv) of Annex A refers to "any other documents, state-level legal instruments, including successor instruments, and any amendments thereto, that provide for a mandatory minimum price for sugarcane that is higher than the FRP in the State of Punjab for the [sugar season] 2017-18".
[76] Annex A to Australia's panel request, para. 2(g)(v), (vi) and (viii). We note that paragraph 2(g)(viii) of Annex A refers to "any other documents, state-level legal instruments, including successor instruments, in the State of Tamil Nadu that provide for a mandatory minimum price for sugarcane that is higher than the FRP during the [sugar season] … 2017-18".
[77] Annex A to Australia's panel request, para. 2(j)(iv).
[78] Annex A to Australia's panel request, para. 5(b).
[79] Annex A to Australia's panel request, paras. 8(a)(i), 8(b)(i) and (iv), 8(e)(i), 8(g)(i), 8(h)(i), (ii) and (iv).
[80] Australia's panel request, para. 19. (underlining original)
[81] Australia's panel request, para. 19(a)-(e). (underlining original)

indicates that "[t]hese measures are reflected in, but not limited to, the instruments and documents identified in paragraph 9 of Annex A to this request."[82]

1.34 Paragraph 9 of Annex A to Australia's panel request identifies the Scheme for Extending Production Subsidies to Sugar Mills for the sugar season 2015-16 among the instruments and documents that contain production subsidies contingent upon export performance.[83]

1.35 Finally, we observe that the Raw Sugar Export Incentive Scheme for the 2014–15 sugar season is listed among the instruments and documents that implement the measure identified as "[f]ederal-level domestic support for sugarcane and sugar provided through financial assistance towards internal transport, freight, handling and other charges on export".[84]

1.36 In light of the above, we do not agree with India that the elements in Australia's panel request identified by India constitute "measures". Rather, our examination of Australia's panel request reveals that the elements identified by India have been presented in Australia's panel request as instruments containing the measures at issue.

1.37 For the reasons outlined in paragraph 1.26 above, we reject India's argument that the elements in Australia's panel request identified by India fall outside the Panel's terms of reference.

1.3.3 Guatemala's panel request

1.38 Sections II and III of Guatemala's panel request are titled "India's domestic support measures in favour of sugarcane producers and sugar producers" and "India's measures pertaining to sugar or sugarcane which provide subsidies contingent upon export performance", respectively. Section II identifies eight measures "through which India provides domestic support in favour of sugarcane producers and sugar producers".[85] These measures include: (i) "[f]ederal-level domestic support in the form of a federal administered price, the 'Fair and Remunerative Price' ('FRP')"[86]; (ii) "[s]tate-level domestic support for sugarcane in the form of a state administered price, the 'State Advised Price' ('SAP')"[87]; and (iii) other non-exempt domestic support measures (including federal-level support through subsidised loans and state-level support involving tax exemptions).[88] India does not take issue with the overall description of the measures indicated above. Guatemala's panel request contains an Annex titled "List of instruments and documents containing the measures at issue".

1.39 With respect to the elements in the complainants' panel requests that India identifies as "measures notifying the FRP for the sugar seasons 2014-15 and 2015-16" that have expired, we note that those elements are listed in the Annex to Guatemala's panel request as "instruments and documents" that reflect the FRP.[89] Similar to those of Brazil and Australia, Guatemala's panel request classifies the legal instruments that reflect the federal-level domestic support for sugarcane in the form of an FRP into three categories: (i) the legal basis for the FRP (the Essential Commodities Act (1955) and Sugarcane (Control) Order (1966))[90]; (ii) annual communications fixing the FRP[91]; and (iii) notifications fixing the FRP to be paid on a mill-specific basis.[92] Communications introducing the FRP for the sugar seasons 2014-15 and 2015-16 are listed as legal instruments under the second category, i.e. annual communications fixing the FRP.[93]

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[82] Australia's panel request, para. 20.
[83] Annex A to Australia's panel request, paras. 9 and 9(b)(iii).
[84] Annex A to Australia's panel request, para. 7(b). (underlining original); Australia's panel request, para. 14.
[85] Request for the establishment of a panel by Guatemala, WT/DS581/8 (Guatemala's panel request), p. 2.
[86] Guatemala's panel request, p. 2, para. 1. (underlining original)
[87] Guatemala's panel request, p. 2, para. 2. (underlining original)
[88] Guatemala's panel request, p. 2, paras. 4-8. We note that, like in those of Brazil and Australia, the underlined parts in Guatemala's panel request refer to what Guatemala considers to be the measures at issue.
[89] Annex to Guatemala's panel request, para. 1(c)(iv) and (v).
[90] Annex to Guatemala's panel request, para. 1(a) and (b).
[91] Annex to Guatemala's panel request, para. 1(c)
[92] Annex to Guatemala's panel request, para. 1(d).
[93] Annex to Guatemala's panel request, para. 1(c).

1.40 With regard to the SAPs for certain states in certain sugar seasons, which India identifies as "measures" that have expired, we note that paragraph 2 of the Annex to Guatemala's panel request contains the list of instruments and documents that reflect the state-level domestic support in the form of SAPs. The elements identified by India are listed in Guatemala's panel request among legal instruments implementing the SAPs. These are: (i) SAP with respect to state of Andhra Pradesh including for the sugar seasons 2015-16 and 2016-17[94]; (ii) SAP with respect to the state of Bihar[95]; (iii) SAP with respect to the state of Haryana for the sugar seasons 2014-15, 2015-16, and 2017-18[96]; (iv) SAP with respect to the state of Punjab for the sugar seasons 2014-15, 2015-16, and 2017-18[97]; (v) SAP with respect to the state of Tamil Nadu for the sugar seasons 2014-15, 2015-16, and 2017-18[98]; and (vi) SAP with respect to the state of Uttar Pradesh for the sugar season 2015-16.[99]

1.41 As regards the Scheme for Extending Soft Loan to Sugar Mills for the 2014–15 sugar season, we note that it is listed among "instruments and documents" that reflect the measure that Guatemala identified as "[f]ederal-level domestic support for sugarcane and sugar provided through subsidised loans".[100]

1.42 With respect to the purchase tax remission schemes of certain states that India has identified as expired measures, we note that paragraph 8 of the Annex to Guatemala's panel request identifies the purchase tax remittance schemes of certain states as "instruments and documents" that reflect the measure identified as "[s]tate-level domestic support for sugarcane and sugar".[101]

1.43 Section III.A of Guatemala's panel request identifies measures pertaining to sugar or sugarcane through which India provides subsidies contingent upon export performance as, *inter alia*, "[f]ederal-level measures pertaining to sugar or sugarcane that provide subsidies contingent upon export performance".[102] Paragraph 9 of the Annex to Guatemala's panel request sets out an illustrative list of the legal instruments and documents that reflect the measures at issue.

1.44 With respect to the Scheme for Extending Production Subsidies to Sugar Mills for the sugar season 2015-16, we note that the Annex to Guatemala's panel request refers to it as one of the instruments that reflect the "[f]ederal-level measures pertaining to sugar or sugarcane that provide subsidies contingent upon export performance".[103]

1.45 Finally, with respect to the Raw Sugar Export Incentive Scheme for the 2014–15 sugar season, we note that paragraph 11 of Guatemala's panel request refers to the relevant measures at issue as "[f]ederal-level assistance and export incentives, including, but not limited to, the instruments identified in paragraph 11 of the Annex to this request."[104] Thus, the panel request identifies the measure at issue as "federal-level assistance and export incentives" and refers to the elements listed in paragraph 11 of the Annex as "instruments", which we interpret to mean instruments that contain the measure. Paragraph 11 of the Annex to Guatemala's panel request, in turn, reads, in relevant part:

> 11. Federal-level assistance and export incentives, including under Sugar Rules / Sugar Development Fund (SDF) Rules rule 20B as amended (also referred to as the Raw Sugar Export Incentive Scheme), including, but not limited to the following: …[105]

1.46 The text of this paragraph of the Annex to Guatemala's panel request confirms our understanding of paragraph 11 of the panel request. Like the panel request itself, the Annex identifies the measure at issue as "federal-level assistance and export incentives", and states that

[94] Annex to Guatemala's panel request, para. 2(a)(ii) and (iii).
[95] Annex to Guatemala's panel request, para. 2(b).
[96] Annex to Guatemala's panel request, para. 2(d)(vi)-(vii).
[97] Annex to Guatemala's panel request, para. 2(h)(v).
[98] Annex to Guatemala's panel request, para. 2(i)(v) and (vii)-(viii).
[99] Annex to Guatemala's panel request, para. 2(l)(iv).
[100] Annex to Guatemala's panel request, para. 5(b). (underlining original)
[101] Annex to Guatemala's panel request, para. 8(a)(i), (c)(i), e(i), (g)(i) and (h)(i)-(ii), (iv), and (vi). (underlining original)
[102] Guatemala's panel request, para. 9. (underlining original)
[103] Annex to Guatemala's panel request, para. 9(b)(iv). (underlining omitted)
[104] Guatemala's panel request, para. 11. (underlining original)
[105] Annex to Guatemala's panel request, para. 11. (footnotes omitted) (underlining original)

this includes the incentives provided, among others, under the Raw Sugar Export Incentive Scheme. This introductory language in paragraph 11 of the Annex is followed by a list of seven legal instruments that allegedly contain the federal-level assistance and export subsidies maintained by India. Guatemala has identified the relevant measure at issue as "[f]ederal-level assistance and export incentives" and referred to the Raw Sugar Export Incentive as a legal instrument containing this measure.[106]

1.47 In light of the above, we do not agree with India that the elements in Guatemala's panel request that India has identified constitute "measures". Rather, our examination of Guatemala's panel request reveals that the elements identified by India have been presented in Guatemala's panel request as instruments containing the measures at issue.

1.48 For the reasons outlined in paragraph 1.26 above, we reject India's argument that the elements in Guatemala's panel request identified by India fall outside the Panel's terms of reference.

1.4 Conclusion

1.49 Our review of the complainants' panel requests demonstrates that the elements in the panel requests, which India refers to as "measures", are in fact legal instruments that, in the view of the complainants, contain the measures at issue. We therefore reject India's request to find that the elements it has identified fall outside our terms of reference. We will examine the relevance and probative value of these legal instruments in assessing the complainants' claims, in making an objective assessment in accordance with Article 11 of the DSU.

[106] We further note that elements of the Raw Sugar Export Incentive Scheme for the 2014–15 sugar season have been identified as instruments implementing the measure at issue. (Annex to Guatemala's panel request, para. 11(c)-(d))

ANNEX E-2

1 PRELIMINARY RULING BY THE PANEL CONCERNING INDIA'S MARKETING AND TRANSPORTATION SCHEME

1.1 Introduction

1.1 As noted in Annex E-1, in its first written submission, India sought a preliminary ruling by the Panel that certain measures challenged by the complainants in their panel requests fall outside the Panel's terms of reference because they either expired before, or were enacted after, the Panel's establishment.[1] As part of its request for a preliminary ruling, India argued that the Marketing and Transportation Scheme came into existence after the establishment of the Panel and therefore is outside the Panel's terms of reference.[2]

1.2 On 9 November 2020, the Panel issued the first part of its preliminary ruling regarding the allegedly expired measures, including the Panel's reasoning to the parties and third parties. On 14 December 2020, the Panel issued the second part of its preliminary ruling regarding the Marketing and Transportation Scheme to the parties. The Panel found that the Marketing and Transportation Scheme fell within its terms of reference and informed the parties that the reasoning for the ruling would be included in its Interim Report.

1.3 This section contains the reasoning for the second part of the Panel's preliminary ruling. We first summarize the parties' arguments. We then address India's argument that a panel's terms of reference are limited to the measures that were in existence at the time of the panel's establishment. Thereafter, we assess whether the Marketing and Transportation Scheme is within the Panel's terms of reference. In this context we examine whether: (i) the complainants' panel requests are broad enough to encompass the Marketing and Transportation Scheme; (ii) the Marketing and Transportation Scheme is of the same essence as the assistance schemes explicitly referred to in the complainants' panel requests; and (iii) inclusion of the Marketing and Marketing and Transportation Scheme in the Panel's terms of reference would contribute to the prompt settlement of, and securing a positive solution to, the present disputes pursuant to Articles 3.3 and 3.7 of the DSU.

1.2 Arguments of the parties

1.4 India argues that since the Marketing and Transportation Scheme came into existence after the establishment of the Panel, it is not within the Panel's terms of reference.[3] India observes that the Marketing and Transportation Scheme challenged by the complainants "was introduced by the Government of India on 12 September 2019 for the sugar season 2019-20 (i.e. 1st October 2019 to 30th September 2020)", while the Panel was established on 15 August 2019.[4]

1.5 India notes that a panel's terms of reference are limited to the measures that were in existence at the time of the panel's establishment.[5] In India's view, there is no legal basis in the text of the DSU to include in a panel's terms of reference measures that were introduced after the panel's establishment.[6] In response to the complainants' arguments regarding exceptions to this general rule identified in previous disputes, India submits that such exceptions do not apply in the present

[1] India's first written submission, para. 32; comments regarding its request for a preliminary ruling, 27 April 2020, para. 4.
[2] India's first written submission, para. 44.
[3] India's first written submission, para. 44; comments regarding its request for a preliminary ruling, 27 April 2020, para. 60.
[4] India's first written submission, para. 44 (referring to Notification of 12 September 2019, (Exhibit JE-114)); comments regarding its request for a preliminary ruling, 27 April 2020, para. 44.
[5] India's first written submission, para. 46; response to Panel question No. 9.
[6] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 14; response to Panel question No. 12.

disputes.[7] In this regard, India submits three main arguments based on the criteria developed in the disputes referred to by the complainants.

1.6 First, India argues that the Marketing and Transportation Scheme is not a successor or amendment to the measures identified in the complainants' panel requests.[8] In this regard, India notes, first, that a panel may "examine a legal instrument enacted after the establishment of the panel that *amends* a measure identified in the panel request".[9] However, in India's view, the Marketing and Transportation Scheme does not amend any of the measures identified in the complainants' panel requests. India further submits that the fact that the Marketing and Transportation Scheme was adopted after the adoption of certain measures identified in the complainants' panel requests does not necessarily make it a "successor" or an "amendment" of those measures.[10]

1.7 Second, India contends that the Marketing and Transportation Scheme is not of the "same essence" as those measures identified in the complainants' panel requests.[11]According to India the Marketing and Transportation Scheme is a measure that is separate and distinct from the measures identified in the complainants' panel requests, in terms of: (i) the nature of the assistance provided; (ii) eligibility criteria for obtaining that assistance; and (iii) the amount of assistance provided and the methodology to determine such amount.[12]

1.8 With respect to the nature of the assistance, India observes that the Buffer Stock Scheme was introduced with a view to offsetting the cost of cane incurred by sugar mills and reimbursing the carrying cost of maintenance of buffer stocks by sugar mills.[13] By contrast, India underscores that the Marketing and Transportation Scheme "has been introduced specifically with the view of providing WTO-consistent payments to offset transport and marketing costs incurred by sugar mills carrying out the export of sugar".[14] With respect to the eligibility criteria, India points out that the Production Assistance Scheme requires mills with ethanol production capacity to have supplied a certain amount of ethanol to oil marketing companies. In addition, according to India, eligibility for the Buffer Stock Scheme is dependent on the actual maintenance of buffer stock by mills during the designated period. By contrast, India points out that, under the Marketing and Transportation Scheme, eligibility requirements "are set so as to cover sugar mills that have actually incurred … marketing and transport expenses by exporting sugar in accordance with their MAEQs".[15] With respect to the amount of assistance, India submits that, unlike other schemes, which provide different amounts of assistance calculated on the basis of the amount of sugar cane crushed, the Marketing and Transportation Scheme "provides assistance towards marketing and transport costs at a specified rate".[16]

1.9 Third, India maintains that including the Marketing and Transportation Scheme in the Panel's terms of reference is not necessary to secure a positive solution to the dispute because the Marketing and Transportation Scheme is not a recurring measure. In India's view, if any of the measures alleged to constitute export subsidies in the present disputes are found to be WTO-inconsistent, subsequently adopted measures that share similar characteristics may be appropriately addressed during the compliance stage of these disputes.[17]

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[7] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 15.

[8] India's comments regarding its request for a preliminary ruling, 27 April 2020, paras. 47-50.

[9] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 47 (referring to Appellate Body Report, *Chile – Price Band System*). (emphasis original)

[10] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 49.

[11] India's comments regarding its request for a preliminary ruling, 27 April 2020, paras. 51-56.

[12] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 52.

[13] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 53.

[14] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 53. India notes that paragraph 3(i)(a) of the Marketing and Transportation Scheme envisages payments to sugar mills at a specified rate for expenses incurred for the marketing, handling, quality up-gradation, debagging, re-bagging, and other processing costs of sugar. India further notes that paragraph 3(i)(b) envisages payments for internal transport and freight charges including loading, unloading, and fobbing, at a specified rate, while paragraph 3(i)(c) provides for payments to sugar mills at a specified rate for ocean freight costs incurred as a result of shipments from Indian ports to destination countries. (Ibid. referring to Notification of 12 September 2019, (Exhibit JE-114))

[15] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 54.

[16] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 55.

[17] India's comments regarding its request for a preliminary ruling, 27 April 2020, paras. 57-59.

1.10 In response to India's arguments, the complainants submit that the Appellate Body in *EC - Chicken Cuts* set out "a general rule" that a panel's terms of reference encompass measures that are in existence at the time of the panel's establishment.[18] The complainants argue, however, that this does not prevent a measure adopted after the panel's establishment from falling within the panel's terms of reference.[19] Referring to the criteria established in past cases for the inclusion in the panel's terms of reference of measures that postdate a panel's establishment, the complainants assert that the Marketing and Transportation Scheme falls within this Panel's terms of reference because: (i) the texts of the complainants' respective panel requests are broad enough to encompass the Marketing and Transportation Scheme[20]; (ii) the Marketing and Transportation Scheme is of the same essence as the export subsidies identified in the complainants' panel requests[21]; and (iii) the inclusion of the Marketing and Transportation Scheme in the Panel's terms of reference is necessary for the prompt settlement of, and to secure a positive solution to, the disputes.[22]

1.11 Regarding the first criterion, the complainants point out that their panel requests define the measures at issue as federal-level export subsidies pertaining to sugar and sugarcane, which is followed by a list of legal instruments that implement them, including any amendments, related, successor, replacement, or implementing instruments.[23] In the complainants' view, the scope of their panel requests is therefore broad enough to encompass the Marketing and Transportation Scheme.[24]

1.12 Regarding the second criterion, the complainants argue that the Marketing and Transportation Scheme is, in essence, the same as the measures identified in the complainants' panel requests.[25] In this regard, Brazil submits that the Marketing and Transportation Scheme is of the same essence as the Scheme for Assistance to Sugar Mills for the 2018-19 sugar season. According to Brazil, "both policies share the same policy purpose, and the same design, structure and impact."[26] In addition, Brazil submits that the Marketing and Transportation Scheme "shares the same *policy objective* as all the other export subsidies that Brazil identified in its panel request".[27] In Brazil's view, "India tries to hide the fundamental sameness of the [Marketing and Transportation] Scheme and the other export subsidies by atomizing the analysis and focusing on immaterial differences".[28]

1.13 Australia submits that the Marketing and Transportation Scheme has the same purpose, and exhibits the same design and structural features, as the subsidy programmes that Australia listed in

[18] Brazil's comments regarding its request for a preliminary ruling, 1 April 2020, para. 15; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 54; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 41 (quoting Appellate Body Report, *EC - Chicken Cuts*, para. 156).

[19] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 50; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 55; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 40-42.

[20] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 60-63; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 66-72; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 45-55.

[21] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 64-70; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 73-80; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 56-58.

[22] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 71-74; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 81-83; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 59-61.

[23] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 61 (referring to Brazil's panel request, paras. 14-16); Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 67-70 (referring to Australia's panel request, paras. 18-20 and para. 9 of Annex A); comments regarding India's request for a preliminary ruling, 4 May 2020, para. 30; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 46-51 (referring to Guatemala's panel request, para. 9 of Section III.A).

[24] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 60 and 63; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 72; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 52.

[25] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 64; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 73; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 58.

[26] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 67.

[27] Brazil's comments regarding India's request for a preliminary ruling, 4 May 2020, para. 35. (emphasis original)

[28] Brazil's comments regarding India's request for a preliminary ruling, 4 May 2020, para. 45.

in its panel request. In particular, Australia points out that each of these programmes is "designed to achieve the policy purpose of assisting sugar mills to pay down sugarcane price dues by providing direct subsidies" and "embod[ies] the same design and structure, exhibiting the same two core constituent elements": (i) a direct payment, which is tied to (ii) an export quota, usually by requiring sugar mills to comply with export requirements as an eligibility condition for receiving the payment.[29] To Australia, the Marketing and Transportation Scheme "is merely the latest (albeit renamed) iteration of India's sugar export subsidy policy of tying direct payment schemes to an export quota program, repeated annually on a seasonal basis".[30] Australia maintains that the Panel should focus on the core elements of the measure and avoid being distracted by India's attempt to draw the Panel's focus away from such core elements.[31]

1.14 In Guatemala's view, the structure, operation and constituent elements of the subsidies identified in Guatemala's panel request and those of the Marketing and Transportation Scheme are the same, and the only notable difference is the titles of the respective programmes.[32] Guatemala disagrees with India's view that two measures can be of the same essence only if they are identical in all respects, including the eligibility requirements that have not been challenged by Guatemala and the methodology for calculating the amount of the subsidy.[33]

1.15 Regarding the third criterion, the complainants consider that including the Marketing and Transportation Scheme in the Panel's terms of reference is necessary to secure a prompt settlement of, and positive solution to, the disputes in accordance with the principles articulated in Articles 3.3 and 3.7 of the DSU.[34]

1.3 Whether measures introduced after a panel's establishment may fall within the panel's terms of reference

1.16 India argues that there is no legal basis in the text of the DSU to include in a panel's terms of reference measures introduced after the panel's establishment. The complainants submit that, in certain circumstances, measures enacted after a panel's establishment may fall within the panel's terms of reference.

1.17 Article 6.2 of the DSU reads in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

1.18 As described in Annex E-1, the requirements of Article 6.2 of the DSU are "central to the establishment of the jurisdiction of a panel"[35] in that the panel request governs a panel's terms of reference and delimits the scope of the panel's jurisdiction.[36] A panel's terms of reference are to

[29] Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 74-75 (referring to Exhibits JE-74, JE-75, JE-76, JE-77, JE-78, JE-107, JE-108, JE-109, and JE-112).

[30] Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 80.

[31] Australia's comments regarding India's request for a preliminary ruling, 4 May 2020, para. 64.

[32] Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 57.

[33] Guatemala's comments regarding India's request for a preliminary ruling, 4 May 2020, para. 48. In Guatemala's view, none of these aspects go to the measure's essence. Rather, the essential element of the measure is that payments are available to sugar mills that export sugar according to export quotas pre-determined by the Indian Government on a mill-wide basis. (Ibid. para. 49)

[34] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 71-74; comments regarding India's request for a preliminary ruling, 4 May 2020, paras. 46-50; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 81-83; comments regarding India's request for a preliminary ruling, 4 May 2020, paras. 79-83; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 59-61; comments regarding India's request for a preliminary ruling, 4 May 2020, paras. 51-56.

[35] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.6.

[36] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.12. See also Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.4; *EC and certain member States – Large Civil Aircraft*, para. 640; *US – Countervailing Measures (China)*, para. 4.6; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

examine the measures and related claims the complainant has raised in its panel request.[37] It has been observed in past disputes that, as a general rule, "the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel".[38] However, contrary to India's argument, Article 6.2 does not set out an express temporal condition or limitation on the measures that can be identified in a panel request. In certain circumstances, measures enacted subsequent to the establishment of the panel may fall within its terms of reference.[39] Thus, measures that are modified during the panel proceedings or introduced after a panel's establishment do not *a priori* fall outside the panel's terms of reference.

1.19 A panel may examine a measure adopted after the date of the panel's establishment if it amends one of the measures explicitly identified in the complainant's panel request, provided that the panel request is broad enough to encompass such an amendment and the amendment does not change the "essence" of the measure identified in the panel request.[40] Another factor to be taken into account in assessing whether a measure that postdates the panel's establishment falls within the panel's terms of reference, is whether excluding such a measure from the panel's terms of reference would be contrary to the objectives of prompt dispute settlement and securing a positive solution to disputes, as laid down in Articles 3.3 and 3.7 of the DSU.[41]

1.20 In light of the above, we are not convinced by India's argument that only measures that were in existence at the time of the panel's establishment fall within the panel's terms of reference. We find the criteria discussed in previous disputes useful for determining whether the Marketing and Transportation Scheme falls within the Panel's terms of reference and will take them into account in our analysis.

1.4 Whether the Marketing and Transportation Scheme is within the Panel's terms of reference

1.21 The parties disagree whether: (i) the texts of the complainants' panel requests are broad enough to encompass the Marketing and Transportation Scheme; (ii) the Marketing and Transportation Scheme is of the same essence as the alleged export subsidies identified in the complainants' panel requests; and (iii) the inclusion of the Marketing and Transportation Scheme in the Panel's terms of reference is necessary for the prompt settlement of, and securing a positive solution to, the present disputes. We examine each of these issues in turn to determine whether the Marketing and Transportation Scheme is within our terms of reference.

1.4.1 Whether the complainants' panel requests are "sufficiently broad" to encompass the Marketing and Transportation Scheme

1.22 We first assess the content of the complainants' panel requests to determine whether the descriptions of the measures identified therein are sufficiently broad to encompass the Marketing and Transportation Scheme.

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[37] See e.g. Appellate Body Report, *EC – Selected Customs Matters*, para. 131 ("the panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will have the authority to make findings"). See also Panel Report, *EC – Selected Customs Matters*, para. 7.43.

[38] Appellate Body Report, *EC – Chicken Cuts*, para. 156. See also Panel Reports, *US – Renewable Energy*, para. 7.8 and *US – Tariff Measures (China)*, para. 7.35.

[39] Appellate Body Report, *EC – Chicken Cuts*, para. 156. See also Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 121 and Panel Reports, *US – Renewable Energy*, para. 7.8 and *US – Tariff Measures (China)*, para. 7.35.

[40] Panel Reports, *US – Tariff Measures (China)*, para. 7.35; *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.808; Appellate Body Reports, *Chile – Price Band System*, paras. 136-144; and *EC – Selected Customs Matters*, para. 184.

[41] Article 3.3 of the DSU reads: "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." Article 3.7 of the DSU reads, *inter alia*, "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." (See Panel Reports, *Argentina - Footwear (EC)*, para. 8.41; *EC – Fasteners (China)*, para. 7.34; *Russia – Pigs (EU)*, para. 7.155; and Appellate Body Report, *Chile – Price Band System*, paras. 140-141).

1.23 India argues that the Marketing and Transportation Scheme is not an "amendment" or "successor" to the measures identified in the complainants' panel requests merely because it was enacted subsequent to those measures.[42]

1.24 For its part, Brazil submits that the Marketing and Transportation Scheme is covered by paragraphs 14 and 16 of Brazil's panel request.[43]

1.25 Paragraph 13 of Brazil's panel request states that "[t]he export subsidy measures and programs pertaining to sugar and sugarcane include, but are not limited to" the list that follows. The following paragraph reads:

> 14. Federal-level export subsidies pertaining to sugar or sugarcane which make the provision of financial support contingent upon export performance under, including but not limited to, the following legal instruments … [.][44]

1.26 Paragraphs 14.a–14.d then list the "legal instruments" through which individual subsidy programmes identified in the request are implemented. Paragraph 14.e reads:

> e. All other Federal-level instruments, including all successor instruments, and any amendments thereto, providing Federal-level subsidies contingent on export performance during the 2014/15, 2015/16, 2016/17, 2017/18, 2018/19 seasons and subsequent seasons.[45]

1.27 Paragraph 16 of Brazil's panel request further states:

> 16. In addition to the measures identified in paragraphs 14 to 15, the measures covered by this request for the establishment of a Panel include any amendments to any of the measures listed in paragraphs 14 to 15, above, or related, successor, replacement or implementing measures thereto.[46]

1.28 First, we note that the phrase "measures … include, but are not limited to" in paragraph 13 of Brazil's panel request leaves the list of the measures at issue open. Paragraph 14 further identifies the measures at issue broadly as "[f]ederal-level export subsidies pertaining to sugar or sugarcane".[47] We note that the Marketing and Transportation Scheme, like other alleged export subsidies listed in Brazil's panel request, was adopted by the DFPD, a federal agency, and is therefore a measure adopted at the federal level of Government that could be covered by paragraph 14 of the panel request. Furthermore, paragraph 16 of Brazil's panel request refers to "any amendments to any of the measures listed in paragraphs 14 to 15 … or related, successor, replacement or implementing measures thereto". Thus, Brazil's panel request anticipates the possibility of a change to the measures listed therein. In our view, the Marketing and Transportation Scheme is covered by the terms "any amendments to … or related, successor, replacement or implementing measures" in paragraph 16.

1.29 As an additional point, we note that the open-ended list of legal instruments implementing the alleged federal-level export subsidies in paragraph 14.e would include the instruments implementing the Marketing and Transportation Scheme. The Marketing and Transportation Scheme is applicable to the 2019-20 sugar season, which follows the 2018-19 sugar season, and therefore is covered by the terms "during … subsequent seasons" in paragraph 14.e of Brazil's panel request. This reinforces our view that the Marketing and Transportation Scheme falls within the scope of Brazil's panel request.

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[42] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 49.

[43] Brazil's comments regarding India's request for a preliminary ruling, 1 April, paras. 61-63; comments regarding India's request for a preliminary ruling, 4 May, paras. 30-32.

[44] Brazil's panel request, para. 14. (underlining original)

[45] Brazil's panel request, para. 14.e.

[46] Brazil's panel request, para. 16.

[47] Brazil's panel request, para. 14. (underlining omitted)

1.30 Australia submits that paragraphs 18-20 of its panel request, as well as paragraph 9 of Annex A of the panel request, are sufficiently broad to encompass the legal instruments that implement the Marketing and Transportation Scheme.[48]

1.31 Paragraph 18 of Australia's panel request states:

> 18. Pursuant to Article 6.2 of the DSU, Australia identifies below the specific measures through which India provides export subsidies for sugar and sugarcane, which are the subject of this request. The measures at issue include the following, as well as any amending, successor, supplemental, replacement, renewal, extension or implementing measures thereto[.][49]

1.32 Paragraph 19 defines the measures at issue as:

> 19. Federal-level measures pertaining to sugar or sugarcane which provide subsidies contingent upon export performance, through, operating individually, collectively, or in combination with each other[.][50]

1.33 Paragraph 20 of the panel request indicates that "[t]hese measures are reflected in, but not limited to, the instruments and documents identified in paragraph 9 of Annex A to this request."[51] Paragraph 9 of Annex A of the panel request contains an indicative list of legal instruments through which the federal-level measures referred to in paragraph 19 operate. Paragraph 9(e) of Annex A states:

> (e) All other documents, communications, orders, directives, legal instruments, including all successor instruments and any amendments thereto, providing for export subsidies for sugarcane or sugar.

1.34 We note that paragraph 18 of Australia's panel request indicates that the measures at issue include not only those identified in paragraph 19, but also "any amending, successor, supplemental, replacement, renewal, extension or implementing measures thereto". Thus, Australia's panel request anticipates the possibility of a change to the measures listed therein. Furthermore, paragraph 19 of the panel request identifies the measures at issue broadly as "[f]ederal-level measures pertaining to sugar or sugarcane which provide subsidies contingent upon export performance". We recall that the Marketing and Transportation Scheme, like other alleged export subsidy schemes listed in Australia's panel request, was adopted by the DFPD, a federal agency, and is therefore a measure adopted at the federal level of Government that could be covered by paragraph 19. We therefore consider that the phrase "any amending, successor, supplemental, replacement, renewal, extension or implementing measures thereto" in paragraph 18 of Australia's panel request is broad enough to include the Marketing and Transportation Scheme.

1.35 As an additional point, we note that the list of legal instruments that implement the measures at issue, in paragraph 9(e) of Annex A of Australia's panel request, is open-ended. In our view, the phrase "[a]ll other documents, communications, orders, directives, legal instruments, including all successor instruments and any amendments thereto, providing for export subsidies for sugarcane or sugar[]" found in this paragraph is also broad enough to cover the instruments implementing the Marketing and Transportation Scheme. This reinforces our view that the Marketing and Transportation Scheme falls within the scope of Australia's panel request.

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[48] Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 66-72; comments regarding India's request for a preliminary ruling, 4 May 2020, paras. 50-58.

[49] Australia's panel request, para. 18.

[50] Australia's panel request, para. 19. (underlining original) This is followed by the list of specific subsidy programmes at issue, namely (i) subsidies for the production of sugarcane and sugar that are contingent upon export performance; (ii) subsidies for the maintenance of stocks for sugar that are contingent upon export performance; (iii) measures that prescribe maximum domestic sales quotas and stockholding limits connected to export performance; (iv) MIEQs that require mills to export certain quantities of sugar; and (v) DFIA for sugar to be imported in the 2019-20 and 2020-21 sugar seasons. (Ibid.)

[51] Australia's panel request, para. 20.

1.36 Guatemala submits that the terms of its panel request, in particular Section III.A and paragraph 9, are broad enough to encompass the Marketing and Transportation Scheme.[52]

1.37 Section III.A of Guatemala's panel request refers, *inter alia*, to the following measures that Guatemala considers to be contingent upon export performance:

> The measures at issue include the following, as well as any amendments, related, successor, replacement or implementing measures thereto:
>
> > 9. Federal-level measures pertaining to sugar or sugarcane that provide subsidies contingent upon export performance, including, but not limited to, the instruments (operating individually, collectively, or in combination with each other) identified in paragraph 9 of the Annex to this request.[53]

1.38 Paragraph 9 of the Annex to Guatemala's panel request, provides:

> Federal-level measures pertaining to sugar or sugarcane that provide subsidies contingent upon export performance, including, but not limited to, the following instruments (operating individually, collectively, or in combination with each other):
>
> …
>
> > (h) All other instruments, including all successor instruments and any amendments thereto, providing federal-level subsidies contingent on export performance to sugar mills.[54]

1.39 The chapeau of Section III.A of Guatemala's panel request specifies that the measures at issue "include" the measures identified in paragraphs 9-11 of Guatemala's panel request, "as well as any amendment, related, successor, replacement or implementing measures thereto". Accordingly, the list of the measures at issue anticipates the possibility of a change to the measures at issue. Furthermore, paragraph 9, which follows the chapeau of Section III.A, refers to "[f]ederal-level measures pertaining to sugar or sugarcane that provide subsidies contingent upon export performance".[55] We recall that the Marketing and Transportation Scheme, like other alleged export subsidy schemes, was adopted by the DFPD, a federal agency, and is therefore a measure adopted at the federal level of Government. We therefore consider that the text of Section III.A of Guatemala's panel request is broad enough to cover the Marketing and Transportation Scheme.

1.40 As an additional point, we note that paragraph 9 of the Annex to Guatemala's panel request provides that the measures at issue are "not limited to" the instruments identified therein.[56] In our view, the phrase "[a]ll other instruments, including all successor instruments and any amendments thereto, providing federal-level subsidies contingent on export performance to sugar mills" found in paragraph 9(h) of the Annex is broad enough to cover the legal instruments implementing the Marketing and Transportation Scheme. This reinforces our view that the Marketing and Transportation Scheme falls within the scope of Guatemala's panel request.

1.41 In sum, our examination of the texts of the complainants' panel requests reveals that they are broad enough to encompass the Marketing and Transportation Scheme.

1.4.2 Whether the measures are of the same essence

1.42 We now turn to examine whether the Marketing and Transportation Scheme is of the same essence as the alleged export subsidies identified in the complainants' panel requests.

1.43 India submits three main arguments why it considers that the Marketing and Transportation Scheme is not of the same essence as the measures identified in the complainants' panel requests.[57]

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[52] Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 45-55.
[53] Guatemala's panel request, para. 9. (underlining original)
[54] Guatemala's panel request, para. 9 of the Annex. (underlining original)
[55] Guatemala's panel request, para. 9. (underlining omitted)
[56] Guatemala's panel request, para. 9. (underlining added)
[57] India's comments regarding its request for a preliminary ruling, 27 April 2020, paras. 51-56.

First, India argues that the nature of the Marketing and Transportation Scheme is different from the Production Assistance Scheme and the Buffer Stock Scheme because the Marketing and Transportation Scheme "has been introduced specifically with the view of providing WTO-consistent payments to offset transport and marketing costs incurred by sugar mills carrying out the export of sugar".[58] Second, India submits that the eligibility requirements under the different schemes vary significantly. India points out that, pursuant to the terms of the Production Assistance Scheme, mills that have ethanol production capacity are required to supply a certain amount of ethanol to oil marketing companies. India further notes that the eligibility for the buffer stock subsidies is dependent on the actual maintenance of buffer stock.[59] India contrasts this with the eligibility requirements for the Marketing and Transportation Scheme which, according to India, "cover sugar mills that have actually incurred … marketing and transport expenses by exporting sugar in accordance with their MAEQs".[60] Third, India contends that the amounts of assistance provided, and the methodology to determine such amounts, vary greatly depending on the scheme. In this regard, India submits that the Marketing and Transportation Scheme provides assistance towards marketing and transportation costs at a specified rate in contrast to other schemes under which the amount of assistance depends of the volume of the cane crushed.[61]

1.44 The complainants maintain that the Marketing and Transportation Scheme is of the same essence as India's export contingent measures listed in the complainants' panel requests. In particular, the complainants submit that the Marketing and Transportation Scheme exhibits the same policy purpose, and design and structure as the measures listed in the complainants' panel requests.[62] For Australia, the Marketing and Transportation Scheme "is merely the latest (albeit renamed) iteration of India's sugar export policy of tying direct payment schemes to an export quota program, repeated annually on a seasonal basis".[63] Similarly, Brazil and Guatemala argue that India simply changed the title of the schemes.[64]

1.45 The following factors have been considered in assessing whether a measure enacted after the panel request was of the same essence as the measures identified in the request: the type of trade-restrictive effect[65]; the range of products subject to duties[66]; the operation of the measure and the amendment[67]; their legal implications[68]; their regulatory purpose[69]; the proximity of design, structure, and impact[70]; the existence of an explicit reference to the original measure in the amendment[71]; the title of the amendment[72]; the authority that issued the measure and the amendment[73]; the legal basis cited[74]; and whether the original measure remained in force "in substance".[75] We consider some of these factors to be relevant in assessing the matter before us.

1.46 First, we note that the Production Assistance Scheme, the Buffer Stock Scheme, and the Marketing and Transportation Scheme were implemented through the same types of legal instruments – notifications and orders – and were issued by the same federal agency, the DFPD.[76]

[58] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 53.
[59] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 54.
[60] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 54.
[61] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 55.
[62] Brazil's comments regarding India's request for a preliminary ruling, 4 May 2020, paras. 36-38; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 73-75.
[63] Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 80.
[64] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 69; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 57.
[65] See e.g. Panel Report, *Colombia – Textiles*, para. 7.37.
[66] See e.g. Panel Reports, *Colombia – Textiles*, para. 7.37; *India – Additional Import Duties*, para. 7.63; and *US – Tariff Measures (China)*, para. 7.49; and Appellate Body Report, *EC – Chicken Cuts*, para. 158.
[67] See e.g. Panel Reports, *Colombia – Textiles*, para. 7.37; and *EC – IT Products*, para. 7.186.
[68] See e.g. Appellate Body Report, *EC – Chicken Cuts*, para. 158; and Panel Reports, *EC – IT Products*, para. 7.186; *India – Additional Import Duties*, para. 7.63; and *US – Tariff Measures (China)*, para. 7.50.
[69] See e.g. Panel Report, *Russia – Pigs (EU)*, para. 7.156.
[70] See e.g. Panel Report, *Russia – Pigs (EU)*, para. 7.156.
[71] See e.g. Appellate Body Report, *EC – Chicken Cuts*, para. 158.
[72] See e.g. Panel Reports, *Colombia – Textiles*, para. 7.37; and *US – Tariff Measures (China)*, para. 7.51.
[73] See e.g. Panel Reports, *Colombia – Textiles*, para. 7.37; and *US – Tariff Measures (China)*, para. 7.51.
[74] See e.g. Panel Report, *Colombia – Textiles*, para. 7.37.
[75] Panel Report, *Argentina – Footwear (EC)*, para. 8.45
[76] Notification of 2 December 2015, (Exhibit JE-76); Notification of 9 May 2018 (Exhibit JE-75); Notification of 5 October 2018 (Exhibit JE-74); Notification of 15 June 2018, (Exhibit JE-78); Notification of 31 July 2019, (Exhibit JE-77); and Notification of 12 September 2019, (Exhibit JE-114); MIEQ Order of 18 September 2015,

We also note that the legal bases of such notices were the same, i.e. Section 3 of the Essential Commodities Act 1955[77] and Clause 5 of the Sugar (Control) Order 1966.[78]

1.47 Second, the purpose of the assistance provided under the Marketing and Transportation Scheme[79] is the same as that of the Production Assistance Scheme[80] and the Buffer Stock Scheme[81], namely, to pay cane price dues of farmers for the relevant sugar season. India argues that the purpose of the Marketing and Transportation Scheme is to provide WTO-consistent payments to offset the transport and marketing costs incurred by sugar mills that export sugar.[82] As explained in section 7.2.4.4 of this Report, we are not persuaded by India's arguments regarding the purpose of the Marketing and Transportation Scheme. Although some elements of the Marketing and Transportation Scheme do refer to transport and marketing costs[83], paragraph 1 of the Marketing and Transportation Scheme, titled "Purpose of Assistance", states that the assistance "is to be used for payment of cane price dues of farmers for the sugar season 2019-20 and cane price arrears of previous seasons, if any."[84] Furthermore, the preamble to, and paragraph 5(i) of, the Marketing and Transportation Scheme also stipulate that the assistance must be used for the payment of cane price dues of farmers.[85]

1.48 Third, the Marketing and Transportation Scheme, the Production Assistance Scheme, and the Buffer Stock Scheme prescribe the same modalities for the payment of the assistance. Specifically, each of the schemes requires that sugar mills open separate non-lien accounts in a bank and provide to the bank a list of farmers and their bank account details, as well as the amount of cane price dues.[86] All three schemes also require sugar mills receiving assistance to submit to the DFPD a utilization certificate indicating that the assistance was used to pay cane price arrears to farmers in the relevant sugar season.[87]

1.49 Fourth, the three subsidy schemes at issue have similar eligibility criteria in that they require mills to export a certain amount of sugar in order to be eligible for assistance. In particular, to be eligible for assistance under these schemes, a sugar mill must, *inter alia*, comply with orders and directives of the DFPD, including the MIEQ and the MAEQ orders that set the amount of sugar to be exported and divide it among individual mills.[88] More specifically, the Notifications implementing the Production Assistance Scheme for the sugar seasons 2017-18 and 2018-19 require, as an eligibility

(Exhibit JE-109); MIEQ Order of 28 March 2018, (Exhibit JE-107); MIEQ Order of 28 September 2018, (Exhibit JE-108).

[77] Section (3E) of the Essential Commodities Act states:

> Central Government may, from time to time, by general or special order, direct any producer or importer or exporter or recognised dealer or any class of producers or recognised dealers, to take action regarding production, maintenance of stocks, storage, sale, grading, packing, marking, weighment, disposal, delivery and distribution of any kind of sugar in the manner specified in the direction.

(Exhibit JE-43, Section (3E))

[78] Clause 5 of the Sugar (Control) Order enables the Central Government to issue general or special orders to sugar producers, importers or dealers to regulate, among others, production, maintenance of stocks, storage, sales, delivery and distribution of any kind of sugar. (Sugar (Control) Order, 1966, (Exhibit JE-44), Clause 5, p. 42)

[79] Notification of 12 September 2019, (Exhibit JE-114), preamble and para. 1.

[80] See Notification of 2 December 2015, (Exhibit JE-76), preamble and para. 1; Notification of 9 May 2018 (Exhibit JE-75), preamble and para. 1; and Notification of 5 October 2018, (Exhibit JE-74), preamble and para. 1.

[81] See Notification of 15 June 2018 (Exhibit JE-78), preamble and para. 1; and Notification of 31 July 2019 (Exhibit JE-77), preamble and para. 1.

[82] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 53.

[83] Notification of 12 September 2019, (Exhibit JE-114), para. 3.

[84] Notification of 12 September 2019, (Exhibit JE-114), para. 1.

[85] Notification of 12 September 2019, (Exhibit JE-114), preamble and para. 5.

[86] Notification of 2 December 2015, (Exhibit JE-76), para. 2.v; Notification of 9 May 2018, (Exhibit JE-75), para. 3(v); Notification of 5 October 2018, (Exhibit JE-74), para. 3(iv); Notification of 15 June 2018, (Exhibit JE-78), para. 9(a); Notification of 31 July 2019, (Exhibit JE-77), para. 9(a); Notification of 12 September 2019, (Exhibit JE-114), para. 5(ii).

[87] Notification of 2 December 2015, (Exhibit JE-76), para. 3; Notification of 9 May 2018, (Exhibit JE-75), para. 4; Notification of 5 October 2018, (Exhibit JE-74), para. 4; Notification of 15 June 2018, (Exhibit JE-78), para. 10; Notification of 31 July 2019, (Exhibit JE-77), para. 10; Notification of 12 September 2019, (Exhibit JE-114), para. 6.

[88] Notification of 12 September 2019, (Exhibit JE-114), para. 2.a.

criterion, that the mill fully comply with all orders of the DFPD for the relevant sugar season.[89] By the same token, the amendments of 31 December 2018 to the Buffer Stock Scheme 2018 stipulate that, to receive the quarterly reimbursement of the buffer stock subsidy, mills are "required to fully comply with all the orders/directives issued by [the DFPD] for compliance during the 2018-19 sugar season".[90] Such orders include the MIEQ orders for the relevant sugar seasons, which determine a total quantity of sugar that must be exported, and set mill-wise allocations.[91] The Marketing and Transportation Scheme likewise provides that, to be eligible for assistance, sugar mills "should have exported sugar up to the extent of their [MAEQ] determined by the Central Government for such mills for the sugar season 2019-20".[92] In order to be eligible for assistance, a sugar mill is required to export at least 50% of its MAEQ.[93]

1.50 India argues that, under the Production Assistance Scheme, mills that have ethanol production capacity are required to supply a certain amount of ethanol to oil marketing companies. India further notes that the eligibility for the Buffer Stock Scheme is dependent on the actual maintenance of buffer stock.[94] India contrasts this with the eligibility criteria for the Marketing and Transportation Scheme, which, "cover sugar mills that have actually incurred … marketing and transport expenses by exporting sugar in accordance with their MAEQs".[95] It is true that each of the subsidy schemes at issue contains several eligibility requirements. For example, as India points out, under the Production Assistance Scheme, mills that have ethanol production capacity must supply a certain amount of it to marketing companies.[96] However, we consider that a common core feature of all three schemes is that they require compliance with the MIEQ or MAEQ orders that set out mill-specific export targets. That they also contain other requirements does not change the fact that their central requirement is the exportation of a certain amount of sugar.

1.51 Finally, India argues that the amounts of assistance provided, and the methodology to determine such amounts, vary greatly depending on the scheme. In this regard, India submits that the Marketing and Transportation Scheme provides assistance towards marketing and transportation costs at a specified rate, in contrast to other schemes that provide different amounts calculated on the basis of the amount of the cane crushed.[97] The complainants do not disagree with India on this point.[98] Indeed, India is correct that the amount of assistance and the methodology to determine that amount vary across the different subsidy schemes. This difference, however, does not detract from the fact that the schemes were implemented by the same federal agency through the same types of legal instruments, all three schemes require exportation of a certain amount of sugar in order for mills to be eligible for assistance, the purpose of the schemes is the same, and all three schemes require that payments be made directly to farmers' accounts on behalf of sugar mills. We agree with Australia that the differences that India points out "are immaterial to the issues that fall for consideration in this dispute. What is material is that the financial assistance that is paid under each scheme, whatever its amount and however that amount is determined, is tied to export performance."[99]

1.52 Based on the foregoing, we find the Marketing and Transportation Scheme to be of the same essence as the Production Assistance and Buffer Stock Schemes identified in the complainants' panel requests.

[89] Notification of 9 May 2018, (Exhibit JE-75), para. 2(c); Notification of 5 October 2018 (Exhibit JE-74), para. 2(c). In the same vein, the Notification implementing the Production Assistance Scheme for the 2015-16 sugar season provides that, in order to be eligible for assistance, a mill must export 80 per cent of its MIEQ target. (Notification of 2 December 2015, (Exhibit JE-76), para. 2.iii)

[90] Notification of 31 December 2018, (Exhibit JE-112), para. 2.

[91] MIEQ Order of 28 March 2018, (Exhibit JE-107); Notification of 9 May 2018, (Exhibit JE-111), para. 2; Notification of 28 September 2018, (Exhibit JE-108).

[92] Notification of 12 September 2019, (Exhibit JE-114), para. 2(a); MAEQ Order of 16 September 2019, (Exhibit JE-115).

[93] Notification of 12 September 2019, (Exhibit JE-114), para. 2(a).

[94] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 54.

[95] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 54.

[96] Notification of 9 May 2018, para. 2(a); Notification of 5 October 2018, para. 2(a).

[97] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 55.

[98] Brazil's comments regarding India's request for a preliminary ruling, 4 May 2020, para. 44; Australia's comments regarding India's request for a preliminary ruling, 4 May 2020, para. 78.

[99] Australia's comments regarding India's request for a preliminary ruling, 4 May, para. 78.

1.4.3 Whether including the Marketing and Transportation Scheme in the Panel's terms of reference would contribute to the prompt settlement of, and securing a positive solution to, the present disputes

1.53 India considers that including the Marketing and Transportation Scheme in the Panel's terms of reference is neither necessary nor warranted to secure a positive solution to this dispute. India submits that the Marketing and Transportation Scheme "by no means is a recurring measure but rather a separate and distinct measure in its own right".[100] In India's view, "the Marketing and Transportation Scheme may be adequately examined and taken into consideration, if required, during the stage of compliance".[101]

1.54 The complainants submit that including the Marketing and Transportation Scheme in the Panel's terms of reference is necessary to contribute to a prompt settlement of, and securing a positive solution to, the disputes, in accordance with the principles articulated in Articles 3.3 and 3.7 of the DSU.[102] The complainants argue that India has a demonstrated pattern of adopting, on a seasonal basis, export-related support schemes that have similar policy objectives and design, structure, and operation.[103] Australia and Guatemala further note that requiring the complainants to challenge every new iteration of these measures could turn them into a "moving target" that shifts from year to year.[104]

1.55 We note that India's assistance schemes are adopted on a seasonal basis. In particular, the complainants submit evidence with respect to the Production Assistance Scheme for the 2015-16[105], 2017-18,[106] and 2018-19 sugar seasons[107], and the Buffer Stock Scheme for the 2018-19[108] and 2019-20 sugar seasons.[109] The Marketing and Transportation Scheme was also adopted on a seasonal basis, for the 2019-20 sugar season.[110]

1.56 We agree with the complainants that requiring them to challenge each seasonal iteration of India's alleged export subsidy measures would turn such measures into moving targets. Such an outcome would defeat the objectives of prompt dispute settlement, set out in Article 3.3 of the DSU, and securing a positive solution to disputes, set out in Article 3.7 of the DSU.[111] Thus, including the Marketing and Transportation Scheme in the Panel's terms of reference would contribute to a prompt settlement of, and securing a positive solution to, the present disputes.

1.57 Regarding India's argument that the Marketing and Transportation Scheme may be assessed in a compliance proceeding brought pursuant to Article 21.5 of the DSU, we note that this argument prejudges the evolution of these disputes by assuming that there will be compliance proceedings. Furthermore, India has not explained how exactly the Marketing and Transportation Scheme would fall within the scope of such hypothetical compliance proceedings. In any event, we cannot, based on such a speculative argument, decline to exercise jurisdiction over a measure that we find to be within our terms of reference.

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[100] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 57.
[101] India's comments regarding its request for a preliminary ruling, 27 April 2020, para. 57.
[102] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 71-74; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 81-83; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 59-61.
[103] Brazil's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 73; Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, paras. 82-83.
[104] Australia's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 82; comments regarding India's request for a preliminary ruling, 4 May 2020, para. 83; Guatemala's comments regarding India's request for a preliminary ruling, 1 April 2020, para. 59; comments regarding India's request for a preliminary ruling, 4 May 2020, paras. 54-55.
[105] Notification of 2 December 2015, (Exhibit JE-76).
[106] Notification of 9 May 2018, (Exhibit JE-75).
[107] Notification of 5 October 2018, (Exhibit JE-74).
[108] Notification of 15 June 2018, (Exhibit JE-78).
[109] Notification of 31 July 2019, (Exhibit JE-77).
[110] Notification of 12 September 2019, (Exhibit JE-114), preamble.
[111] As the panel in *Argentina – Footwear (EC)* observed, in such circumstances, "Members could always keep one step ahead of any WTO dispute settlement proceeding because in such a situation, the complaining Member would indeed, challenge a 'moving target', and panel and Appellate Body's findings could already be overtaken by events when they are rendered and adopted by the DSB." (Panel Report, *Argentina - Footwear (EC)*, para. 8.41. See also Appellate Body Report, *Chile – Price Band System*, para. 144).

1.5 Conclusion

1.58 We have concluded that the complainants' panel requests are broad enough to encompass the Marketing and Transportation Scheme. We have also concluded that the Marketing and Transportation Scheme is of the same essence as the subsidy schemes listed in the complainants' panel requests because all those Schemes: (i) were implemented by the same federal agency through the same type of legal instrument; (ii) have the same purpose; (iii) prescribe the same modalities for the payment of the assistance; and (iv) have similar eligibility criteria in that they require mills to export a certain amount of sugar in order to be eligible for assistance. As the Marketing and Transportation Scheme is of the same essence as the other subsidy schemes, and the complainants' panel requests are broad enough to encompass it, and in light of the seasonal character of India's alleged export subsidies, we consider that including the Marketing and Transportation Scheme in our terms of reference would contribute to the prompt settlement of, and securing a positive solution to, the present disputes, in accordance with Articles 3.3 and 3.7 of the DSU.

1.59 We therefore find that the Marketing and Transportation Scheme is within our terms of reference.