



WORLD TRADE
ORGANIZATION

WT/DS579/R
WT/DS580/R
WT/DS581/R

14 December 2021

(21-8036)

Page: 1/115

Original: English

INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

REPORTS OF THE PANELS

TABLE OF CONTENTS

1 INTRODUCTION	16
1.1 Complaint by Brazil.....	16
1.2 Complaint by Australia	16
1.3 Complaint by Guatemala	16
1.4 Panel establishment and composition	16
1.5 Panel proceedings.....	17
1.5.1 General	17
1.5.2 The Panel's substantive meetings held by remote means	18
1.5.2.1 First substantive meeting with the parties and third parties.....	18
1.5.2.2 Second substantive meeting with the parties.....	21
1.5.3 Preliminary ruling	21
2 FACTUAL ASPECTS.....	22
2.1 The measures at issue	22
2.1.1 India's alleged domestic support to sugarcane producers	22
2.1.2 India's alleged export subsidies	24
3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS	25
3.1 Brazil	25
3.2 Australia.....	25
3.3 Guatemala.....	26
3.4 India.....	26
4 ARGUMENTS OF THE PARTIES	27
5 ARGUMENTS OF THE THIRD PARTIES	27
6 INTERIM REVIEW	27
6.1 Introduction.....	27
6.2 Requests for review of sections 1 to 3 (Introduction, Factual aspects, and Parties' requests for findings and recommendations)	28
6.3 Requests for review of section 7.1 (Domestic support)	28
6.4 Requests for review of section 7.2 (Export subsidies).....	30
6.4.1 Requests for review regarding the Panel's recommendation under Article 4.7 of the SCM Agreement.....	32
6.5 Requests for review of section 7.3 (Notifications)	35
6.6 Requests for review of the Appendix (Calculation of India's market price support to sugarcane producers for the 2014-15 to 2018-19 sugar seasons)	35
7 FINDINGS	35
7.1 Domestic support	35
7.1.1 Introduction	35
7.1.2 India's permitted level of product-specific support to sugarcane producers.....	38
7.1.3 India's actual amount of non-exempt product-specific support to sugarcane producers.....	40
7.1.3.1 General considerations	40
7.1.3.2 Market price support	42

7.1.3.2.1	Overview	42
7.1.3.2.2	The scope of "market price support"	44
7.1.3.2.3	India's market price support to sugarcane producers	52
7.1.3.2.4	Budgetary payments made to maintain the price gap	53
7.1.3.3	Non-exempt direct payments and other non-exempt policies	54
7.1.3.3.1	Overview	54
7.1.3.3.2	Tamil Nadu's transitional production incentives	56
7.1.3.3.3	Andhra Pradesh's purchase tax remittances	58
7.1.3.3.4	Karnataka's incentive price payments	61
7.1.3.3.5	Amount of non-exempt direct payments or other non-exempt policies to sugarcane producers	64
7.1.3.4	Overall calculation	64
7.1.4	Comparison and conclusion	64
7.2	Export subsidies	65
7.2.1	Introduction	65
7.2.2	Measures at issue	67
7.2.2.1	MIEQs and MAEQ	67
7.2.2.2	Production Assistance Scheme	68
7.2.2.3	Buffer Stock Scheme	69
7.2.2.4	Marketing and Transportation Scheme	70
7.2.2.5	Duty Free Import Authorization (DFIA) Scheme	71
7.2.3	Order of analysis	72
7.2.4	Claims under the Agreement on Agriculture	73
7.2.4.1	Introduction	73
7.2.4.2	Overview of the relevant provisions	74
7.2.4.3	India's export subsidy commitments	75
7.2.4.4	Whether the Marketing and Transportation Scheme falls under Article 9.4 of the Agreement on Agriculture	76
7.2.4.4.1	Introduction	76
7.2.4.4.2	Burden of proof	76
7.2.4.4.3	Main arguments of the parties and third parties	77
7.2.4.4.4	Legal standard	79
7.2.4.4.5	Assessment of the Marketing and Transportation Scheme under Articles 9.1(d) and 9.1(e) of the Agreement on Agriculture	80
7.2.4.4.5.1	Whether the assistance under the Marketing and Transportation Scheme relates to the types of costs in Articles 9.1(d) and (e)	81
7.2.4.4.5.2	Whether the amount of assistance provided under the Marketing and Transportation Scheme exceeds the actual marketing and transportation costs	82
7.2.4.4.6	Conclusion	84
7.2.4.5	Whether India's assistance schemes are subsidies contingent on export performance under Article 9.1(a) of the Agreement on Agriculture	84
7.2.4.5.1	Introduction	84

7.2.4.5.2	Legal standard	85
7.2.4.5.3	Production Assistance Scheme, Buffer Stock Scheme, and Marketing and Transportation Scheme	87
7.2.4.5.3.1	Whether the assistance is provided by a government or its agency	87
7.2.4.5.3.2	Whether assistance 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"	88
7.2.4.5.3.3	Whether the assistance is "a direct subsid[y]"	89
7.2.4.5.3.4	Whether the subsidies are "contingent on export performance"	95
7.2.4.5.4	Duty Free Import Authorization (DFIA) Scheme	98
7.2.4.5.4.1	Introduction.....	98
7.2.4.5.4.2	Whether the DFIA Scheme does not constitute a subsidy pursuant to footnote 1 to the SCM Agreement	98
7.2.4.5.4.3	Whether the DFIA Scheme is inconsistent with Article 9.1(a) of the Agreement on Agriculture	100
7.2.4.6	Guatemala's claim under Article 9.1(c) of the Agreement on Agriculture	102
7.2.4.7	Overall conclusion under the Agreement on Agriculture	102
7.2.5	Claims under the SCM Agreement.....	102
7.2.5.1	Introduction	102
7.2.5.2	Whether Article 27.2(b) applies to India.....	103
7.2.5.3	Whether India's subsidy schemes are inconsistent with Article 3.1(a) of the SCM Agreement.....	106
7.2.5.4	Conclusion under the SCM Agreement	107
7.2.6	Recommendation under Article 4.7 of the SCM Agreement.....	107
7.3	Notifications.....	108
8	CONCLUSIONS AND RECOMMENDATIONS	113
8.1	Complaint by Brazil (DS579).....	113
8.2	Complaint by Australia (DS580)	113
8.3	Complaint by Guatemala (DS581)	114

LIST OF ANNEXES**ANNEX A****WORKING PROCEDURES OF THE PANEL**

	Contents	Page
Annex A-1	Working Procedures of the Panel	5
Annex A-2	Additional Working Procedures for the Panel's First Substantive Meeting to be Held by Remote Means	13
Annex A-3	Additional Working Procedures for the Panel's Second Substantive Meeting to be Held by Remote Means	15

ANNEX B**ARGUMENTS OF THE PARTIES**

	Contents	Page
Annex B-1	Integrated executive summary of the arguments of Brazil	18
Annex B-2	Integrated executive summary of the arguments of Australia	37
Annex B-3	Integrated executive summary of the arguments of Guatemala	59
Annex B-4	Integrated executive summary of the arguments of India	83

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

	Contents	Page
Annex C-1	Integrated executive summary of the arguments of Canada	104
Annex C-2	Integrated executive summary of the arguments of China	108
Annex C-3	Integrated executive summary of the arguments of Costa Rica	110
Annex C-4	Integrated executive summary of the arguments of El Salvador	113
Annex C-5	Integrated executive summary of the arguments of the European Union	116
Annex C-6	Integrated executive summary of the arguments of Japan	119
Annex C-7	Integrated executive summary of the arguments of the United States	122

ANNEX D**COMMUNICATIONS BY THE PANEL REGARDING THE FIRST SUBSTANTIVE MEETING**

	Contents	Page
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	128
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	130
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	133
Annex D-4	Panel's communication to the parties and third parties regarding the postponement of the first substantive meeting, dated 18 November 2020	135

ANNEX E

PRELIMINARY RULING

Contents		Page
Annex E-1	Preliminary Ruling by the Panel concerning India's allegedly expired measures dated 9 November 2020	138
Annex E-2	Preliminary Ruling by the Panel concerning India's Marketing and Transportation Scheme	149

CASES CITED IN THESE REPORTS

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R , adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R , DSR 2000:II, p. 575
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R , adopted 20 August 1999, DSR 1999:III, p. 1161
<i>Brazil – Aircraft</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/R , adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R , DSR 1999:III, p. 1221
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R , adopted 20 August 1999, DSR 1999:III, p. 1377
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/RW , adopted 4 August 2000, as modified by Appellate Body Report WT/DS70/AB/RW , DSR 2000:IX, p. 4315
<i>Canada – Aircraft Credits and Guarantees</i>	Panel Report, <i>Canada – Export Credits and Loan Guarantees for Regional Aircraft</i> , WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III, p. 849
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R , WT/DS113/AB/R , and Corr.1, adopted 27 October 1999, DSR 1999:V, p. 2057
<i>Canada – Dairy</i>	Panel Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/R , WT/DS113/R , adopted 27 October 1999, as modified by Appellate Body Report WT/DS103/AB/R , WT/DS113/AB/R , DSR 1999:VI, p. 2097
<i>Canada – Dairy (Article 21.5 – New Zealand and US)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW , WT/DS113/AB/RW , adopted 18 December 2001, DSR 2001:XIII, p. 6829
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R , adopted 24 May 2013, DSR 2013:I, p. 7
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Panel Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R , DSR 2013:I, p. 237
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R , adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>China – Agricultural Producers</i>	Panel Report, <i>China – Domestic Support for Agricultural Producers</i> , WT/DS511/R and Add.1, adopted 26 April 2019
<i>China – Autos (US)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R , adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R , WT/DS286/AB/R , adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R , adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R and Corr.1, adopted 28

Short Title	Full Case Title and Citation
	July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R , WT/DS266/AB/R , WT/DS283/AB/R , adopted 19 May 2005, DSR 2005:XIII, p. 6365
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R , adopted 1 June 2011, DSR 2011:I, p. 7
<i>EC and certain member States – Large Civil Aircraft</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R , adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – EU)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the European Union and Certain Member States</i> , WT/DS316/RW2 and Add.1, circulated to WTO Members 2 December 2019 [appealed by the European Union 6 December 2019 – the Division suspended its work on 10 December 2019]
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/AB/RW and Add.1, adopted 28 May 2018, DSR 2018:V, p. 1985
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/RW and Add.1, adopted 28 May 2018, as modified by Appellate Body Report WT/DS316/AB/RW, DSR 2018:VI, p. 2519
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R , adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC – Selected Customs Matters</i>	Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/R , adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX, p. 3915
<i>EU – PET (Pakistan)</i>	Appellate Body Report, <i>European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan</i> , WT/DS486/AB/R and Add.1, adopted 28 May 2018, DSR 2018:IV, p. 1615
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R , adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>India – Export Related Measures</i>	Panel Report, <i>India – Export Related Measures</i> , WT/DS541/R and Add.1, circulated to WTO Members 31 October 2019 [appealed by India 19 November 2019 – the Division suspended its work on 10 December 2019]
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
<i>Korea – Alcoholic Beverages</i>	Panel Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/R , WT/DS84/R , adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, p. 44
<i>Korea – Pneumatic Valves (Japan)</i>	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , WT/DS504/AB/R and Add.1, adopted 30 September 2019
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R , WT/DS169/AB/R , adopted 10 January 2001, DSR 2001:I, p. 5
<i>Korea – Various Measures on Beef</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R , WT/DS169/R , adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, p. 59
<i>Russia – Pigs (EU)</i>	Panel Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
<i>Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines</i> , WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018 [appealed by Thailand 9 January 2019 – the Division suspended its work on 10 December 2019]
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R , adopted 19 December 2014, DSR 2014:V, p. 1727

Short Title	Full Case Title and Citation
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R , adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R , adopted 16 January 2015, DSR 2015:I, p. 7
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R , adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – FSC</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/R , adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R , DSR 2000:IV, p. 1675
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW , adopted 29 January 2002, DSR 2002:I, p. 55
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Large Civil Aircraft (2nd complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R , adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Large Civil Aircraft (2nd complaint)</i>	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/R , adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R , DSR 2012:II, p. 649
<i>US – Shrimp (Viet Nam)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS404/R , adopted 2 September 2011, DSR 2011:X, p. 5301
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R , adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Renewable Energy</i>	Panel Report, <i>United States – Certain Measures Relating to the Renewable Energy Sector</i> , WT/DS510/R and Add.1, circulated to WTO Members 27 June 2019 [appealed by the United States 15 August 2019 – the Division suspended its work on 10 December 2019]
<i>US – Tariff Measures (China)</i>	Panel Report, <i>United States – Tariff Measures on Certain Goods from China</i> , WT/DS543/R and Add.1, circulated to WTO Members 15 September 2020 [appealed by the United States 26 October 2020]
<i>US – Tax Incentives</i>	Panel Report, <i>United States – Conditional Tax Incentives for Large Civil Aircraft</i> , WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R , DSR 2017:V, p. 2305
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R , adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R , Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R , DSR 2005:II, p. 299
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW , adopted 31 August 2009, DSR 2009:VIII, p. 3441

EXHIBITS REFERRED TO IN THESE REPORTS

Exhibit No.	Short title	Title
AUS-1 (revised 23 March 2021)	Australia's Domestic Support Calculations	Australia's domestic support calculations, Microsoft Excel workbooks, Revision 3
AUS-8, GTM-31	Rangarajan Committee Report	"Report of the Committee on the Regulation of Sugar Sector in India: The Way Forward", 5 October 2012 (Rangarajan Committee Report)
AUS-15	Press Release, Press Information Bureau, 31 July 2018	Press Information Bureau, Ministry of Consumer Affairs, Food and Public Distribution, "Fair and Remunerative Price of Sugarcane" (Press Release), 31 July 2018
AUS-17	Order of 22 October 2013	Order G.S.R. 697(E)/Ess.Com./Sugarcane, Ministry of Consumer Affairs, Food and Public Distribution, 22 October 2013
AUS-19	Notification of 1 October 2015	Order G.S.R. 752(E), Ministry of Consumer Affairs, Food and Public Distribution, 1 October 2015
AUS-20	Notification of 30 September 2016	Notification G.S.R. 932(E), Ministry of Consumer Affairs, Food and Public Distribution, 30 September 2016
AUS-22	Notification of 27 September 2017	Notification G.S.R. 1205(E), Ministry of Consumer Affairs, Food and Public Distribution, 27 September 2017
AUS-38	-	Customs Tariff Act 1975
AUS-40	Foreign Trade Policy 2015-2020	Notification 01/2015-2020, Foreign Trade Policy, 2015-2020
AUS-41	Amendment to the Foreign Trade Policy 2015-2020	Notification No. 57/2015-2020, Department of Commerce, 28 March 2018
AUS-45	DFPD Functions	Government of India, Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution, "Functions (As per Allocation of Business Rules)", https://dfpd.gov.in/fun.htm
AUS-48	Notes on Demands for Grants, 2018-2019	Central Government of India's 2018-19 Expenditure Budget
AUS-49	-	First Advance Estimates of Production of Foodgrains for 2019-20, Ministry of Agriculture and Farmers Welfare, 23 September 2019
AUS-52	Karnataka Sugarcane Act	Karnataka Sugarcane (Regulation of Purchase and Supply) Act 2013
AUS-54	Order of 24 July 2018	Order G.O.(Ms).No.191, Government of Tamil Nadu, Agriculture (S1) Department, 24 July 2018
AUS-63	Notification by the Haryana Government, 8 March 2019	Notification No. 649-Agri.II(3)-219/3493, Haryana Government, Agriculture and Farmers Welfare Department, 8 March 2019
AUS-66	"Punjab Govt to pay Rs 25 per quintal directly to cane farmers", <i>The Tribune</i> , 6 December 2018	"Punjab Govt to pay Rs 25 per quintal directly to cane farmers", <i>The Tribune</i> , 6 December 2018, https://www.tribuneindia.com/news/archive/pvt-sugar-mill-owners-to-clear-payments-of-cane-growers-capt-amarinder-693812
BRA-1 (revised-3)	-	Brazil's Calculation of India's Domestic Support for Sugarcane
GTM-19	Mr. Tarun Sawhney, President of ISMA, "The Current Sugarcane Pricing Policy & its Critical Analysis"	Mr. Tarun Sawhney, President of ISMA, "The Current Sugarcane Pricing Policy & its Critical Analysis" available at https://indiansugar.com/PDFS/Current_sugarcane_pricing_policy_0405-Tarun_Sawhney.pdf , last accessed on 14.01.2020
GTM-22	Priyanka Singh, Manmohan Singh and BL Sharma, "Variation in sugar content between early and mid-late maturing sugarcane varieties across the crushing period in sub-tropical India", <i>Proceedings of the International Society of Sugar Cane Technologists</i> , volume 29, 2016	Priyanka Singh, Manmohan Singh and BL Sharma, "Variation in sugar content between early and mid-late maturing sugarcane varieties across the crushing period in sub-tropical India", <i>Proceedings of the International Society of Sugar Cane Technologists</i> , volume 29, 2016, available at https://www.researchgate.net/publication/311986635_Variation_in_sugar_content_between_early_and_mid-late_maturing_sugarcane_varieties_across_the_crushing

Exhibit No.	Short title	Title
		period in sub-tropical India , last accessed on 15.01.2020
GTM-28	Karnataka Sugarcane Amendment Act	The Karnataka Act No. 28 of 2014, The Karnataka Sugarcane (Regulation of Purchase and Supply) (Amendment) Act, 2014
GTM-45 (revised 12 May 2021)	-	Guatemala's calculations of India's AMS Revision 12 May 2021 (Revision 12 May 2021)
IND-4	Communication from the Government of India of 18 March 2020	Communication F. No. 21(3)/2019-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution, dated 18 March 2020
IND-5	Notification from the Ministry of Finance of 14 November 2018 (Goods and Services Tax Compensation)	Gazette of India, Notification No. 1/2018 (Goods and Services Tax Compensation), G.S.R. 1116(E), Ministry of Finance, Department of Revenue, 14 November, 2018
IND-15	DFPD's Letter to Food Corporation of India of 25 June 2019	Communication from Department of Food & Public Distribution dated 25 June 2019 to Food Corporation of India
IND-16	DFPD's Letter to Ministry of Railways of 26 June 2019	Communications from Department of Food & Public Distribution dated 26 and 27 June 2019 to Ministry of Railways
IND-17	DFPD's Office Memorandum to MMTC of 11 July 2019	Communication from Department of Food & Public Distribution dated 11 July 2019 to Metals and Minerals Trading Corporation of India Ltd.
IND-18	DFPD's Office Memorandum to STC of 11 July 2019	Communication from Department of Food & Public Distribution dated 11 July 2019 to State Trading Corporation of India Ltd.
IND-21	Foreign Trade Policy, Handbook of Procedures 2015-20	Chapter 4, Foreign Trade Policy 2015-20, Handbook of Procedures
IND-23	Office Memorandum from Ministry of Railways to DFPD of 28 June 2019	Ministry of Railways Office Memorandum dated 28 June 2019
IND-24	-	Application Form ANF - 4G for issue of Transferable Duty-Free Import Authorisation (DFIA)
IND-25	-	Appendix 4H, Register for accounting the consumption and stocks of duty free imported or domestically procured raw materials, components, etc., allowed under Advance Authorisation/DFIA, Foreign Trade Policy, Handbook of Procedures
JE-2	DFPD Communication: Fixation of FRP 2014-15 season, 14 February 2014	Ministry of Consumer Affairs, Food & Public Distribution, Fixation of Fair and Remunerative Price payable by sugar mills for 2014-15 sugar season, 14 February 2014
JE-3	Press Release, Press Information Bureau, 16 January 2015	Cabinet Committee on Economic Affairs (CCEA), Determination of Fair and Remunerative Price payable by sugar mills for 2015-16 sugar season, 16 January 2015
JE-4	DFPD Communication: Fixation of FRP for 2015-16 season, 2 February 2015	Ministry of Consumer Affairs, Food & Public Distribution, Fixation of Fair and Remunerative Price payable by sugar mills for 2015-16 sugar season, 2 February 2015
JE-5	CACP Price Policy for Sugarcane: 2016-17 Sugar Season	CACP, Price Policy for Sugarcane (the 2016-17 Sugar Season), August 2015
JE-6	Press Release, Press Information Bureau, 24 May 2017	CCEA, A farmer friendly step Cabinet approves Fair and Remunerative Price payable by sugar mills for 2017-18 sugar season, 24 May 2017
JE-7	DFPD Communication: Fixation of FRP for 2017-18 season, 1 June 2017	Ministry of Consumer Affairs, Food & Public Distribution, Fixation of Fair and Remunerative Price payable by sugar mills for 2017-18 sugar season, 1 June 2017
JE-8	Press Release, Press Information Bureau, 18 July 2018	CCEA, Determination of Fair and Remunerative Price payable by sugar mills for 2018-19 sugar season, 18 July 2018
JE-9	DFPD Communication: Fixation of FRP for 2018-19 sugar season, 20 July 2018	Communication No. 3(1)/2017-SP-I, Ministry of Consumer Affairs, Food and Public Distribution, 20 July 2018
JE-11	Fair and Remunerative Price of Sugarcane in the Country, ISMA	Indian Sugar Mills Association, "Fair and Remunerative Price of Sugarcane in the Country"
JE-43	Essential Commodities Act	The Essential Commodities Act 1955
JE-44	Sugar (Control) Order, 1966	The Sugar (Control) Order 1966
JE-45	Sugarcane (Control) Order	The Sugarcane (Control) Order 1966 (Amended to 2013)

Exhibit No.	Short title	Title
JE-47	"Govt keeps cane FRP unchanged at Rs 230 per qtl for 2016-17", India Today, 6 April 2016	India Today, "Govt keeps cane FRP unchanged at Rs 230 per qtl for 2016-17", 6 April 2016
JE-48	-	Practical Action technical brief: Sugar Production from Sugar Cane
JE-49	-	Judgement of the Supreme Court of India, <i>U.P. Co-operative Cane Unions Federations v. West U.P. Sugar Mills Association & Ors. Etc.</i> , 5 May 2004
JE-50	Bihar Sugarcane Act	Bihar Sugarcane (Regulation of Supply and Purchase) Act 1981
JE-52	CACP Price Policy for Sugarcane: 2018-19 Sugar Season	CACP, Price Policy for Sugarcane (2018-19 sugar season), August 2017
JE-53	CACP Price Policy for Sugarcane: 2019-20 Sugar Season	CACP, Price Policy for Sugarcane (2019-20 sugar season), August 2018
JE-54-B	Notification by the Bihar Government, 24 November 2016 (English translation)	Notification No. 2-02/2007-2316 of the State government of Bihar, 24 November 2016 (English translation)
JE-55	-	Riga Sugar Company Limited, Annual Report 2018-19
JE-56	Haryana Amendment Act; or Haryana Sugarcane Act	Punjab Sugarcane (Regulation of Purchase and Supply) Haryana Amendment Act 2004
JE-57	Haryana Sugarcane Rules	Haryana Sugarcane (Regulation of Purchase and Supply) Rules 1992
JE-58	State of Haryana, Budget 2019-20: Explanatory Memorandum	Finance Department of the State of Haryana, Budget 2019-20: Explanatory Memorandum on Welfare and Development Schemes
JE-59	Punjab Sugarcane Act	Punjab Sugarcane (Regulation of Purchase and Supply) Act 1953
JE-60	Punjab Sugarcane Rules	Punjab Sugarcane (Regulation of Purchase and Supply) Rule 1958
JE-61	Notification by the Punjab Government, 28 November 2019	Notification of the State Government of Punjab, SAP for the 2018/19 season, 28 November 2019
JE-62	Order of 14 January 2015	Order G.O.(Ms).No.15 of the Agriculture (S1) Department of the Government of Tamil Nadu of 14 January 2015
JE-63	Order of 11 January 2016	Order G.O.(Ms).No.20 of the Agriculture (S1) Department of the Government of Tamil Nadu of 11 January 2016
JE-64	Order of 5 January 2017	Order G.O.(Ms).No.5 of the Agriculture (S1) Department of the Government of Tamil Nadu of 5 January 2017
JE-65	-	Tamil Nadu Sugarcane (Regulation of Purchase Price) Act 2018
JE-67	Tamil Nadu Sugarcane Act	Tamil Nadu Sugar Factories Control Act 1949
JE-68	Uttar Pradesh Sugarcane Act	Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Act 1953
JE-69-B	Notification of 1 December 2018 (English translation)	Notification No. 24/2018/2077/46-3-18-3(48)/98-99 of the State government of Uttar Pradesh, 1 December 2018 (English translation)
JE-70-B	Notification of 26 October 2017 (English translation)	Notification No. 2489/46-3-17-3(48)/98-99 issued by the Sugar Industry Section-3, Government of Uttar Pradesh, 26 October 2017 (English translation)
JE-71	Uttarakhand Amendment Act	Uttarakhand Sugarcane (Regulation of Supply and Purchase) (Amendment) Act 2013
JE-72-B	Notification of 20 December 2018 (English translation)	Notification 788/XIV-2/2018/07(6)/2013 of the State government of Uttarakhand, 20 December 2018 (English translation)
JE-74	Notification of 5 October 2018	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 ("Scheme for assistance to sugar mills")
JE-75	Notification of 9 May 2018	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
JE-76	Notification of 2 December 2015	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
JE-77	Notification of 31 July 2019	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

Exhibit No.	Short title	Title
JE-78	Notification of 15 June 2018	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
JE-85	Andhra Pradesh Budget Estimates for the 2018-19 financial year	The State of Andhra Pradesh's Budget Estimates 2018-19 for Industries and Commerce Department
JE-86	Andhra Pradesh Budget Estimates for the 2015-16 financial year	The State of Andhra Pradesh's Budget Estimates 2015-16 for Industries and Commerce Department
JE-88	Order of 17 September 2018	Notification of the Agriculture Department of the State government of Tamil Nadu of 17 September 2018
JE-89	Budget Speech of 15 March 2018	Speech of Thiru O. Panneerselvam, Hon'ble Deputy Chief Minister, Government of Tamil Nadu, presenting the Budget for the year 2018-2019 to the Legislative Assembly on 15th March 2018
JE-90	Karnataka Budget Estimates for the 2019-20 financial year	The State government of Karnataka's Detailed Budget Estimates of Expenditure for the year 2019-20
JE-107	MIEQ Order of 28 March 2018	DFPD Order of 28 March 2018, "Allocation of sugar factory-wise Minimum Indicative Export Quotas (MIEQ) under tradable export scrip schemes"
JE-108	MIEQ Order of 28 September 2018	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"
JE-109	MIEQ Order of 18 September 2015	DFPD Order of 18 September 2015, "Allocation of sugar factory-wise Minimum Indicative Export Quotas (MIEQ) under tradable export scrip schemes"
JE-111	Notification of 9 May 2018	Notification No. 1(4)/2018-S.P.-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 9 May 2018
JE-112	Notification of 31 December 2018	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
JE-113	Cabinet Committee on Economic Affairs Announcement of Sugar export policy for evacuation of surplus stocks during sugar season 2019-20	CCEA, "Cabinet approves Sugar export policy for evacuation of surplus stocks during sugar season 2019-20: about 60 lakh tons sugar to be exported this financial year", 28 August 2019
JE-114	Notification of 12 September 2019	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
JE-115	MAEQ Order of 16 September 2019	Notification F.No.1(14)/2019-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution of 16 September 2019
JE-118	World Customs Organization, HS Nomenclature 2017 edition	World Customs Organization, HS Nomenclature, 2017 edition, http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition/hs-nomenclature-2017-edition.aspx
JE-121	Notes on Demands for Grants, 2019-2020	The Central Government of India's 2019-20 Expenditure Budget
JE-134	Andhra Pradesh Budget Estimates for the 2016-17 financial year	The State of Andhra Pradesh's Budget Estimates for Industries and Commerce Department 2016-2017
JE-135	Andhra Pradesh Budget Estimates for the 2017-18 financial year	State of Andhra Pradesh's Budget Estimates for Industries and Commerce Department 2017-18
JE-136	Order of 7 March 2019	Government of Tamil Nadu, Agriculture (S1) Department, Order G.O.(Ms) No.61, 7 March 2019
JE-137	Tamil Nadu Budget Publication for the 2019-2020 financial year	The State of Tamil Nadu's 2019-2020 Budget publication- Industries Department
JE-139	Cane Commissioner's Annual Report, 2017-18	Annual Report of the Commissioner for Cane Development and Director of Sugar for the Year 2017-18
JE-140	-	Directorate of Sugarcane Development, Sugarcane in India: State wise Production
JE-141	-	Department of Agriculture & farmers Welfare, 1st advance estimates for 2019-20
JE-142	Notes on Demands for Grants, 2020-2021	Expenditure Budget 2020-2021 for the Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution
JE-146	Andhra Pradesh Budget Estimates for the 2019-20 financial year	State of Andhra Pradesh's Budget Estimates for Industries and Commerce Department 2019-20

Exhibit No.	Short title	Title
JE-147	MOSPI, National Accounts Statistics 2020, Statement 8.1.2 Crop-wise value of output	Ministry of Statistics and Programme Implementation (MOSPI), National Accounts Statistics 2020, Statement 8.1.2 Crop-wise value of output
JE-148	Sugarcane (Control) Order 1966 (prior to 2009)	The Sugarcane (Control) Order 1966 (prior to 2009)
JE-149	-	Dhampur Sugar Mills Limited Annual Report 2019-20
JE-156	-	Chairman's note on options in the agricultural negotiations, MTN.GNG/AG/W/1/Add.4
JE-157	-	Balrampur Chini Mills Limited Annual Report 2019-20
JE-158	-	Avadh Sugar & Energy Limited Annual Report 2019-20
JE-159	International Chamber of Commerce (ICC), Incoterms Rules	International Chamber of Commerce (ICC), Incoterms Rules, Rules for any mode or modes of transport
JE-160	-	Tender Notice for Export of Sugar (Jawahar S.S.S.K. Ltd)
JE-161	-	Tender Notice for Sale of Raw Sugar or White Sugar for Export (Shree Datta S.S.S.K. Ltd)
JE-162	-	HPCL Biofuels Ltd Sugar Export Contracts Specifications
JE-163	-	Reuters, "Indian sugar mills clinch export deals as prices jump – industry", 7 January 2021
JE-164	-	Reuters, "Indian sugar exports poised to hit record 5 million tonnes this year", 17 December 2019
JE-165	Consultancy Report, February 2021	Green Pool Commodity Specialists, Consultancy Report, February 2021
JE-167	CACP Price Policy for Sugarcane: 2020-21 Sugar Season	CACP, Price Policy for Sugarcane (2020-21 sugar season), November 2019
JE-168	MOSPI, National Accounts Statistics Sources and Methods 2007, Chapter 9	National Accounts Statistics Sources and Methods 2007, Chapter 9
JE-169	Tamil Nadu Policy Note 2020-21	Agriculture Department of the Government of Tamil Nadu, Policy Note 2020-2021
JE-170	-	Andhra Pradesh Budget Manual
JE-172	-	Karnataka Budget Manual
JE-173	Karnataka Budget Estimates for the 2020-21 financial year	Karnataka Detailed Budget Estimates of Expenditure – Demand-wise for the Year 2020-21, Volume 6

ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
AAP	Applied Administered Price
AMS	Aggregate Measurement of Support
CACP	Commission for Agricultural Costs and Prices
DFIA	Duty Free Imports Authorisation
DFPD	Department of Food and Public Distribution
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FERP	Fixed External Reference Price
FRP	Fair and Remunerative Price
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized System
INR	Indian Rupees
MAEQ	Maximum Admissible Export Quantity
MIEQ	Minimum Indicative Export Quotas
MMTC	Metals and Minerals Trading Corporation of India Limited
MOSPI	Ministry of Statistics and Programme Implementation
MPIA	Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU
QEP	Quantity of Eligible Production
SAP	State-Advised Price
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SCM Committee	Committee on Subsidies and Countervailing Measures
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Brazil

1.1. On 27 February 2019, Brazil requested consultations with India pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 19 of the Agreement on Agriculture, and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), with respect to the measures and claims set out below.¹

1.2. Consultations were held on 15 April 2019 but failed to resolve the dispute.

1.2 Complaint by Australia

1.3. On 1 March 2019, Australia requested consultations with India pursuant to Articles 1 and 4 of the DSU, Article 19 of the Agreement on Agriculture, Articles 4 and 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and Article XXII:1 of the GATT 1994, with respect to the measures and claims set out below.²

1.4. Consultations were held on 16 April 2019 but failed to resolve the dispute.

1.3 Complaint by Guatemala

1.5. On 15 March 2019, Guatemala requested consultations with India pursuant to Article 4 of the DSU, Article 19 of the Agreement on Agriculture, Articles 4 and 30 of the SCM Agreement, and Article XXII of the GATT 1994, with respect to the measures and claims set out below.³

1.6. Consultations were held on 22 May 2019 but failed to resolve the dispute.

1.4 Panel establishment and composition

1.7. On 11 July 2019, Brazil, Australia, and Guatemala each requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.⁴ At its meeting on 15 August 2019, the Dispute Settlement Body (DSB) established three panels pursuant to the requests of Brazil, Australia, and Guatemala in documents WT/DS579/7, WT/DS580/7, and WT/DS581/8, respectively, in accordance with Article 6 of the DSU.⁵

1.8. The Panels' terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Brazil in document WT/DS579/7 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁶

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Australia in document WT/DS580/7 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁷

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Guatemala in document

¹ See WT/DS579/1, G/AG/GEN/151, G/L/1298.

² See WT/DS580/1, G/L/1299, G/AG/GEN/152, G/SCM/D124/1.

³ See WT/DS581/1, G/AG/GEN/153, G/SCM/D125/1, G/L/1302.

⁴ WT/DS579/7, WT/DS580/7, and WT/DS581/8.

⁵ See WT/DSB/M/433.

⁶ WT/DS579/8.

⁷ WT/DS580/8.

WT/DS581/8 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁸

1.9. On 16 October 2019, Brazil, Australia, and Guatemala requested the Director-General to determine the composition of the Panels, pursuant to Article 8.7 of the DSU. On 28 October 2019, the Director-General accordingly composed three Panels, of the same persons, as follows:

Chairperson: Mr Thomas Cottier
Members: Ms Gerda Van Dijk
Mr Roberto Zapata Barradas

1.10. Canada, China, Colombia, Costa Rica, El Salvador, the European Union, Honduras, Indonesia, Japan, Panama, the Russian Federation, Thailand, and the United States reserved their rights to participate as third parties in all three Panel proceedings. In addition, each of the three complainants reserved its right to participate as a third party in the Panel proceedings initiated by the other two complainants.

1.5 Panel proceedings

1.5.1 General

1.11. The Panel⁹ held an organizational meeting with the parties on 22 November 2019.

1.12. After consulting with the parties, the Panel adopted its Working Procedures¹⁰ and timetables on 5 December 2019. Pursuant to Article 9.3 of the DSU, the timetables in the three disputes were harmonized.

1.13. Brazil, Australia, and Guatemala ("the complainants") submitted their first written submissions on 16 January 2020. India submitted its first written submission on 19 March 2020.

1.14. On 9 April 2020, the Panel received third-party submissions from Canada, Costa Rica, El Salvador, the European Union, and the United States.

1.15. The first substantive meeting of the Panel was postponed on several occasions, due to the COVID-19 pandemic.¹¹ In addition, while the first substantive meeting was postponed until further notice, the Chairperson of the Panel informed the parties, on 9 June 2020, in accordance with the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, that he had been nominated by Switzerland to be included in the pool of arbitrators of the Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU (MPIA). In this communication, the Chairperson noted that the complainants, and certain third parties in these proceedings, were parties to the MPIA. In this connection, the Chairperson informed the parties of his intention to conduct himself, at all times, in a way that would fully respect his personal independence and impartiality in his role as Chairperson, as well as the confidentiality of these proceedings. In the interest of full transparency, the Chairperson invited the parties to raise any questions or concerns regarding this matter. This was followed by a number of communications that took place between the Chairperson and the parties in the period between 9 June 2020 and 1 October 2020.¹² On 30 September 2020, India sent a final communication to the Chairperson, indicating that, notwithstanding his MPIA appointment, India believed that the Chairperson would continue to discharge his functions independently and impartially. India also indicated its trust that

⁸ WT/DS581/9.

⁹ For the reader's convenience, the Panels in DS579, DS580, and DS581 are herein collectively referred to as the "Panel". Additionally, any references to "this Report" or the Panel's "Report" should be understood to refer to the Panel's Final (or, where applicable, Interim) Reports in all three disputes.

¹⁰ See the Panel's Working Procedures in Annex A-1.

¹¹ See section 1.5.2 below.

¹² In a communication dated 7 August 2020, the Chairperson informed the parties of his appointment, and his acceptance, to serve as an arbitrator under the MPIA.

the proceedings would be conducted fairly and fully respecting India's due process rights as a developing country and as respondent in the present disputes.¹³

1.16. The Panel held its first substantive meeting with the parties on 8-11 December 2020. A session with the third parties took place on 10 December 2020. Prior to the substantive meeting, on 9 November 2020, the Panel sent the parties a list of questions to be answered orally at the meeting. Following the meeting, on 14 December 2020, the Panel sent written questions to the parties. Written responses to these questions were received on 14 January 2021.

1.17. The parties submitted their second written submissions on 11 February 2021.

1.18. The Panel held its second substantive meeting with the parties on 23-25 March 2021. Prior to the substantive meeting, on 8 March 2021, the Panel sent the parties a list of questions to be answered orally at the meeting. Following the meeting, on 26 March 2021, the Panel sent written questions to the parties. On the same date, Guatemala sent three written questions to India. Written responses to the Panel's questions were received on 22 April 2021. Written responses to Guatemala's questions were received on 29 April 2021.¹⁴ The Panel gave the parties an opportunity to comment on each other's responses. These comments were received on 12 May 2021.

1.19. On 3 June 2021, the Panel issued the descriptive part of its Report to the parties. On 22 July 2021, the Panel issued its Interim Report to the parties. Following the interim review process, on 30 September 2021, the Panel issued its Final Report to the parties.

1.5.2 The Panel's substantive meetings held by remote means

1.20. The COVID-19 pandemic disrupted the Panel's work, resulting in an overall delay of seven months.¹⁵ In order to advance the proceedings, and in light of the requirements of Article 3.3 of the DSU, the Panel held its first and second substantive meetings by remote means. Parties and third parties, as well as the Panel and WTO Secretariat staff, participated in the meeting remotely, via Cisco Webex videoconferencing technology. The Panel adopted additional working procedures for its first and second substantive meetings, after consulting with the parties, as provided for in Article 12.1 of the DSU.

1.21. This section provides an overview of the process leading to the Panel's decision to conduct its first and second substantive meetings remotely.

1.5.2.1 First substantive meeting with the parties and third parties

1.22. The first substantive meeting of the Panel was initially scheduled for 12-14 May 2020. Due to the COVID-19 pandemic, Switzerland and other countries, including parties and third parties in these disputes, imposed restrictive measures on international travel and in-person gatherings. Moreover, on 3 April 2020, the Director-General informed WTO Members and Observers that all WTO staff members (with the exception of on-site critical staff) were requested to work from home and that all meetings at the WTO were suspended until the end of April 2020.¹⁶ The suspension of meetings among delegates was extended on several occasions.¹⁷ It therefore appeared unlikely that the Panel

¹³ India's communication regarding the Chairperson's MPIA appointment, 30 September 2020, paras. 7-8.

¹⁴ On 28 April 2021, Guatemala requested that the Panel put on record India's lack of response to Guatemala's questions following the second substantive meeting. India indicated that it had inadvertently missed to submit its responses to Guatemala's questions and that, in any event, it "had clarified its position with respect to these questions during the second virtual meeting". (India's cover letter transmitting its responses to Guatemala's questions following the second substantive meeting of the Panel, 29 April 2021)

¹⁵ Seven months passed between the dates on which the first substantive meeting was originally scheduled to take place, and the dates on which the first substantive meeting actually took place. See paras. 1.22 and 1.30 below.

¹⁶ Director-General Azevêdo's communication to WTO Members and Observers, 3 April 2020.

¹⁷ See e.g. Deputy Director-General Brauner's communication to Heads of Delegation, 7 May 2020, confirming the suspension of meetings until the end of May 2020. This suspension was maintained through subsequent communications. As of 15 June 2020, meetings among delegates at the WTO premises were allowed, albeit subject to certain restrictions that have since been changing in light of the recommendations by Swiss authorities and the WTO Health Task Force. (See e.g. Deputy Director-General Brauner's communication to Heads of Delegation, 4 June 2020)

would be able to hold its first substantive meeting as originally scheduled with all parties and third parties physically present at the WTO premises.

1.23. On 9 April 2020, the Panel proposed to the parties to conduct the first substantive meeting through a written procedure. The complainants agreed with the proposal, arguing it would be consistent with the DSU and would not prejudice the rights of the parties or third parties.¹⁸ India disagreed and requested that the meeting be postponed until conditions would permit in-person gatherings. India argued that conducting the meeting through a written procedure amidst the COVID-19 crisis would undermine India's due process rights and limit its ability to meaningfully participate, and defend itself adequately, in the proceedings.¹⁹

1.24. Following another round of comments by the parties²⁰, and the receipt of comments by the third parties²¹, the Panel decided, on 4 May 2020, to postpone its first substantive meeting until further notice. To facilitate its work on the disputes, on 25 May 2020, the Panel sent questions to the parties concerning certain factual and legal issues, pursuant to paragraph 9 of the Working Procedures and Article 13 of the DSU. The Panel indicated that these questions did not substitute the first substantive meeting. The parties submitted written responses to those questions on 18 June 2020.

1.25. On 2 October 2020, given the continuing health risks resulting from the COVID-19 pandemic and the travel restrictions imposed by Switzerland and other countries, including parties and third parties in these disputes, the Panel proposed two further options to the parties.²² The first option envisaged holding two substantive meetings, whereby the first meeting would be held in a "hybrid" format, with delegates attending the meeting either virtually or from a designated room at the WTO premises. The second option envisaged holding a single substantive meeting, also in a "hybrid" format.

1.26. On 9 October 2020, the complainants submitted that both options were consistent with the DSU, and therefore acceptable to them and open to the Panel. The complainants preferred to proceed with a single meeting, on the grounds that it would be most efficient for the resolution of the disputes in light of the long delay already caused by the pandemic, while also preserving the parties' due process rights.²³ India disagreed with both options. India asserted, *inter alia*, that an oral hearing in the physical presence of panelists and parties' representatives is a fundamental aspect of a party's due process rights and an indispensable part of the WTO dispute settlement process, which cannot be altered without the parties' agreement. India recognized the objective of prompt settlement of disputes under Article 3.3 of the DSU but contended that this objective should not be used to interpret the DSU in a way that undermined India's due process rights. In India's view, the DSU envisages the conduct of substantive meetings in the physical presence of all parties and "a hearing through video conferencing is not a substantive meeting as envisaged under the DSU".²⁴ India also asserted that conducting such a meeting would pose serious technical and logistical difficulties, as well as certain coordination limitations between Indian Central and State Government officials, and its legal representatives. According to India, a "hybrid" meeting would not permit effective communication between the participants and would impair India's ability to present its case.²⁵

1.27. On 16 October 2020, after careful consideration of the parties' arguments, the Panel decided to hold two substantive meetings, with the first meeting to be held in a "hybrid" format. The Panel

¹⁸ Complainants' comments on the Panel's alternative proposal, 17 April 2020.

¹⁹ India's comments on the Panel's alternative proposal, 17 April 2020.

²⁰ Complainants' further comments regarding the Panel's alternative proposal, 23 April 2020; India's further comments regarding the Panel's alternative proposal, 28 April 2020.

²¹ A day before the deadline, on 30 April 2020, the European Union submitted comments on the Panel's alternative proposal. On 1 May 2020, Canada and the United States also submitted their respective comments.

²² Throughout these proceedings, the Panel closely monitored the evolving sanitary situation, as well as the restrictions on international travel, and communicated with the parties regarding the impact of such restrictions on the proceedings. (See e.g. Panel's communications to the parties, 14 July 2020; and 7 August 2020 (in response to the complainants' communication, 31 July 2020))

²³ Complainants' comments on the Panel's two alternative options, 9 October 2020, p. 2.

²⁴ India's comments on the Panel's two alternative options, 9 October 2020, para. 7.

²⁵ India's comments on the Panel's two alternative options, 9 October 2020, paras. 9-10.

proposed specific dates, and the adoption of draft additional working procedures, for the first substantive meeting.²⁶

1.28. On 28 October 2020, the complainants agreed with the proposed dates for the first substantive meeting, as well as the draft additional working procedures, and provided comments relating to the arrangements of the meeting and the draft additional working procedures. India maintained its position that it was unable to agree to a "hybrid" procedure and again raised several concerns relating to India's due process rights and the confidentiality of the procedure. Taking into account the parties' comments provided on 28 October 2020, in particular India's contention that a "hybrid" meeting would be "inequitable"²⁷, due to the nature of the travel restrictions, and in light of the limitation imposed by Swiss authorities on in-person gatherings (limiting such events to a maximum of five people), the Panel decided to hold its meeting in a fully virtual format during the week of 23 November 2020 and adopted Additional Working Procedures for the Panel's First Substantive Meeting to be Held by Remote Means ("Additional Working Procedures regarding the Panel's first meeting").²⁸ To ensure that the parties had sufficient opportunity to effectively prepare and present their cases, the Panel also decided to send advance questions to the parties 10 working days before the start of the meeting. Moreover, the Panel decided that it would not pose any additional questions at the meeting, in order to provide maximum clarity as to the scope of the discussions at the meeting, but indicated that it might send written questions to the parties and third parties after the conclusion of the meeting. The Panel conveyed and explained these decisions to the parties in a communication dated 2 November 2020.²⁹

1.29. On 4 November 2020, India sent a communication to the Panel seeking clarification on two issues with respect to the confidentiality of the first substantive meeting. In the same communication, India requested that the Panel reconsider the dates for the first substantive meeting and postpone it by two more weeks. India based its request for postponement of the meeting on two grounds: (i) due to India's public holidays, several key officials of its Central and State Governments (specifically, the State of Uttar Pradesh and the State of Bihar) involved in these disputes, would be on leave at the time of the meeting, and (ii) a key member of its delegation was infected with COVID-19 and would need time to fully recover in order to attend the meeting. In a communication dated 6 November 2020, the Panel addressed India's confidentiality queries and declined the request to postpone the meeting.³⁰

1.30. On 17 November 2020, India once again requested the Panel to postpone the meeting because a key member of its delegation, who was indispensable for the substantive, as well as logistical and organizational aspects of the meeting, had contracted the COVID-19 virus and was not able to participate in the Panel's meeting. On 18 November 2020, the Panel postponed the first substantive meeting by two more weeks, i.e. to the week of 7 December 2020. The Panel stated that the purpose of the postponement was to allow time for India and all other parties and third parties to make alternative arrangements in case any delegate would be unable to participate at the meeting due to health reasons.³¹

1.31. Prior to the first substantive meeting, consistent with paragraph 7 of the Additional Working Procedures regarding the Panel's first meeting, the parties and third parties conducted individual test sessions with the WTO Secretariat. Those sessions were aimed at demonstrating the use of the Cisco Webex platform and detecting any technical issues in advance of the meeting. In addition, on 7 December 2020, the Panel convened a joint test session with all participants from the parties and third parties. The purpose of the joint test session was to reflect, as far as possible, the conditions of the meeting. The test sessions were conducted successfully and did not reveal any technical problems that could affect the conduct of the meeting.

²⁶ See the Panel's communication dated 16 October 2020 in Annex D-1. Following a communication by India dated 20 October 2020, the Panel, on the same day, extended the deadline for the parties' comments on the proposed dates, and draft additional working procedures for the first substantive meeting, to 28 October 2020.

²⁷ India's comments regarding the first substantive meeting and additional working procedures, 28 October 2020, paras. 5-9.

²⁸ See the Panel's Additional Working Procedures regarding the Panel's first meeting in Annex A-2.

²⁹ See the Panel's communication dated 2 November 2020 in Annex D-2.

³⁰ See the Panel's communication dated 6 November 2020 in Annex D-3.

³¹ See the Panel's communication dated 18 November 2020 in Annex D-4.

1.32. On 8 December 2020, as provided for in paragraph 15 of its Working Procedures, the Panel began its meeting by inviting the complainants to deliver their opening statements. The following day, the Panel invited India to deliver its opening statement. Thereafter, the parties provided oral responses to the Panel's advance questions. They also made comments on each other's responses to the Panel's advance questions. The parties were invited to ask any questions to each other, which they preferred not to do. The third-party session was held on 10 December 2020. Canada, China, the European Union, and Japan made oral statements at the third-party session. The parties were invited to ask questions to the third parties, which they preferred not to do. India made certain comments, through the Panel, on China's oral statement, to which China responded. On the final day of the meeting, 11 December 2020, the parties presented their closing statements.

1.5.2.2 Second substantive meeting with the parties

1.33. The Panel scheduled its second substantive meeting for the week of 22 March 2021.

1.34. On 12 February 2021, as the public health conditions had not improved since the first substantive meeting, and in light of the continuing restrictive measures on international travel and in-person gatherings, the Panel proposed to the parties to hold the second substantive meeting in the same format as the first substantive meeting (i.e. remotely, via Cisco Webex). The complainants agreed with the Panel's proposal.³² India continued to object on the same grounds as those raised in connection with the first substantive meeting and pointed to the possibility of international travel restrictions being relaxed.³³

1.35. On 23 February 2021, having considered the parties' comments and the existing public health situation, the Panel decided to hold its second substantive meeting in a virtual format and adopted Additional Working Procedures for the Panel's Second Substantive Meeting to be Held by Remote Means.³⁴ The Panel also decided to send advance questions to the parties 10 working days before the meeting. Moreover, the Panel decided not to ask any additional questions at the meeting but indicated that it might send written questions to the parties after the conclusion of the meeting. In reaching its decisions regarding the format and conduct of the second substantive meeting, the Panel was guided by the same considerations as for the first substantive meeting.

1.36. Similar to the first substantive meeting, in addition to the individual test sessions conducted by the WTO Secretariat with each party, the Panel held a joint test session with all participants on 22 March 2021. The test sessions were conducted successfully and did not reveal any technical problems that could affect the conduct of the meeting. On 23 March 2021, the parties delivered their opening statements. The complainants presented their statements, followed by India.³⁵ Guatemala provided comments on India's opening statement to which India responded. On 24 March 2021, the parties provided their oral responses to the Panel's advance questions. On the final day of the meeting, 25 March 2021, the parties completed their oral responses to the advance questions. The parties also made comments on certain of the parties' respective responses to the Panel's advance questions. Finally, the parties delivered their closing statements.

1.5.3 Preliminary ruling

1.37. In its first written submission, India asked the Panel to issue a preliminary ruling finding that certain measures challenged by the complainants fell outside the Panel's terms of reference because they expired before, or were enacted after, the date of the Panel's establishment.³⁶

1.38. On 1 April 2020, the complainants responded to India's request for a preliminary ruling. On 8 April 2020, the United States submitted its third-party comments on India's request for a preliminary ruling. El Salvador and the European Union included their third-party comments in their written submissions, which were submitted on 9 April 2020.

³² Complainants' comments on the Panel's proposal for the second substantive meeting, 19 February 2021.

³³ India's comments on the Panel's proposal for the second substantive meeting, 19 February 2021.

³⁴ See the Panel's Additional Working Procedures regarding the Panel's second meeting in Annex A-3.

³⁵ India did not avail itself of the right provided under paragraph 16 of the Panel's Working Procedures to deliver its opening statement first at the second substantive meeting of the Panel.

³⁶ India's first written submission, para. 32.

1.39. On 13 April 2020, India sought an opportunity from the Panel to comment on the complainants' and third parties' comments concerning its request for a preliminary ruling. On 17 April 2020, the complainants indicated, at the Panel's invitation, that if the Panel granted India's request, it should also give the complainants a further opportunity to comment on India's comments. On 20 April 2020, the Panel granted all parties and third parties a final opportunity to comment on India's request for a preliminary ruling.

1.40. On 27 April 2020, India submitted comments on the complainants' and third parties' comments concerning its request for a preliminary ruling. On 4 May 2020, the complainants submitted their further comments. On 8 May 2020, Costa Rica submitted comments on India's request. On 11 May 2020, El Salvador provided further comments on India's request.³⁷

1.41. On 9 November 2020, the Panel issued to the parties and third parties the first part of its preliminary ruling regarding the allegedly expired measures, including the Panel's reasoning. The Panel found that the elements which India had identified as "measures" that had expired, were in fact part of the legal instruments that, in the complainants' view, implemented the challenged measures. Therefore, the Panel rejected India's request to find that the identified "measures" fell outside its terms of reference. The Panel decided to examine the relevance and probative value of these legal instruments as part of its substantive assessment of the complainants' claims.

1.42. On 14 December 2020, the Panel issued to the parties its finding with respect to the second part of India's request for a preliminary ruling, regarding 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" (the Marketing and Transportation Scheme), which was enacted after the Panel's establishment. The Panel rejected India's request and found that the Marketing and Transportation Scheme fell within its terms of reference. The Panel informed the parties that the reasoning for this finding would be included in the Interim Report.

1.43. The first and second parts of the Panel's preliminary ruling are set out in Annexes E-1 and E-2, respectively.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. The claims brought by the complainants concern India's alleged domestic support to sugarcane producers and export subsidies pertaining to sugar or sugarcane.

2.1.1 India's alleged domestic support to sugarcane producers

2.2. The complainants argue that India maintains mandatory minimum prices for sugarcane, as well as other payments and policies in favour of sugarcane producers.

2.3. Regarding the mandatory minimum prices for sugarcane, the complainants submit that India provides domestic support, in the form of market price support, to sugarcane producers through the following measures, which are implemented through a number of legal instruments:

- i. The "Fair and Remunerative Price" (FRP), maintained by the Indian Central Government, which requires Indian purchasers of sugarcane to pay a mandatory minimum price to the sugarcane producers. The FRP is allegedly determined by the Central Government annually, based on the recommendations of the Commission for Agricultural Costs and Prices (CACP)³⁸;
- ii. A number of "State-Advised Prices" (SAPs), maintained by certain Indian State Governments³⁹, which require purchasers of sugarcane to pay a mandatory minimum

³⁷ El Salvador submitted its comments after the deadline set by the Panel.

³⁸ Brazil's first written submission, paras. 25-34 and 134-155; Australia's first written submission, paras. 23-39 and 166-173; Guatemala's first written submission, paras. 37-50 and 137-165.

³⁹ The complainants challenge the SAPs maintained by six States, namely Bihar, Haryana, Punjab, Tamil Nadu, Uttar Pradesh, and Uttarakhand.

price to the sugarcane producers of the specific state. The SAPs are allegedly determined by the State Governments on an annual basis and are higher than the FRP. According to the complainants, where an SAP is applied, purchasers are required to pay the SAP instead of the FRP⁴⁰; and

- iii. A number of policies and payments provided by the Central Indian Government and certain State Governments that allegedly operate to assist sugarcane purchasers in paying the mandatory minimum price for sugarcane.⁴¹

2.4. In addition to market price support, the complainants submit that India provides domestic support to sugarcane producers in the form of non-exempt direct payments and other policies. Specifically, the complainants refer to⁴²:

- i. Tamil Nadu's transitional production incentives in favour of sugarcane producers, for which the Tamil Nadu State Government budgeted certain amounts under the entry "Production Incentive to Sugarcane Farmers" for the sugar seasons 2017-18 and 2018-19⁴³;
- ii. Andhra Pradesh's purchase tax remittances in favour of sugarcane producers, for which the Andhra Pradesh State Government budgeted certain amounts under the entry "Assistance to Co-operative Sugar Factories towards reimbursement of Purchase Tax incentives" for the sugar seasons 2014-15 and 2015-16⁴⁴; and
- iii. Karnataka's incentive price payments in favour of sugarcane producers, for which the Karnataka State Government budgeted certain amounts under the entry "Payment of Incentive Price for Sugar Cane through Sugar Factories. Subsidies" for the sugar season 2017-18.⁴⁵

⁴⁰ Brazil's first written submission, paras. 35-48 and 156-160; Australia's first written submission, paras. 41-61 and 174-180; Guatemala's first written submission, paras. 51-72 and 137-165.

⁴¹ Brazil's first written submission, paras. 161-162 and Appendix A; Australia's first written submission, paras. 181-185 and Annexes A, B, C, D-2, D-3 and E; Guatemala's first written submission, paras. 87-96 and 166-168. The complainants submit that these policies and payments constitute measures through which India provides domestic support to sugarcane producers. (Brazil also submits that these "support programs ... constitute either non-exempt direct payments or other non-exempt policies". (Brazil's response to Panel question No. 21, para. 21)) Nonetheless, the complainants do not include them in their calculations of India's alleged market price support, because, in their view, they either constitute (in the view of Australia and Guatemala), or "may" constitute (in the view of Brazil), "measures made to maintain the price gap" within the meaning of the second sentence of paragraph 8 of Annex 3 to the Agreement on Agriculture. Australia is the only complainant that requests the Panel to explicitly identify them as "measures through which India is providing market price support above *de minimis*". (See Australia's first written submission, para. 186)

⁴² Brazil also considers that the alleged support programs listed under paragraph 2.3(iii) above constitute non-exempt direct payments or other non-exempt policies. However, Brazil does not include them in its calculation of India's AMS. (See Brazil's response to Panel question No. 21)

⁴³ Brazil's first written submission, para. 163 and Appendix B-2; Australia's first written submission, paras. 198-203 and Annex E-8; Guatemala's first written submission, paras. 81-86 and 176-179. See also complainants' responses to Panel question No. 73.

⁴⁴ Brazil's first written submission, para. 163 and Appendix B-1; Australia's first written submission, paras. 190-194 and Annex E-1; Guatemala's first written submission, paras. 97-99 and 180-184. See also complainants' responses to Panel question Nos. 28, 50 and 74. In the context of our preliminary ruling, found in Annex E-1 to this Report, the word "remission" is used in referring to this measure allegedly maintained by Andhra Pradesh and similar measures maintained by certain other States in India.

⁴⁵ Brazil's first written submission, para. 163 and Appendix B-3; Australia's first written submission, paras. 195-197 and Annex E-5. See also complainants' responses to Panel question Nos. 27, 75-78. While Guatemala initially included Karnataka's alleged "incentive price payments" in its calculation of India's domestic support to sugarcane producers, it subsequently withdrew its assertions, and omitted the respective amounts from its calculation. (Guatemala's comments on India's response to Guatemala's question No. 3)

2.1.2 India's alleged export subsidies

2.5. The complainants identify the measures at issue as federal-level measures pertaining to sugar or sugarcane that provide subsidies contingent upon export performance, which are implemented through a number of legal instruments.⁴⁶

2.6. The complainants challenge, as allegedly WTO-inconsistent subsidies contingent upon export performance, three schemes that operate in conjunction with Minimum Indicative Export Quotas (MIEQs) or Maximum Admissible Export Quantity (MAEQ). The MIEQ and MAEQ orders allocate sugar export quotas to sugar mills on a per-mill basis. They are adopted for each sugar season by the Department of Food and Public Distribution (DFPD), a Central Government agency that is part of the Indian Ministry of Consumer Affairs, Food and Public Distribution.

2.7. Specifically, all complainants take issue with the following assistance schemes introduced by India:

- a. Production Assistance Scheme, which operates in conjunction with the MIEQ⁴⁷, implemented, *inter alia*, through:
 - i. The "Scheme for extending production subsidy to sugar mills" for the sugar season 2015-16;
 - ii. The "Scheme for Assistance to Sugar Mills" for the sugar season 2017-18; and
 - iii. The "Scheme for Assistance to Sugar Mills" for the sugar season 2018-19.
- b. Buffer Stock Scheme, which operates in conjunction with the MIEQ⁴⁸, implemented, *inter alia*, through:
 - i. The "Scheme for Creation and Maintenance of Buffer Stock of 30 Lakh MT", introduced in 2018 ("Buffer Stock Scheme 2018"); and
 - ii. The "Scheme for Creation and Maintenance of Buffer Stock of 40 Lakh MT", introduced in 2019 ("Buffer Stock Scheme 2019").
- c. Marketing and Transportation Scheme, which operates in conjunction with the MAEQ.⁴⁹

2.8. In addition, Australia takes issue with the Duty Free Imports Authorisation (DFIA) Scheme.⁵⁰

⁴⁶ Brazil's panel request, para. 14; Australia's panel request, para. 19, and para. 9 of Annex A thereto; Guatemala's panel request, para. 9, and para. 9 of the Annex thereto. A detailed description of the measures at issue, and the complainants' requests for findings with respect to export subsidies, is set forth in section 7 of this Report.

⁴⁷ Brazil's first written submission, paras. 200-204, 214-222 and response to Panel question No. 79; Australia's first written submission, para. 230 and Annex A; Guatemala's first written submission, paras. 208-219.

⁴⁸ Brazil's first written submission, paras. 205-213 and response to Panel question No. 79; Australia's first written submission, paras. 231-233 and Annex C; Guatemala's first written submission, paras. 220-233 and response to Panel question No. 80.

⁴⁹ Brazil's first written submission, paras. 223-229; Australia's first written submission, para. 234 and Annex D-3; Guatemala's first written submission, paras. 234-241.

⁵⁰ Australia's first written submission, para. 235 and Annex F.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Brazil

3.1. Brazil requests that the Panel find that India provides domestic support to sugarcane producers that exceeds the *de minimis* level of 10% of the total value of sugarcane production, and therefore acts inconsistently with its obligations under Article 7.2(b) of the Agreement on Agriculture.⁵¹

3.2. Brazil also requests that the Panel find that India provides 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.⁵²

3.3. Brazil thus requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with its obligations under the Agreement on Agriculture.⁵³

3.2 Australia

3.4. Australia requests that the Panel find that India provides domestic support to sugarcane producers that exceeds the *de minimis* level of 10% of the total value of sugarcane production, contrary to India's obligations under Article 7.2(b) of the Agreement on Agriculture.⁵⁴

3.5. Australia further requests that the Panel find that India's Production Assistance and Buffer Stock Schemes, operating in conjunction with the MIEQ orders, the Marketing and Transportation Scheme, operating in conjunction with the MAEQ, and the DFIA Scheme: (i) 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, with Articles 8 and 10.1 of the Agreement on Agriculture; and (ii) constitute prohibited export subsidies that are inconsistent with India's obligations under Articles 3.1(a) and 3.2 of the SCM Agreement.⁵⁵

3.6. Australia also requests that the Panel find that, by failing to notify any of its annual domestic support for sugarcane and sugar subsequent to 1995–96, and its export subsidies 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 1994.⁵⁶

3.7. Australia thus requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with its obligations under the Agreement on Agriculture, the SCM Agreement, or the GATT 1994, as reflected above. With respect to the export subsidies prohibited under Article 3.1(a) of the SCM Agreement, Australia further requests that the Panel,

⁵¹ Brazil's second written submission, para. 151. In its first written submission, in addition to the claim under Article 7.2(b), Brazil raised an alternative claim under Articles 3.2 and 6.3 of the Agreement on Agriculture. (Brazil's first written submission, para. 232) In its second written submission, Brazil stated that the Panel need not address Brazil's alternative claim because "India agrees that its Schedule contains no Total AMS commitment". (Brazil's second written submission, fn 22 to para. 9 (referring to India's response to Panel question No. 46), and fn 25 to para. 10 (referring to Brazil and India's responses to Panel question No. 15(b)))

⁵² Brazil's first written submission, para. 233. According to Brazil, the following schemes constitute prohibited export subsidies: (i) Scheme for assistance to sugar mills for the 2018-19 sugar season; (ii) Scheme for creation and maintenance of buffer stock in 2018; (iii) Scheme for creation and maintenance of buffer stock in 2019; (iv) Scheme for assistance to sugar mills for the 2017-18 sugar season; (v) Scheme for extending production subsidy to sugar mills for the 2015-16 sugar season; and (vi) the Marketing and Transportation Scheme. (Brazil's second written submission, paras. 82-83; response to Panel question No. 79)

⁵³ Brazil's first written submission, para. 234.

⁵⁴ Australia's second written submission, para. 235. In its first written submission, in addition to the claim under Article 7.2(b), Australia raised an alternative claim under Articles 3.2 and 6.3 of the Agreement on Agriculture. (Australia's first written submission, para. 468. See also Australia's response to Panel question No. 15) At the first substantive meeting, Australia asserted that, since India agreed that it has no Total AMS commitment in its Schedule, there is "no dispute amongst the parties that India is bound by Article 7.2(b) of the Agreement on Agriculture and must not provide support to agricultural producers in excess of India's *de minimis* level". (Australia's closing statement at the first substantive meeting of the Panel, para. 11) Thereafter, Australia did not include the alternative claims under Articles 3.2 and 6.3 in its list of findings requested from the Panel.

⁵⁵ Australia's first written submission, para. 468.

⁵⁶ Australia's first written submission, para. 468.

consistent with Article 4.7 of the SCM Agreement, recommend that India withdraw them without delay within a time-period specified by the Panel.⁵⁷

3.3 Guatemala

3.8. Guatemala requests that the Panel find that India acts inconsistently with Article 7.2(b) of the Agreement on Agriculture by providing domestic support that exceeds the *de minimis* level of 10% of the total value of sugarcane production.⁵⁸

3.9. Guatemala further requests that the Panel find that India's subsidies under the Production Assistance and Buffer Stock Schemes, which operate in conjunction with the MIEQs, and under the Marketing and Transportation Scheme, which operates in conjunction with the MAEQ: (i) constitute export subsidies under Articles 9.1(a) and 9.1(c) of the Agreement on Agriculture, for which India did not undertake reduction commitments, and thus violate India's obligations under Articles 3.3, 8, and 9.1 of the Agreement on Agriculture; and (ii) constitute prohibited export subsidies within the meaning of Article 3.1(a) of the SCM Agreement.⁵⁹

3.10. Guatemala thus requests, pursuant to Article 19.1 of the DSU, 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 constitute prohibited export 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 those measures without delay within a time-period specified by the Panel.⁶⁰

3.4 India

3.11. India requests that the Panel find that:

- i. the complainants have failed to meet their burden of showing that India provides market price support for sugarcane that exceeds the *de minimis* level of 10% of the total value of sugarcane production as per Article 7.2(b) of the Agreement on Agriculture⁶¹;
- ii. the complainants have failed to meet their burden of showing that India's Production Assistance Scheme, Buffer Stock Scheme, the Marketing and Transportation Scheme, and the DFIA constitute subsidies within the meaning of Article 9 of the Agreement on Agriculture and, consequently, that the complainants have failed to demonstrate that India has acted inconsistently with its obligations under Articles 3.3, 8, and 10 of the Agreement on Agriculture;

⁵⁷ Australia's first written submission, para. 469.

⁵⁸ In its first written submission, Guatemala requested that the Panel find that India acts inconsistently with Articles 7.2(b), 3.2, and 6.3 of the Agreement on Agriculture. (Guatemala's first written submission, para. 324. See also Guatemala's response to Panel question No. 15) Following India's acknowledgement that its Schedule does not contain Total AMS reduction commitments (India's response to Panel question No. 46), Guatemala, in its second written submission, requested that the Panel find that India acts inconsistently with Article 7.2(b) of the Agreement on Agriculture, or, in the alternative, if the Panel were to find that India has scheduled commitments of "zero" or "nil" for sugarcane, that India violates its obligations under Articles 3.2 and 6.3 of the Agreement on Agriculture. (Guatemala's second written submission, para. 132)

⁵⁹ Guatemala's first written submission, para. 324.

⁶⁰ Guatemala's first written submission, para. 325.

⁶¹ In its first written submission, India asserted that 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 Agreement on Agriculture. (India's first written submission, para. 51) In response to a Panel question, India submitted that it does not have a Total AMS commitment in Part IV of its Schedule, such that Articles 3.2 and 6.3 do not apply. (India's response to Panel question No. 46. See also India's response to Panel question 15(a)) India also asserted that a finding under Articles 3.2 and 6.3 of the Agreement on Agriculture is not necessary if the Panel concludes that India has acted inconsistently with Article 7.2(b) of that Agreement. (India's response to Panel question No. 15(b))

- iii. the Marketing and Transportation Scheme falls within the scope of Articles 9.1(d) and (e) of the Agreement on Agriculture and is, therefore, permitted under Article 9.4 of that Agreement;
- iv. the requirements of Article 3 of the SCM Agreement are not yet applicable to India and that India has a phase-out period of 8 years to eliminate export subsidies, if any, pursuant to Article 27 of the SCM Agreement;
- v. notwithstanding the above, the complainants have failed to demonstrate that India's Production Assistance Scheme, Buffer Stock Scheme, the Marketing and Transportation Scheme, and the DFIA constitute prohibited export subsidies that are inconsistent with India's obligations under Articles 3.1(a) and 3.2 of the SCM Agreement; and
- vi. the DFIA falls within the scope of footnote 1, read with Annex I, of the SCM Agreement, and thus it is not a "subsidy" within the meaning of the SCM Agreement and the Agreement on Agriculture.⁶²

3.12. In addition, as noted in section 1.5.3 above, India, in its first written submission, requested the Panel to issue a preliminary ruling finding that certain measures challenged by the complainants do not fall within the Panel's terms of reference as per Articles 6.2 and 7.1 of the DSU.⁶³

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their integrated executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted on 5 December 2019 (see Annexes B-1, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Canada, China, Costa Rica, El Salvador, the European Union, Japan, and the United States are reflected in their executive summaries, provided to the Panel in accordance with paragraph 26 of the Working Procedures adopted on 5 December 2019 (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, and C-7). The other third parties did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 22 July 2021, the Panel issued its Interim Report to the parties. On 12 August 2021, Brazil, Australia, Guatemala, and India each submitted written requests for the Panel to review precise aspects of the Interim Report. On 26 August 2021, Australia, Guatemala, and India submitted comments on the other parties' requests for review.

6.2. In addition to its request for review, on 12 August 2021, India also requested that the Panel hold an interim review meeting with the parties to discuss two precise aspects of the Interim Report, namely the Panel's reference to the Duty Free Import Authorization (DFIA) Scheme⁶⁴ and the Panel's recommendation under Article 4.7 of the SCM Agreement.⁶⁵

6.3. On 18 August 2021, the complainants indicated, *inter alia*, that the interim review meeting had to be confined to the two precise aspects identified by India. On 20 August 2021, India also indicated that the scope of the interim review meeting would be confined to the two precise aspects of the Interim Report identified in its request for review. Moreover, in India's view, since these two precise aspects did not concern the claims raised by Brazil (DS579), participation in the meeting had to be limited to the parties in the other two disputes (DS580 and DS581), the Panel, and the WTO

⁶² India's first written submission, para. 161.

⁶³ India's first written submission, para. 162.

⁶⁴ See section 7.2.2.5 below.

⁶⁵ See section 7.2.6 below.

Secretariat. On 24 August 2021, Brazil stated that it did not object to the interim review meeting proceeding without its participation, provided that the meeting was limited to the two issues raised in India's request for review of precise aspects of the Interim Report dated 12 August 2021. Brazil also stated that it would not submit any comments on India's request for review. Australia and Guatemala did not provide any comments on India's view in this regard. In accordance with Article 15.2 of the DSU, the Panel held an interim review meeting with the parties in DS580 and DS581 (i.e. Australia, Guatemala, and India) on 2 September 2021, in a virtual format, via Cisco Webex.

6.4. In accordance with Article 15.3 of the DSU, this section of the Report sets out our response to the parties' requests made at the interim review stage. In addition to the requests discussed below, we made corrections to a number of typographical and other non-substantive errors in the Report, including those identified by the parties. The numbering of some of the footnotes in the Final Report has changed from the numbering in the Interim Report. The discussion in this section refers to the numbering in the Final Report and, where it differs, includes the corresponding numbering in the Interim Report.

6.5. Brazil, Australia, and Guatemala made requests to amend or add a number of footnotes containing references to the parties' statements and submissions. A number of these requests have been implemented, resulting in modifications to, or additional references in, footnotes to paragraphs 7.1, 7.2, 7.11, 7.28, 7.46, 7.78, 7.126, 7.131, 7.147, 7.149, 7.151, 7.158, 7.180, 7.181, 7.182, 7.184, 7.201, 7.210, 7.225, 7.227, 7.233, 7.235, 7.237, 7.239, 7.247, 7.257, 7.260, 7.266, 7.272, 7.286, 7.288, 7.296, 7.298, 7.343, and 7.346.

6.2 Requests for review of sections 1 to 3 (Introduction, Factual aspects, and Parties' requests for findings and recommendations)

6.6. Guatemala suggested adding, in paragraphs 1.31 and 1.36, an explanation that the test sessions for the first and second substantive meetings were conducted successfully without any indication of technical problems. We have implemented this suggestion.

6.7. To reflect more accurately what is being described in paragraph 2.3, Guatemala suggested replacing "legal instruments" at the end of the first line with "measures". We have implemented this suggestion and made an additional modification in line with our preliminary ruling, set out in Annex E-1 to this Report.

6.8. Guatemala suggested adding a brief explanation in footnote 41 to paragraph 2.3 in order to explain why the complainants did not include certain measures in their calculations of India's alleged market price support. We have added and, for the sake of accuracy, expanded the suggested change.

6.9. Brazil requested adding a sentence in footnote 41 to paragraph 2.3 to reflect its view that the policies and payments listed in paragraph 2.3(iii) constitute "non-exempt direct payments" or "other non-exempt policies". We have implemented this request and made minor stylistic changes.

6.10. Brazil also requested adding a new footnote reflecting its view that the policies and payments listed under paragraph 2.3(iii) constitute "non-exempt direct payments" or "other non-exempt policies". We have accepted Brazil's request and added footnote 42 to paragraph 2.4.

6.11. Guatemala requested that footnote 58 (footnote 57 of the Interim Report) to paragraph 3.8 be reformulated in order to explain that Guatemala limited its request for findings to Article 7.2(b) of the Agreement on Agriculture because India acknowledged that its Schedule contains no Total AMS commitments, as well as to chronologically present the references to Guatemala's submissions. We have reformulated the footnote as requested.

6.3 Requests for review of section 7.1 (Domestic support)

6.12. Regarding paragraph 7.1, Guatemala requested adding a footnote indicating that India acknowledged that it has no Total AMS commitments in its Schedule. Regarding paragraph 7.2, Guatemala proposed adding a sentence explaining why India considers that the complainants' interpretation of market price support is incorrect. We have added certain language to paragraph 7.2 in order to implement these requests by Guatemala.

6.13. With respect to footnote 123 (footnote 93 of the Interim Report) to paragraph 7.19, and paragraph 7.29, Guatemala requested the inclusion of an explanation as to why the complainants omitted certain measures from their calculations of India's alleged market price support. To implement these requests, we have included additional language and cross-references to where this explanation is contained elsewhere in the Report.

6.14. With respect to paragraph 7.20, Brazil and Australia requested that the description of India's arguments replicate the wording used by India. Australia requested a similar change to paragraph 7.59. We have modified the language used in these paragraphs.

6.15. Regarding paragraph 7.37, Brazil and Australia requested revising the Panel's description of the complainants' understanding of when market price support can be said to exist. Guatemala also requested amending paragraph 7.37 to reflect the argument, which Guatemala ascribes to the complainants, that the applied administered price may be achieved in different ways, one of which consists of a price set by the government at which specified entities will purchase a given agricultural product. India objected to Guatemala's request because, in India's view, this paragraph accurately conveys Guatemala's arguments regarding the applied administered price. Finally, Guatemala also requested ascribing the argument concerning Article 6.1 of the Agreement on Agriculture to all three complainants and not just Brazil and Australia. Regarding the existence of market price support, we have revised the description of the complainants' arguments and, for the sake of clarity, included direct quotations from their submissions and statements in footnote 147 (footnote 117 of the Interim Report) to paragraph 7.37. Regarding the applied administered price, we note that Guatemala does not indicate any references to the complainants' submissions or statements that would support the assertion that Guatemala wishes to ascribe to the complainants. We therefore decline that request. Regarding Article 6.1 of the Agreement on Agriculture, we have ascribed this argument to all three complainants.

6.16. Regarding paragraph 7.42, Brazil requested that the Panel's description of the logic of the Agreement on Agriculture be harmonized with the description in paragraph 7.26. We have revised paragraph 7.42 to implement this request.

6.17. Concerning paragraph 7.44, Australia requested that the reference to the complainants, in the context of describing three possible interpretations of paragraph 1 of Annex 3, be revised to Guatemala. In light of Australia's request, we have modified the relevant sentence of paragraph 7.44.

6.18. With respect to footnote 176 (footnote 144 of the Interim Report) to paragraph 7.46, Australia requested ascribing to all three complainants, instead of just Brazil and Guatemala, an argument opposing India's view that all subsidies must share a commonality with the types of subsidies set out in paragraph 2 of Annex 3 of the Agreement on Agriculture. In our view, the reference provided by Australia in its request (to paragraph 66 of its second written submission) is not sufficient to ascribe the argument to Australia. Nevertheless, we have included a quotation from that paragraph in footnote 176 for the sake of completeness.

6.19. Regarding paragraph 7.48, Brazil and Australia requested removing the word "probably" in reference to the intentions of the drafters of the Agreement on Agriculture, in order to harmonize with a corollary reference in paragraph 7.57. While we agree that the description in these two paragraphs should be harmonious, our use of the word "probably" in paragraph 7.48 is deliberate. We have therefore added the word "probably" to paragraph 7.57.

6.20. Concerning paragraph 7.53, Guatemala suggested simplifying the Panel's reasoning by deleting certain language. We consider that Guatemala's proposed revision would not only simplify but modify the substance of our reasoning and therefore decline this request.

6.21. Brazil requested either the deletion or revision of paragraph 7.55 in order to avoid giving the impression that a methodology based on budgetary outlays is hierarchically superior to other methodologies for the purpose of quantifying non-exempt direct payments or other non-exempt measures. We agree with Brazil that this paragraph could benefit from further clarity and have revised it accordingly.

6.22. Brazil requested that, in paragraph 7.60, the Panel avoid inadvertently characterizing the interpretative relevance of Members' Schedules. For the sake of clarity, we have revised the last sentence of paragraph 7.60.

6.23. With respect to paragraph 7.69, Guatemala suggested modifying the Panel's description of the second sentence of paragraph 8 of Annex 3, for the sake of completeness and clarity. We have modified the relevant language of paragraph 7.69.

6.24. Brazil requested that the heading of section 7.1.3.2.3 be revised to reflect that this section addresses both the existence and the amount of India's market price support. We have modified the heading of that section.

6.25. Brazil requested replacing the words "have, in principle, to be taken" with "must be taken" in the fourth sentence of paragraph 7.78. We have modified the paragraph accordingly.

6.26. Brazil requested that the definition of the term "direct" as provided in paragraph 7.225, in the context of our analysis of Article 9.1(a) of the Agreement on Agriculture, be added to the definition of the same term provided in paragraph 7.88, in the context of our analysis of paragraph 1 of Annex 3 to that Agreement.⁶⁶ India requested that we reject Brazil's request because we need not reconcile the two definitions to resolve these disputes. We agree with India and therefore decline Brazil's request. We have, however, added the words "*inter alia*" before the definition set out in paragraph 7.88 to indicate that there may be more than one definition of the term "direct" than the one provided therein.

6.27. Brazil requested modifying paragraphs 7.96 and 7.104 to clarify that our findings in the relevant sections apply "in the circumstances of this case" and "in light of the schemes at issue". Doing so, in Brazil's view, would avoid any suggestion that we consider evidence of actual disbursement, drawn from an annual budget document, to be necessary in all circumstances to establish the existence and amount of domestic support provided by non-exempt direct payments and other non-exempt policies. To accommodate Brazil's request, we have modified the last sentences of both paragraphs.

6.28. Regarding paragraph 7.111, Guatemala suggested, for the sake of clarity, illustrating the level of India's actual AMS in relation to India's total value of sugarcane by including a comparison in relative terms (in addition to the existing comparison in absolute terms). India did not consider that this comparison was necessary for the purposes of resolving these disputes. We agree with India and therefore decline Guatemala's request in this respect.

6.4 Requests for review of section 7.2 (Export subsidies)

6.29. In addition to the changes listed in paragraph 6.5 above, the complainants requested that minor changes be made in footnotes 328 and 329 (footnotes 295 and 296 in the Interim Report) to paragraph 7.124; paragraphs 7.126, 7.143, 7.146, 7.165, 7.171, 7.173, 7.196, 7.202, 7.266, 7.288, and 7.289; and the title of section 7.2.5.4. We have made the requested changes.

6.30. Australia requested that, for the sake of consistency with Australia's written submissions, the Panel clarify, in paragraph 7.116, that Australia makes an alternative claim under Article 10.1 of the Agreement on Agriculture. We have made the requested modification.

6.31. Australia and Brazil requested that the Panel modify its descriptions of the MAEQ in paragraphs 7.124, 7.192, 7.275 and footnote 307 (footnote 274 of the Interim Report) to paragraph 7.115 to indicate that the MIEQs and the MAEQ "each determine a total annual amount of sugar export quotas". In Australia's and Brazil's view, this would ensure that the Report does not minimize the similarities between the MIEQs and the MAEQ. India considers that the changes requested by Brazil and Australia are not required because the MIEQ is the minimum quantity of sugar allocated to sugar mills for export, while the MAEQ is the maximum quantity allocated to sugar mills for export. We do not consider the change requested by Australia and Brazil to be necessary. Section 7.2.2 of the Report seeks to describe the measures at issue based on the text of the legal instruments, which implement them. In paragraph 7.275 of the Report, we explain that, although,

⁶⁶ Brazil made a similar request regarding paragraph 7.225. See para. 6.41 below.

on its face, the MAEQ order imposes "the maximum admissible export quantity of sugar", to be eligible for assistance, a sugar mill is required to have fulfilled at least 50% of its export target. Therefore, eligibility for a subsidy under the Marketing and Transportation Scheme is contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture. We consider this explanation sufficient to address the Australia's and Brazil's concerns.

6.32. Brazil requested that the Panel add a footnote to the phrase "pursuant to Article 21.1" in the second sentence of paragraph 7.154, to reflect that Article 3.1 of the SCM Agreement applies "except as provided in the Agreement on Agriculture". We have accepted Brazil's request and added footnote 389 to paragraph 7.154.

6.33. To better reflect Australia's position, Australia requested that the Panel indicate, in paragraph 7.180, that Australia "does not consider the characterisation of Article 9.4 determinative of which party bears the initial burden of raising the provision". Australia also requested that the Panel add additional references to footnote 418 (footnote 384 in the Interim Report). We have made the requested changes.

6.34. The complainants requested that paragraph 7.181 be reformulated to avoid confusion as to the respective positions of the complainants and India. We have implemented this suggestion. Brazil also requested that we add references to India's submissions in footnote 421 (footnote 387 of the Interim Report) to paragraph 7.181. We have implemented Brazil's request.

6.35. Brazil requested that we expand the summary of Brazil's arguments regarding the legal standard under Articles 9.1(d) and (e) of the Agreement on Agriculture in paragraph 7.186. We have partially accepted Brazil's request by adding the summary of its arguments in footnotes 431 and 432 (footnotes 397 and 398 of the Interim Report).

6.36. Brazil requested that the content of footnote 412 to paragraph 7.192 of the Interim Report be moved into the body of paragraph 7.192. We have implemented Brazil's request.

6.37. Guatemala requested that we clarify, in paragraph 7.202, that the relevant payments under the Marketing and Transportation Scheme are made to sugarcane farmers. We have made the requested change.

6.38. Brazil requested that the Panel consider tying its reasoning in paragraph 7.204 to the interpretation set out in paragraph 7.191 of the Interim Report. We have accepted Brazil's request and added footnote 461 to paragraph 7.204, which cross-refers to the reasoning set out in paragraph 7.191.

6.39. Guatemala requested that we add to paragraph 7.210 references to the evidence submitted by the complainants to demonstrate that, because sugar mills are located in different parts of India and export sugar on different delivery terms, they incur different amounts of transportation costs. We have accepted Guatemala's request and added references to the relevant evidence in footnotes 467 and 469 to paragraph 7.210. Guatemala also requested that we specify that, when exports occur on an EXW basis, the seller incurs neither internal nor international transport costs. We have made the modification requested by Guatemala.

6.40. Guatemala requested that the Panel add a footnote to paragraph 7.217 to reflect that the DFIA Scheme is challenged only by Australia. We have made the requested clarification in footnote 479 to paragraph 7.217.

6.41. Should the Panel accept Brazil's request regarding paragraph 7.88, Brazil requested that the Panel revise the second sentence of paragraph 7.225 and add the phrase "without intervening factors or intermediaries" to the definition of "straightforward, uninterrupted, immediate". To reflect this change in the application of that interpretation in the context of the export subsidy analysis, Brazil further requested that the Panel revise the third sentence of paragraph 7.225 and make a similar change to paragraph 7.266. As noted in paragraph 6.26 above, we do not consider it necessary to revise paragraph 7.88. We therefore also decline Brazil's request to modify paragraphs 7.225 and 7.226.

6.42. Guatemala requested that a footnote to the complainants' response to Panel question No. 9 be added to paragraph 7.237. For its part, Brazil requested that the last sentence of paragraph 7.237 be modified to reflect that the purpose for which the assistance is provided to sugar mills is to alleviate the mills from financial obligations to the farmers. We have made the requested changes to the text of paragraph 7.237 and added a reference to the complainants' arguments in footnote 519.

6.43. Brazil requested that the Panel delete the words "potentially" and "however" from footnote 528 (footnote 489 in the Interim Report) to paragraph 7.240. Brazil considers that, in this footnote, the Panel made additional findings regarding the characterization of the recipients under Article 9.1(a), with which Brazil agrees. Brazil also notes that India did not disagree with this alternative characterization of the recipient of the subsidies under Article 9.1(a). In addressing Brazil's request, instead of deleting the words "potentially" and "however", we rephrased the footnote to avoid the perception of making additional findings.

6.44. Guatemala requested that, for the sake of completeness, the Panel reflect in paragraph 7.245 the complainants' argument that, in any event, the record in these proceedings contains evidence showing that the Central Government has made disbursements pursuant to the challenged export subsidy schemes. We have implemented Guatemala's request.

6.45. Brazil and Australia requested a change to paragraph 7.252 and footnote 563 thereto (footnote 523 of the Interim Report) to more fully reflect the evidence provided by the complainants. We have made the requested changes.

6.46. To reflect more clearly the legal standard for "benefit", Brazil requested that the last sentence of footnote 586 (footnote 546 of the Interim Report) to paragraph 7.260 be revised. We have modified the footnote accordingly.

6.47. To enhance the clarity of the Panel's findings, Guatemala suggested amending the phrase "a separate assessment" in paragraph 7.326 by replacing the words "a separate" with the words "an additional". We have made the requested change.

6.48. Regarding the DFIA Scheme, India requested that changes be made in paragraphs 7.116, 7.120, 7.121, 7.146, 7.279, 7.292, 7.301, 7.327, and 7.334 to reflect that Australia's claim concerns the DFIA's application to sugar. Australia considers that the Interim Report is clear that Australia's claim concerning the DFIA Scheme is limited to its application to sugar. Nevertheless, to achieve further clarity, Australia does not object to the Panel making minor amendments to some of the paragraphs identified by India. We agree with Australia that it is sufficiently clear from the Report that Australia's claim and the Panel's findings, as well as conclusions and recommendations concern the application of the DFIA Scheme to sugar.⁶⁷ Nevertheless, to accommodate India's request, we have made the changes requested by India in paragraphs 7.116, 7.120, 7.279, 7.291, 7.292, and 7.301.

6.4.1 Requests for review regarding the Panel's recommendation under Article 4.7 of the SCM Agreement⁶⁸

6.49. Regarding the Panel's recommendation that India withdraw its prohibited subsidies within 120 days from the adoption of the Reports in DS580 and DS581, India makes two arguments. First, India requests that the Panel review its recommendation and not recommend any time-period for compliance.⁶⁹ Second, should the Panel decide to recommend a time-period for compliance under Article 4.7, India requests that the Panel consider extending the 120-day period.⁷⁰

6.50. Regarding the first argument, India submits that the Panel's recommendation has failed to take into account the fact that, in these disputes, the measures found to be inconsistent with the SCM Agreement have also been found to be inconsistent with the Agreement on Agriculture.⁷¹ India points out that the Agreement on Agriculture "does not contain any special rules with respect to

⁶⁷ See e.g. paras. 7.277, 7.300, and 8.6 (Panel's conclusions and recommendations in DS580) below.

⁶⁸ The requests for review under this subsection concern only the disputes DS580 and DS581.

⁶⁹ India's request for review, paras. 11 and 13.

⁷⁰ India's request for review, para. 14.

⁷¹ India's request for review, para. 11.

dispute settlement; nor does it provide for an expedited time-period within which a measure inconsistent with [that Agreement] must be withdrawn".⁷² India points out that Article 19 of the Agreement on Agriculture refers to Articles XXII and XXIII of the GATT 1994, as elaborated and applied by the DSU. In India's view, by referring to the DSU, Article 19 requires that the time-period for withdrawal of an inconsistent measure be determined in accordance with Article 21.3 of the DSU.⁷³ India considers that Article 21.3 of the DSU and Article 4.7 of the SCM Agreement cannot apply together.⁷⁴ In India's view, in light of Article 21.1 of the Agreement on Agriculture, Article 19 of the Agreement on Agriculture prevails over Article 4.7 of the SCM Agreement.⁷⁵ India further notes that Article 1.2 of the DSU does not alter the subordination of the SCM Agreement to the Agreement on Agriculture and that it should not be read to indirectly allow Article 4.7 of the SCM Agreement to nullify Article 21.1 of the Agreement on Agriculture.⁷⁶

6.51. Regarding the second argument, India contends that its "cooperative federalism and democratic decision-making process require that withdrawal of the measures be preceded by extensive discussions with all stakeholders including the relevant State governments, thousands of sugarcane farmers spread across several States, sugar mills, farmers' rights groups, and civil society".⁷⁷ India further underlines "the strain on human resources and other impediments caused by the COVID-19 pandemic". India therefore requests that the Panel consider providing a period of 180 days from the date of adoption of the Reports in DS580 and DS581 to bring these measures into compliance.⁷⁸

6.52. Australia and Guatemala argue that no conflict exists between the Agreement on Agriculture and the SCM Agreement.⁷⁹ They point out that Article 19 of the Agreement on Agriculture does not regulate the same matter as Article 4.7 of the SCM Agreement, i.e. the period of time for withdrawing a prohibited export subsidy, and the two provisions can apply simultaneously.⁸⁰ Australia points out that, on the contrary, when India complies with the Panel's recommendation to withdraw prohibited export subsidies it will be in compliance with both the SCM Agreement and the Agreement on Agriculture.⁸¹ They further argue that any difference between Article 21.3(c) of the DSU and Article 4.7 of the SCM Agreement is addressed in Article 1.2 of the DSU, which provides that where there is a difference between the provisions of the DSU and one of the special or additional rules and procedures in its Appendix 2 (such as Article 4.7 of the SCM Agreement), the latter prevails over the former.⁸²

6.53. With respect to India's request to extend the time-period for compliance, Australia argues that the Panel should reject the request because the time-frame India seeks would not be consistent with the requirement of Article 4.7 to withdraw the prohibited subsidies "without delay".⁸³ For its part, Guatemala submits that India has not substantiated its assertion that it needs to follow a consultative decision-making process.⁸⁴ Furthermore, Australia and Guatemala stress that the Panel has taken the impact of the COVID-19 pandemic into account when determining the 120-day period.⁸⁵

6.54. Turning to our examination of India's request, we first recall that, pursuant to Article 4.7 of the SCM Agreement, if a measure is found to be a prohibited subsidy, the panel shall recommend

⁷² India's opening statement at the interim review meeting, para. 7.

⁷³ India's opening statement at the interim review meeting, para. 10.

⁷⁴ India's opening statement at the interim review meeting, para. 10.

⁷⁵ India's opening statement at the interim review meeting, para. 7.

⁷⁶ India's response to Guatemala's comments at the interim review meeting, para. 5.

⁷⁷ India's request for review, para. 14.

⁷⁸ India's request for review, para. 14.

⁷⁹ Australia's comments on India's request for review, para. 10; Guatemala's comments on India's request for review, paras. 10-11.

⁸⁰ Australia's comments on India's request for review, paras. 9 and 12-13; Guatemala's comments on India's request for review, para. 15.

⁸¹ Australia's comments on India's request for review, para. 14.

⁸² Australia's comments on India's request for review, para. 17; Guatemala's opening statement at the interim review meeting, para. 3.2; comments on India's opening statement at the interim review meeting, paras. 6-11.

⁸³ Australia's comments on India's request for review, para. 20.

⁸⁴ Guatemala's comments on India's request for review, para. 27; comments on India's opening statement at the interim review meeting, para. 14.

⁸⁵ Australia's comments on India's request for review, para. 21; Guatemala's comments on India's request for review, para. 26.

that the subsidizing Member withdraw the subsidy without delay and recommend the time-period within which the measure must be withdrawn. By contrast, Article 19 of the Agreement on Agriculture stipulates that "[t]he provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under [the Agreement on Agriculture]." Accordingly, if a measure is found to be inconsistent with the Agreement on Agriculture, a reasonable period of time for compliance would be determined in accordance with Article 21.3 of the DSU.

6.55. In India's view, the conflict between Article 21.3 of the DSU (which Article 19 of the Agreement on Agriculture refers to) and Article 4.7 of the SCM Agreement is "glaring" and should be resolved by means of Article 21.1 of the Agreement on Agriculture.⁸⁶ Article 21.1 provides that "[t]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of [the Agreement on Agriculture]". In previous disputes, WTO panels and the Appellate Body have outlined three situations in which Article 21.1 can apply: (i) where the Agreement on Agriculture provides an explicit carve-out or exemption from the disciplines of Article 3.1 of the SCM Agreement; (ii) where it would be impossible for a Member to comply with its obligations under the Agreement on Agriculture and the SCM Agreement simultaneously; and (iii) where the Agreement on Agriculture explicitly authorizes a measure that would otherwise be prohibited under Article 3.1 of the SCM Agreement.⁸⁷

6.56. In our view, the relationship between Article 19 of the Agreement on Agriculture and Article 4.7 of the SCM Agreement does not amount to a conflict. As India argues, Article 19 of the Agreement on Agriculture does not prescribe any time-period within which a measure found to be inconsistent with that Agreement must be brought into conformity. By contrast, Article 4.7 of the SCM Agreement requires a panel to determine a time-period during which a prohibited subsidy should be withdrawn.⁸⁸ This, however, does not mean that the two provisions are in conflict. Article 19 of the Agreement on Agriculture does not provide any carve-out from the provisions of Article 4.7 of the SCM Agreement. Furthermore, by complying with the Panel's recommendation under Article 4.7 of the SCM Agreement, India will simultaneously bring its measures into compliance with the Agreement on Agriculture.

6.57. In addition, the reference in Article 19 of the Agreement on Agriculture to the DSU means that a time-period for compliance with findings of violation under the Agreement on Agriculture would have to be determined pursuant to Article 21.3(c) of the DSU. Any conflict between Article 21.3(c) of the DSU and Article 4.7 of the SCM Agreement would be addressed in Article 1.2 of the DSU. Article 1.2 of the DSU stipulates that, to the extent that there is a difference between the rules and procedures of the DSU and the special or additional rules and procedures set forth in Appendix 2 of the DSU, the special or additional rules and procedures in Appendix 2 shall prevail. Article 4.7 of the SCM Agreement is listed in Appendix 2 as a special or additional rule. Hence, the provisions of Article 21.3(c) are not relevant in determining the appropriate time-period under Article 4.7 of the SCM Agreement.⁸⁹ Therefore, contrary to what India argues, the difference between Article 21.3(c) of the DSU and Article 19 of the Agreement on Agriculture does not give rise to a conflict within the meaning of Article 21.1 of the Agreement on Agriculture.

6.58. In light of the above, we reject India's request that the Panel review its recommendation and not recommend any time-period for compliance.

6.59. We now proceed to address India's request that we extend the 120-day period for compliance. We have no reason to put in doubt India's assertion that its system of cooperative federalism and democratic decision-making requires consultations with stakeholders in adopting or modifying trade-related legislation. This, however, is a concern shared by many, if not all, WTO Members. We do not see it as a factor that would justify extending the time-period we determined. Further, we note that the measures to be withdrawn are not statutes that would have required a legislative

⁸⁶ India's response to Guatemala's comments at the interim review meeting, para. 5.

⁸⁷ Appellate Body Report, *US – Upland Cotton*, para. 532 (quoting Panel Report, *US – Upland Cotton*, para. 7.1038). As a general point, we agree with India that the instances in which a conflict can arise, referred to by previous panels and the Appellate Body, may not be exhaustive. (See India's opening statement at the interim review meeting, para. 11.) However, as explained below, we do not agree with India that the relationship between Article 19 of the Agreement on Agriculture and Article 4.7 of the SCM Agreement amounts to a conflict.

⁸⁸ India's opening statement at the interim review meeting, para. 9.

⁸⁹ Appellate Body Reports, *Brazil – Aircraft*, paras. 191-192; *Brazil – Taxation*, para. 5.454.

process for withdrawal or modification, which typically takes more time than modifying or withdrawing administrative instruments. In addition, as Australia and Guatemala point out, we have already taken into account the impact of the COVID-19 pandemic on the functioning of the public sector in India in determining the time-period for compliance.⁹⁰

6.60. As a result, we do not consider it appropriate to revise our recommendation that India withdraw its prohibited subsidies within 120 days.

6.5 Requests for review of section 7.3 (Notifications)

6.61. Australia requested amending the final sentence of paragraph 7.336 in order to clarify India's argument that Australia has failed to establish that India was required to submit notifications pursuant to Article 18 of the Agreement on Agriculture, Article 25 of the SCM Agreement, and Article XVI of the GATT 1994. We have modified the paragraph accordingly.

6.6 Requests for review of the Appendix (Calculation of India's market price support to sugarcane producers for the 2014-15 to 2018-19 sugar seasons)

6.62. Since the Appendix contains factual and legal findings by the Panel, Brazil requested that the content of the Appendix be included in the main body of the Panel Report, for instance within section 7.1.3.2.3. Brazil considered that this would enhance the accessibility of the Panel Report. We note that the legal status of the Appendix as an integral part of the Panel Report is unquestioned. We consider it relevant, in addressing this request, that the findings contained in the Appendix are of a highly technical nature and are concerned exclusively with the application, in the specific circumstances of these disputes, of paragraph 8 of Annex 3 to the Agreement on Agriculture. Given the level of technical complexity of those findings, as well as the fact that the findings contained therein are specific to the circumstances of these disputes, we consider that articulating those findings in the Appendix – rather than the main body of the Report – results in a clearer and more readable Panel Report. In our view, accepting Brazil's request would in fact decrease the accessibility of the Panel's findings. We therefore decline this request.

6.63. Concerning paragraph 2.1 of the Appendix, Guatemala requested us to refer to the complainants, instead of solely Brazil and Australia, and to appropriately revise footnote 15. We have revised the Appendix accordingly.

6.64. Regarding footnote 138 to paragraph 6.2 of the Appendix, Brazil and Australia requested us to revisit our explanation for the minor discrepancies between the results of the Panel's calculations and those of the complainants. We have implemented the modification requested by Brazil and Australia, by revising footnotes 128 and 138.

7 FINDINGS

7.1 Domestic support

7.1.1 Introduction

7.1. The complainants claim that India is acting inconsistently with Article 7.2(b) of the Agreement on Agriculture by providing domestic support to sugarcane producers in excess of the *de minimis* level set out in Article 6.4 of the Agreement on Agriculture.⁹¹ The complainants argue that India has no domestic support commitment in its Schedule, and consequently, pursuant to Article 7.2(b), read in light of Article 6.4, India may not provide product-specific domestic support to sugarcane producers that exceeds 10% of the total value of sugarcane production.⁹² On this basis, the complainants provide evidence and calculations seeking to demonstrate that, in each sugarcane season from 2014-15 to 2018-19, India provided product-specific domestic support to sugarcane

⁹⁰ See para. 7.333 below.

⁹¹ See e.g. Brazil's second written submission, para. 151; Australia's second written submission, para. 235; Guatemala's second written submission, para. 132.

⁹² See e.g. Brazil's first written submission, para. 3; Australia's first written submission, paras. 108 and 110; Guatemala's first written submission, paras. 112-114.

producers, in excess of the permitted level, through: (i) market price support and (ii) non-exempt direct payments or other non-exempt policies.⁹³

7.2. India agrees with the complainants that it has no Total AMS commitment in its Schedule.⁹⁴ However, India submits that the complainants' identification of market price support in India is based on a mistaken interpretation of the term "market price support" in the Agreement on Agriculture.⁹⁵ India argues that market price support can only exist when the government or its agents pay for or procure the product in question.⁹⁶ In India's view, the complainants have consequently failed to demonstrate that India provides any market price support to sugarcane producers.⁹⁷ According to India, since the complainants have failed to demonstrate the existence of market price support to sugarcane producers, the complainants have also failed to demonstrate how the total support provided to sugarcane producers exceeds the permitted level of domestic support.⁹⁸ India therefore considers that the complainants have failed to demonstrate that India is acting inconsistently with Article 7.2(b).⁹⁹

7.3. We consider it useful to briefly outline certain aspects of the Agreement on Agriculture related to the present dispute. We begin by noting that several provisions in the Agreement on Agriculture refer to the "Aggregate Measurement of Support" (AMS). Article 1(a) defines AMS as:

[T]he annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is:

- (i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and
- (ii) with respect to support provided during any year of the implementation period and thereafter, 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;

7.4. Article 1(h) further defines "Total AMS":

"Total Aggregate Measurement of Support" and "Total AMS" mean 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, and which is:

- (i) with respect to support provided during the base period (i.e. the "Base Total AMS") and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e. the "Annual and Final Bound Commitment Levels"), as specified in Part IV of a Member's Schedule; and
- (ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (i.e. the "Current Total AMS"), calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables

⁹³ See e.g. Brazil's first written submission, paras. 131-167; Australia's first written submission, paras. 149-209; Guatemala's first written submission, paras. 137-191.

⁹⁴ India's response to Panel question No. 46.

⁹⁵ See e.g. India's first written submission, paras. 59 and 62-63.

⁹⁶ See e.g. India's first written submission, para. 62; second written submission, para. 31.

⁹⁷ See e.g. India's second written submission, para. 8.

⁹⁸ See e.g. India's second written submission, para. 57.

⁹⁹ See e.g. India's second written submission, para. 58.

of supporting material incorporated by reference in Part IV of the Member's Schedule[.]

7.5. Turning to the obligations that Members have undertaken with respect to the provision of domestic support to agricultural producers, we note that Members shall not provide domestic support in excess of the amounts they have committed to, as inscribed in their Schedules.¹⁰⁰ The Agreement on Agriculture also covers the situation where a Member has specified *no* domestic support commitment in its Schedule. Specifically, Article 7.2(b) states that:

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.

7.6. Regarding the relevant *de minimis* level, Article 6.4 elaborates that:

(a) A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:

(i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year; and

(ii) non-product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of the value of that Member's total agricultural production.

(b) For developing country Members, the *de minimis* percentage under this paragraph shall be 10 per cent.

7.7. Article 6.4 thus excludes from the calculation of a Member's Current Total AMS, and exempts from its reduction commitments, a *de minimis* level of domestic support in relation to both the *product-specific* and *non-product-specific* components of its Current Total AMS. For developing country Members, such as India, the *de minimis* level is 10% for each product-specific component (i.e. support in favour of a specific basic agricultural product), and 10% for the non-product-specific component (i.e. support provided generally to agricultural production). We note that certain provisions of the Agreement on Agriculture also exclude certain types of measures from inclusion in the calculation of a Member's AMS, thereby exempting such measures from the relevant reduction commitments.¹⁰¹

7.8. In the context of the present disputes, we understand that sugarcane is a basic agricultural product, within the meaning of the Agreement on Agriculture.¹⁰² We further note the parties' agreement that India's Schedule contains no Total AMS commitment.¹⁰³ Based on our own review of India's Schedule, we too agree that India's Schedule contains no Total AMS commitment.¹⁰⁴

¹⁰⁰ In this respect, Article 3.1 of the Agreement on Agriculture states that "[t]he domestic support ... commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994." Articles 3.2 and 6.3 of the Agreement on Agriculture set out the essential obligation that Members may not provide domestic support in excess of the commitment levels specified in their Schedules.

¹⁰¹ See e.g. paragraph 7.25 below.

¹⁰² This assertion by the complainants is uncontested by India. (Brazil's first written submission, para. 90; Australia's first written submission, para. 154; Guatemala's first written submission, para. 101)

¹⁰³ Brazil's first written submission, paras. 65-69; Australia's first written submission, paras. 103-104; Guatemala's first written submission, paras. 109-110; India's response to Panel question No. 46.

¹⁰⁴ Schedule XII – India ("India's Schedule"), Part IV. We note, in particular, that the columns in Part IV of the Schedule titled "Base Total AMS" and "Annual and final bound commitment levels" are blank. The column titled "Relevant Supporting Tables and document reference" refers to supporting document "AGST/IND". That supporting document, G/AG/AGST/IND, states, under the heading "Domestic Support", that "India is not required to undertake any reduction commitment as the average Total Aggregate Measurement of Support is (-) Rs. 198608 millions (-18 per cent of the value of output)." (G/AG/AGST/IND, p. 3, para. 4)

7.9. Since India specified no Total AMS commitment in its Schedule, Article 7.2(b) stipulates that India may not provide non-exempt support to sugarcane producers in excess of the relevant *de minimis* level set out in Article 6.4.¹⁰⁵ More precisely, since India is a developing country, Article 7.2(b), read in light of Article 6.4, stipulates that India may not provide non-exempt *product-specific* domestic support in excess of 10% of the total value of production of any basic agricultural product (including sugarcane), or non-exempt *non-product-specific* domestic support in excess of 10% of the value of India's total agricultural production.

7.10. The complainants assert that India is acting inconsistently with Article 7.2(b) by providing non-exempt product-specific¹⁰⁶ domestic support to sugarcane producers that exceeds 10% of the total value of sugarcane production in India. The complainants seek to substantiate this assertion by demonstrating that, for each sugar season from 2014-15 to 2018-19, India provided such non-exempt product-specific domestic support in excess of 10% of the total value of its sugarcane production.

7.11. For our purposes, in assessing India's compliance with Article 7.2(b), we consider it appropriate to examine whether India's non-exempt product-specific domestic support to sugarcane producers exceeded 10% of the total value of sugarcane production during recent "relevant years".¹⁰⁷ We agree with the complainants that, in the context of India's sugarcane production, a "relevant year" within the meaning of the Agreement on Agriculture refers to a sugar season.¹⁰⁸ We therefore proceed to examine the complainants' assertions regarding India's provision of domestic support to sugarcane producers in each sugar season from 2014-15 to 2018-19.¹⁰⁹

7.12. We note that conducting this assessment essentially entails comparing two amounts for each season: (i) the level of product-specific domestic support to sugarcane producers that India was *permitted* to provide in each season; and (ii) the amount of non-exempt product-specific domestic support, if any, that India *actually provided* to sugarcane producers in each season (i.e. India's AMS to sugarcane producers). We therefore proceed by assessing each of these issues in turn. Our conclusion as to India's consistency with Article 7.2(b) is based on a comparison of these two figures for each season.

7.1.2 India's permitted level of product-specific support to sugarcane producers

7.13. As a first step in our analysis, we address the maximum level of domestic support that India was permitted to provide to sugarcane producers during each sugar season from 2014-15 to 2018-19. We recall that, under Article 7.2(b) of the Agreement on Agriculture, India was permitted to provide product-specific support to sugarcane producers up to but not exceeding 10% of the total value of its sugarcane production.¹¹⁰

¹⁰⁵ In their first written submissions, in addition to their claims under Article 7.2(b), the complainants also argued that India was acting inconsistently with Articles 3.2 and 6.3 of the Agreement on Agriculture. The complainants' claims under Article 7.2(b) are premised on their understanding that India's Schedule contains no commitment with respect to domestic support, and their claims under Articles 3.2 and 6.3 are only "in the alternative", in the event that India had indeed inscribed such a commitment in its Schedule. (See complainants' responses to Panel question No. 15) Since India's Schedule contains no such commitment, it is unnecessary for us to address the complainants' claims under Articles 3.2 and 6.3. (See also fn 51 to para. 3.1, fn 54 to para. 3.4, fn 58 to para. 3.8, and fn 61 to para. 3.11 above)

¹⁰⁶ The complainants focus exclusively on India's non-exempt *product-specific* domestic support for sugarcane and have not raised any arguments or evidence regarding the *non-product-specific* component of India's obligations. (See e.g. Brazil's first written submission, heading III.C; Australia's first written submission, heading III.C; Guatemala's first written submission, para. 114)

¹⁰⁷ Article 6.4(a)(i) of the Agreement on Agriculture refers to "product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product *during the relevant year*". (emphasis added)

¹⁰⁸ Article 1(i) of the Agreement on Agriculture explains that the term "year" ... refers to the calendar, financial or marketing year specified in the Schedule relating to that Member." We understand that India's Schedule identifies the "marketing year" as the "relevant year" for calculating domestic support. (G/AG/AGST/IND, p. 4, para. 6) It is uncontested that this refers to the sugar season in India, beginning in October and ending in September of the following year. (See e.g. Brazil's first written submission, fn 99 to Table 9 on p. 24; Guatemala's first written submission, paras. 107-108; India's first written submission, para. 18)

¹⁰⁹ We note that India does not contest this evidentiary approach.

¹¹⁰ See para. 7.9 above.

7.14. As evidence of India's total value of production of sugarcane for each season, the complainants submit the official Indian Ministry of Statistics and Programme Implementation (MOSPI) National Accounts Statistics 2020.¹¹¹ Entry 4 of this document indicates the value of production for each relevant sugar season for "Sugars". Under "Sugars", the document indicates the value of production for "Sugarcane" (sub-entry 4.1), "gur" (sub-entry 4.2), and "others" (sub-entry 4.3).¹¹² Based on a 2007 manual published by MOSPI, titled "National Accounts Statistics Sources and Methods"¹¹³, the complainants note that, in addition to sub-entry 4.1 (sugarcane), the data in sub-entry 4.2 (gur) may also be relevant to the total value of production of sugarcane.¹¹⁴

7.15. India does not contest the complainants' factual assertions regarding the total value of production for each sugar season from 2014-15 to 2018-19.¹¹⁵

7.16. We have reviewed the MOSPI data, as well as the explanations in the 2007 MOSPI manual. According to the 2007 manual, "total sugarcane production [in the official MOSPI statistics] is divided into two parts viz., sugarcane utilised as such and the sugarcane converted into gur."¹¹⁶ We therefore understand that the total value of production of sugarcane in India is divided between sub-entries 4.1 (sugarcane) and 4.2 (gur).¹¹⁷ For our purposes, we see no reason to exclude the sugarcane used to produce gur from the calculation of India's total value of production of sugarcane for each sugar season from 2014-15 to 2018-19.¹¹⁸

7.17. We therefore calculate 10% of the total value of production of sugarcane for each sugar season from 2014-15 to 2018-19, to find the maximum level of domestic support that India was permitted, under the Agreement on Agriculture, to provide to sugarcane producers during each sugar season:

Sugar season	Total value of sugarcane production (INR million) ¹¹⁹	India's permitted level of product-specific support to sugarcane producers (INR million) ¹²⁰
2014-15	965,290.00	96,529.00
2015-16	958,640.00	95,864.00

¹¹¹ Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)), "C-27 Value of production" spreadsheet; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "ValueOfProduction" spreadsheet; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "TVP" spreadsheet; Ministry of Statistics and Programme Implementation (MOSPI), National Accounts Statistics 2020, Statement 8.1.2 Crop-wise value of output, (Exhibit JE-147).

¹¹² MOSPI, National Accounts Statistics 2020, Statement 8.1.2 Crop-wise value of output, (Exhibit JE-147).

¹¹³ MOSPI, National Accounts Statistics Sources and Methods 2007, Chapter 9, (Exhibit JE-168).

¹¹⁴ See complainants' responses to Panel question No. 60.

¹¹⁵ The complainants requested India to clarify the correct figures to be used to calculate the *de minimis* level of domestic support that India was entitled to provide to sugarcane producers for each relevant sugar season. (Complainants' responses to Panel question No. 60; Guatemala's questions to India following the second substantive meeting with the Panel, question No. 1) In response, India states that: "(i) the complainants, including Guatemala, have failed to demonstrate why the FRP/SAP measures qualify as market price support; and (ii) the complainants bear the burden to explain the relevance or accuracy of the so called evidence which they have sought to rely on in support of their erroneous claims on market price support." (India's response to Guatemala's questions to India following the second substantive meeting with the Panel, question No. 1)

¹¹⁶ MOSPI, National Accounts Statistics Sources and Methods 2007, Chapter 9, (Exhibit JE-168), p. 97. We note Guatemala's explanation that "gur" is a type of "unrefined or partially refined sugar that [is] produced from sugarcane". (Guatemala's first written submission, para. 39)

¹¹⁷ The Manual also indicates that "in the case of sugarcane, outturn excluding the quantity converted into gur by the cane growers is taken and gur is evaluated separately" and that "[c]onversion of sugarcane into gur is an activity undertaken by the agriculturists." (MOSPI, National Accounts Statistics Sources and Methods 2007, Chapter 9, (Exhibit JE-168), pp. 95 and 97)

¹¹⁸ We note that certain of the complainants have expressed reservations regarding whether the 2007 Manual continues to be relevant to contemporary MOSPI statistics. (See e.g. Brazil's response to Panel question No. 60, para. 5; Australia's response to Panel question No. 60, para. 14) However, we see no reason to conclude that the explanation set out in the 2007 Manual regarding "sugarcane" and "gur" would not continue to apply to contemporary MOSPI statistics.

¹¹⁹ These figures represent the sum of sub-entries 4.1 ("Sugarcane") and 4.2 ("gur") of the MOSPI National Accounts Statistics 2020, (Exhibit JE-147). In representing these figures here, we understand that the term *crore* as used in the MOSPI National Accounts Statistics refers to tens of millions. (See Brazil's first written submission, fn 3 to Table 1; Australia's first written submission, p. 27; Guatemala's first written submission, p. v. India does not contest the complainants' explanation of India's numbering system.)

¹²⁰ I.e. the *de minimis* level of 10% of the total value of sugarcane production.

Sugar season	Total value of sugarcane production (INR million) ¹¹⁹	India's permitted level of product-specific support to sugarcane producers (INR million) ¹²⁰
2016-17	946,980.00	94,698.00
2017-18	1,173,510.00	117,351.00
2018-19	1,230,490.00	123,049.00

7.1.3 India's actual amount of non-exempt product-specific support to sugarcane producers

7.1.3.1 General considerations

7.18. The second step of our analysis entails determining the amount of non-exempt product-specific domestic support that India actually provided to sugarcane producers for each sugar season from 2014-15 to 2018-19. We refer to this amount, for each season, as India's AMS to sugarcane producers.

7.19. The complainants assert that, pursuant to Article 6.1 of the Agreement on Agriculture, any measure that provides support to agricultural producers should be included in the calculation of a Member's AMS, unless that measure is exempted from that calculation pursuant to a relevant provision of the Agreement on Agriculture.¹²¹ The complainants also note that, under paragraph 1 of Annex 3 of the Agreement on Agriculture, a Member's product-specific AMS shall be calculated on the basis of "market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment ('other non-exempt policies')".¹²² The complainants submit that India provides market price support to sugarcane producers in the form of measures, at both the Central and State Government levels, that require sugar mills and factories to pay a minimum price for sugarcane.¹²³ The complainants also allege that several State Governments maintain policies or payments that constitute "non-exempt direct payments" or "other non-exempt policies" that should be included in the calculation of India's AMS to sugarcane producers.¹²⁴

7.20. India argues that the legal instruments identified by the complainants as comprising "market price support" do not fall within the scope of market price support within the meaning of the Agreement on Agriculture.¹²⁵ India submits that market price support, under the Agreement on Agriculture, only exists when the government pays for and procures the relevant agricultural product.¹²⁶ Since the instruments identified by the complainants as market price support fail to satisfy this key requirement, India argues that they should be excluded from the calculation of India's AMS to sugarcane producers.¹²⁷ India further considers that, since these instruments should be excluded from the calculation, the complainants have failed to demonstrate that India is acting inconsistently with its domestic support obligations, because the amounts of the other domestic support measures identified by the complainants (i.e. the "non-exempt direct payments" and "other non-exempt policies") do not exceed India's permitted amounts of domestic support.¹²⁸

¹²¹ Brazil's second written submission, paras. 16-18; Australia's second written submission, paras. 38-39; Guatemala's opening statement at the second substantive meeting of the Panel, para. 2.17.

¹²² Brazil's first written submission, paras. 94-95; Australia's first written submission, para. 111; Guatemala's first written submission, para. 115.

¹²³ Brazil's first written submission, paras. 25-48, 132-133, 135-139 and 156-160; Australia's first written submission, paras. 21-61 and 153-156; Guatemala's first written submission, paras. 37-72 and 137-144. The complainants also identify certain measures that allegedly assist sugarcane purchasers to pay the mandatory minimum prices. (Brazil's first written submission, paras. 161-162 and Appendix A; Australia's first written submission, paras. 181-185 and Annexes A, B, C, D-2, D-3 and E; Guatemala's first written submission, paras. 87-96 and 166-168) The complainants do not include these measures in their calculations of India's alleged market price support. (See fn 41 to para. 2.3 above and para. 7.70 below)

¹²⁴ Brazil's first written submission, paras. 49-54 and 161-165; Australia's first written submission, paras. 189-205; Guatemala's first written submission, paras. 76-86, 97-98 and 166-189.

¹²⁵ India's first written submission, para. 82; second written submission, para. 8.

¹²⁶ India's first written submission, para. 62; second written submission, para. 31.

¹²⁷ India's first written submission, paras. 63-65; second written submission, paras. 28-29 and 31.

¹²⁸ India's first written submission, paras. 81-83; second written submission, para. 6.

7.21. At the outset, we consider it useful to set out our understanding of the structure and logic of the rules in the Agreement on Agriculture regarding the calculation of a Member's AMS. Pursuant to Article 6.1 of the Agreement on Agriculture:

The domestic support reduction commitments of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures in favour of agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in this Article and in Annex 2 to this Agreement.

7.22. Article 1(a)(ii) of the Agreement on Agriculture explains that a Member's AMS in any year during and after the implementation period is to be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". Article 1(h)(ii) indicates that the calculation of a Member's Total AMS, for any year during or after the implementation period, is to be "in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule".

7.23. Annex 3 of the Agreement on Agriculture is titled "Domestic Support – Calculation of Aggregate Measurement of Support". Paragraph 1 of Annex 3 provides that:

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").

7.24. The additional paragraphs of Annex 3 elaborate on various aspects of the calculation of AMS. For instance, paragraph 2 indicates that "[s]ubsidies under paragraph 1 shall include both budgetary outlays and revenue foregone by governments or their agents." Paragraph 3 clarifies that "[s]upport at both the national and sub-national level shall be included." Paragraph 7 states that the AMS "shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned" and that "[m]easures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products." Paragraphs 8-9, 10-12, and 13 concern specific methodologies for calculating the amount of, respectively, "[m]arket price support", "[n]on-exempt direct payments", and "[o]ther non-exempt measures".

7.25. In addition to the *de minimis* exemptions set out in Article 6.4, the Agreement on Agriculture also specifically exempts certain categories of support measures from the calculation of a Member's AMS. For instance, Article 6.2 refers to "government measures of assistance, whether direct or indirect, to encourage agricultural and rural development ..., investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members". Article 6.5 refers to "[d]irect payments under production-limiting programmes" that are "based on fixed area and yields", "made on 85 per cent or less of the base level of production", or constitute "livestock payments ... made on a fixed number of head". Annex 2 of the Agreement on Agriculture sets forth certain conditions that, if satisfied, would exempt certain types of measures from the calculation of a Member's AMS.

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

7.27. In this respect, we consider it important to emphasize that India does not contend that any of the legal instruments or measures identified by the complainants are exempted from the calculation of AMS pursuant to Article 6 or Annex 2 of the Agreement on Agriculture. We note, in particular, that India does not invoke any of the exemptions contained in Article 6.2 pertaining to developing country Members.¹²⁹ Rather, as described above, India's essential argument is that under

¹²⁹ See India's response to Panel question No. 51.

a correct interpretation of paragraph 1 of Annex 3, read in light of paragraph 2, measures such as the FRP and SAPs should be excluded from the calculation of AMS.¹³⁰

7.28. We proceed to determine India's AMS to sugarcane producers in three steps. First, we address the parties' arguments and evidence regarding the alleged market price support.¹³¹ Second, we assess the parties' arguments and evidence concerning the alleged non-exempt direct payments and other non-exempt policies. Third, and finally, we calculate the sum of the market price support, non-exempt direct payments, and other non-exempt policies that have been shown to exist, to determine the total amount of India's product-specific AMS to sugarcane producers for each season from 2014-15 to 2018-19.

7.1.3.2 Market price support

7.1.3.2.1 Overview

7.29. The complainants argue that India provides market price support to sugarcane producers through the Fair and Remunerative Price (FRP), a measure maintained by the Indian Central Government that requires sugar producers to pay a minimum price for sugarcane that is determined by the Central Government on an annual basis.¹³² In addition, the complainants submit that certain State Governments in India provide market price support in the form of so-called State-Advised Prices (SAPs), through which these State Governments annually set mandatory minimum prices that are higher than the FRP.¹³³ Applying the methodology in paragraph 8 of Annex 3 to calculate market price support, the complainants assert that the FRP and (in those States where they are applicable) SAPs constitute relevant applied administered prices (AAPs).¹³⁴ The complainants also provide data regarding the quantity of eligible production (QEP) in different States¹³⁵ and calculate adjusted fixed external reference prices (FERPs) to account for sugarcane quality differences¹³⁶ across different States and seasons.¹³⁷ Using these data, the complainants calculate the level of market price support for each season from 2014-15 to 2018-19.¹³⁸ The complainants also identify certain measures that, in their view, constitute budgetary payments made by India to maintain the price gap between the AAP and the FERP.¹³⁹

7.30. According to India, paragraph 1 of Annex 3 of the Agreement on Agriculture indicates that market price support must be in the form of a subsidy. Moreover, India argues, paragraph 2 of

¹³⁰ See para. 7.20 above.

¹³¹ We note that, while the complainants have argued that the FRP and SAPs should be included in the calculation of India's AMS simply on the basis that they constitute "domestic support" measures, the complainants also specifically identify these measures as comprising "market price support" within the meaning of Annex 3 of the Agreement on Agriculture. (See e.g. Brazil's first written submission, paras. 132-133; Australia's second written submission, paras. 85 and 150-152; Guatemala's first written submission, para. 1; Guatemala's second written submission, para. 3) Moreover, the complainants have calculated the level of domestic support allegedly provided by these measures by applying exclusively the calculation methodology contained in paragraphs 8 and 9 of Annex 3 of the Agreement on Agriculture.

¹³² Brazil's first written submission, paras. 25-34 and 134-155; Australia's first written submission, paras. 23-39 and 166-173; Guatemala's first written submission, paras. 37-50 and 137-165.

¹³³ Brazil's first written submission, paras. 35-48 and 156-160; Australia's first written submission, paras. 41-61 and 174-180; Guatemala's first written submission, paras. 51-72 and 137-165.

¹³⁴ Brazil's first written submission, paras. 142 and 156; Australia's first written submission, paras. 153-156; Guatemala's first written submission, paras. 140-144.

¹³⁵ MOSPI, National Accounts Statistics 2020, Statement 8.1.2 Crop-wise value of output, (Exhibit JE-147).

¹³⁶ Brazil's first written submission, paras. 146-147; Australia's first written submission, paras. 160-162; Guatemala's first written submission, paras. 146-147.

¹³⁷ Brazil's first written submission, paras. 145-148; Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)), "FERP" spreadsheet; Australia's first written submission, paras. 157-162; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "FERP" spreadsheet; Guatemala's first written submission, paras. 145-147; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "FERP details" spreadsheet.

¹³⁸ See Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)); Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)); Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)).

¹³⁹ Brazil's first written submission, paras. 161-162 and Appendix A; Australia's first written submission, paras. 181-185 and Annexes A, B, C, D-2, D-3 and E; Guatemala's first written submission, paras. 87-96 and 166-168. The complainants do not include these measures in their calculations of India's alleged market price support. (See fn 41 to para. 2.3 above and para. 7.70 below)

Annex 3 limits the scope of subsidies to "budgetary outlays and revenue foregone".¹⁴⁰ Alternatively, India argues, even if paragraph 2 does not explicitly limit the scope of subsidies in this way, it nevertheless reveals that subsidies should share the essential characteristics of "budgetary outlays and revenue foregone".¹⁴¹ India submits that, since the FRP and SAPs are payable by sugar mills and not the Central or State Governments, these measures are not subsidies, therefore do not constitute market price support within the meaning of the Agreement on Agriculture, and consequently should not be counted towards India's AMS to sugarcane producers.¹⁴² While India argues that these measures should be excluded from the calculation of its AMS, India does not otherwise contest or raise any reason to doubt the complainants' evidence or their application of the methodology set out in paragraph 8 of Annex 3.¹⁴³

7.31. Annex 3 of the Agreement on Agriculture is titled "Domestic Support: Calculation of Aggregate Measurement of Support". Paragraph 1 of Annex 3 indicates that, subject to Article 6, 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".¹⁴⁴ Paragraphs 8 and 9 of Annex 3 directly concern the calculation of a Member's market price support.

7.32. Paragraph 8 states:

Market price support: market price support shall be calculated using the gap between a fixed external reference price [FERP] and the applied administered price [AAP] multiplied by the quantity of production eligible [QEP] 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.

7.33. Thus, pursuant to the first sentence of paragraph 8, to calculate market price support, an AAP must be subtracted from a FERP, and the difference multiplied by the QEP.¹⁴⁵ Under the second sentence of paragraph 8, "budgetary payments made to maintain" the gap between the FERP and the AAP should be excluded from the calculation of market price support.

7.34. Paragraph 9 provides further guidance on the application of the methodology set out in paragraph 8, specifically with regard to the FERP component. Pursuant to paragraph 9:

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

7.35. Annex 4 of the Agreement on Agriculture is titled: "Domestic Support: Calculation of Equivalent Measurement of Support". Under its explicit terms, Annex 4 pertains to situations "where market price support as defined in Annex 3 exists but for which calculation of this component of the AMS is not practicable". We note that, in the context of this dispute, the complainants have not sought to apply the methodology contained in Annex 4.

7.36. We proceed with our analysis in three steps. First, we assess the parties' disagreement over the correct interpretation of the term "market price support" in the Agreement on Agriculture. Specifically, we address whether "market price support" refers exclusively to measures entailing

¹⁴⁰ India's first written submission, para. 62; second written submission, para. 26.

¹⁴¹ India's second written submission, para. 25.

¹⁴² India's first written submission, paras. 63-65; second written submission, para. 28-29 and 31.

¹⁴³ In response to a question from the Panel seeking to clarify India's views regarding the complainants' calculations, India stated that:

[T]he complainants have failed to demonstrate that the alleged FRP/ SAP measures qualify as market price support in view of paragraph 2 of Annex 3 of the Agreement on Agriculture. In light of this, the calculations presented by the complainants are untenable and without any basis. Without delving into any specifics, the complainants' actual calculations are made based on an incorrect interpretation of the relevant laws and the challenged measures.

(India's response to Panel question No. 45)

¹⁴⁴ Emphasis added.

¹⁴⁵ This can be expressed mathematically as: [Market price support = (FERP – AAP) * (QEP)].

government purchase of the relevant product (i.e. through government expenditure or revenue foregone). Second, and on the basis of our interpretation of the term "market price support", we determine the amount of market price support maintained by India, in accordance with the methodology set out in paragraph 8 of Annex 3. Third, we address the complainants' references to certain measures that, in their view, constitute budgetary payments made to maintain the gap between the FERP and AAP.

7.1.3.2.2 The scope of "market price support"

7.37. The complainants note that Annex 4 of the Agreement on Agriculture indicates that "market price support" is "defined in Annex 3".¹⁴⁶ They argue that, pursuant to paragraph 8 of Annex 3, market price support exists when there exists an AAP, there is a gap between the AAP and FERP, and there is a quantity of production eligible to receive the AAP.¹⁴⁷ The complainants submit that the AAP refers to a price "determined not by market forces but by administrative action", and is "the price set by the government at which specified entities will purchase certain basic agricultural products".¹⁴⁸ The complainants argue that the FRP and SAPs constitute AAPs that differ from the market price and consequently the FRP and SAPs should be included in the calculation of India's AMS to sugarcane producers, using the methodology prescribed in paragraph 8 of Annex 3.¹⁴⁹ The complainants also argue that, pursuant to Article 6.1 of the Agreement on Agriculture, any domestic support measure that is not specifically exempted from the calculation of domestic support is subject to a Member's reduction commitments under the Agreement on Agriculture.¹⁵⁰ The complainants also refer to other relevant context (including India's Schedule), the object and purpose of the Agreement on Agriculture, negotiating history, academic writings, and prior panel reports, all of which they consider to support their interpretation of the Agreement on Agriculture.¹⁵¹

7.38. India argues that the FRP and SAPs do not constitute market price support under Annex 3. Specifically, India argues that the term "market price support" in paragraph 1 of Annex 3 identifies a type of subsidy, in light of the language "any other subsidy" used in that paragraph.¹⁵² Furthermore, according to India's reading of paragraph 2 of Annex 3, a subsidy can only exist where

¹⁴⁶ Brazil's second written submission, para. 57; Australia's second written submission, para. 28; Guatemala's second written submission, para. 43.

¹⁴⁷ The complainants note that, under paragraph 8, market price support is equivalent to the difference between the "applied administered price" (AAP) and the "fixed external reference price" (FERP), multiplied by the "quantity of eligible production" (QEP). (Brazil's first written submission, para. 99; Australia's first written submission, para. 114; Guatemala's first written submission, para. 118) Brazil argues that "market price support" is a function of the QEP and the 'gap' between an AAP and the FERP. 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 and eligibility criteria to determine the QEP". (Brazil's opening statement at the first substantive meeting of the Panel, para. 13) Australia argues that market price support "will exist – or have a measurable value – when there is a gap between a FERP and an AAP" and "market price support will exist and have a value measurable under paragraph 8 when a Member sets an AAP that is higher than the relevant FERP, and determines the production eligible to receive that AAP". (Australia's opening statement at the first substantive meeting of the Panel, para. 49; second written submission, para. 33) Guatemala states that market price support "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." (Guatemala's second written submission, para. 45 (fns omitted))

¹⁴⁸ Brazil's first written submission, para. 101; opening statement at the first substantive meeting of the Panel, para. 14; Australia's first written submission, paras. 116-118; Guatemala's first written submission, para. 119 (quoting Panel Report, *China – Agricultural Producers*, para. 7.177). Australia and Guatemala argue that the AAP does not necessarily entail a price achieved by government expenditures (for instance, through budgetary payments or procurement), but rather can simply be achieved by administrative action. (Australia's first written submission, para. 119; Guatemala's first written submission, para. 119 (referring to Panel Report, *Korea – Various Measures on Beef*, para. 827))

¹⁴⁹ Brazil's first written submission, paras. 135-139 and 156; Australia's first written submission, paras. 153-156; Guatemala's first written submission, paras. 140-144.

¹⁵⁰ Brazil's second written submission, para. 20; Australia's second written submission, para. 39; Guatemala's response to Panel question No. 61, para. 16.

¹⁵¹ See e.g. Brazil's opening statement at the first substantive meeting of the Panel, paras. 8-29; second written submission, paras. 6-16 and 57-60; opening statement at the second substantive meeting of the Panel, paras. 13-31; Australia's opening statement at the first substantive meeting of the Panel, paras. 46-54; second written submission, paras. 31-84; opening statement at the second substantive meeting of the Panel, paras. 16-39; Guatemala's opening statement at the first substantive meeting of the Panel, paras. 3.9-3.17; second written submission, paras. 21-53; opening statement at the second substantive meeting of the Panel, paras. 2.13-2.18.

¹⁵² India's response to Panel question No. 18(a); closing statement at the first substantive meeting of the Panel, para. 25; second written submission, para. 18.

there is a budgetary outlay or revenue foregone by governments or their agents.¹⁵³ India submits that the Central and State Governments do not purchase the sugarcane or pay the administered prices set by the FRP and SAPs.¹⁵⁴ Rather, it is private entities (i.e. sugar mills) that do so. Therefore, the FRP and SAPs do not qualify as market price support, within the meaning of paragraph 1 of Annex 3 of the Agreement on Agriculture, and should not be included in the calculation of India's AMS to sugarcane producers.¹⁵⁵ India also contests the relevance of the complainants' additional arguments relating to context (including India's Schedule), object and purpose and negotiating history of the Agreement on Agriculture, and prior panel reports.¹⁵⁶

7.39. Certain third parties disagree with India's interpretation of Annex 3. Canada, Japan, and the United States consider that the use of the word "include" in paragraph 2 of Annex 3 demonstrates that the list of measures set out in this paragraph is not exhaustive, and measures other than budgetary outlays and revenue foregone by governments or their agents may also be included in the calculation of a Member's AMS.¹⁵⁷ The European Union argues that the commas and use of the word "or" in paragraph 1 of Annex 3 indicate that this paragraph identifies three specific forms of domestic support, which may have different characteristics, and paragraph 2 simply clarifies the notion of subsidies without suggesting that all forms of domestic support mentioned in paragraph 1 must be subsidies or characterised by budgetary outlays or revenue foregone by governments or their agents.¹⁵⁸

7.40. A number of other third parties take no position on the correct interpretation of Annex 3, but nevertheless comment on certain aspects of India's arguments. China argues that India misrepresents the findings of the panel in *China – Agricultural Producers*.¹⁵⁹ Costa Rica agrees with India that there is no rule of binding precedent in WTO dispute settlement, but submits that prior panel reports "may provide valuable guidance in assessing the characterization of the measures in question".¹⁶⁰ El Salvador submits that, since India did not establish any domestic subsidy reduction commitment in its Schedule, "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%".¹⁶¹

¹⁵³ India's first written submission, para. 62; second written submission, paras. 22-26.

¹⁵⁴ India's first written submission, para. 63; second written submission, para. 28.

¹⁵⁵ India's first written submission, para. 63; second written submission, para. 28.

¹⁵⁶ India's second written submission, para. 55; opening statement at the second substantive meeting of the Panel, paras. 6-60.

¹⁵⁷ Canada's third-party statement, paras. 5-7; Canada's third-party submission, paras. 11-12; Japan's third-party statement, para. 5; United States' third-party submission, para. 22. Japan also highlights that Article XVI:1 of the GATT 1994 refers to "any subsidy, including any form of income or price support", which supports a broad interpretation of market price support, and notes that India's Schedule identifies market price support on the basis of a fixed purchase price for sugarcane, which contradicts India's argument that the FRP does not constitute market price support. (Japan's third-party statement, para. 5) The United States considers that India's interpretation artificially limits the scope of the term "domestic support", as used in the Agreement on Agriculture, and is contradicted by the methodology to calculate market price support as set out in paragraph 8 of Annex 3. (United States' third-party submission, paras. 23-25)

¹⁵⁸ European Union's third-party submission, paras. 46-47. The European Union also considers that if Members had intended to limit the scope of their domestic support commitments to subsidies (or budgetary outlays and revenue foregone) then the Agreement on Agriculture "would simply refer to subsidies to agricultural products and not use two different expressions such as domestic support and subsidies". (Ibid. para. 43) The European Union further argues that this interpretation is supported by paragraph 1 of Annex 2 and paragraph 8 of Annex 3 of the Agreement on Agriculture, the object and purpose of the Agreement on Agriculture, and the findings of prior panels. (Ibid. paras. 44-60; European Union's third-party statement, paras. 4-13)

¹⁵⁹ China's third-party statement, paras. 4-5. China submits that India represents the panel's interpretation of the term "applied administered price" in *China – Agricultural Producers* as being influenced by the context of the case, namely the source of financing for purchase and ownership of the purchased products. China argues, however, that in that dispute, neither the parties nor the panel raised the source of finance or ownership of purchased products in interpreting that term. (Ibid. para. 5) China submits that, to the contrary, the panel "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". (Ibid.) China nevertheless agrees with India that the panel "did not address the question of what would constitute ... 'market price support' or whether the applied administered price is the sole prerequisite to a market price support measure". (Ibid. para. 6)

¹⁶⁰ Costa Rica's third-party submission, para. 12. Costa Rica also argues 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 ... the [Agreement on Agriculture]". (Ibid. para. 13)

¹⁶¹ El Salvador's third-party submission, p. 9.

7.41. The difference in the parties' arguments raises the issue of whether market price support, within the meaning of the Agreement on Agriculture, only exists when the government purchases (i.e. pays for) the relevant agricultural product. We note at the outset that the plain meaning of the term "market price support" does not reveal any such limitation. Specifically, the "market price" of an agricultural product is the price of that product in the market¹⁶², and "price support" refers to "assistance from a government or other official body in maintaining prices at a certain level regardless of supply or demand."¹⁶³ Thus, the concept of market price support, on its face, appears to refer to *any* government measures that set and maintain prices at a certain level, independent of the supply and demand dynamics in the market. This would appear to include measures that set or maintain mandatory minimum prices payable by private entities.

7.42. Turning to the usage of this term in the Agreement on Agriculture, we recall that the logic of the Agreement on Agriculture is that any measure that provides support to domestic agricultural producers should be included in the calculation of a Member's AMS *unless* it is specifically exempted or otherwise excluded from that calculation, pursuant to a provision of the Agreement on Agriculture.¹⁶⁴ We further understand that a mandatory minimum price for agricultural products, that is independent of supply and demand in the market, could indeed provide some measure of support to producers of agricultural products, regardless of whether the price is payable by private entities or the government. Conceptually, therefore, a mandatory minimum price set by the government but payable by private entities would seem to constitute "domestic support" to agricultural producers and would therefore have to be included in the calculation of a Member's AMS.

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

7.44. The first pillar of India's arguments concerns paragraph 1 of Annex 3. This paragraph indicates, *inter alia*, that a Member's 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')." India submits that the use of the words "any other subsidy" reveals that the preceding measures must also be subsidies.¹⁶⁵ The complainants, however, variously argue that the phrase "any other subsidy" can be interpreted differently: (i) Australia and Guatemala submit that this language could indicate that domestic support measures *may* be, but are not *necessarily*, in the form of subsidies¹⁶⁶; (ii) Brazil and Guatemala consider that this language could indicate that the second and third categories of domestic support identified in paragraph 1, namely non-exempt direct payments and other non-exempt policies, are subsidies¹⁶⁷; and finally, Guatemala submits that this language could even refer exclusively to the third category of domestic support, namely "other non-exempt policies".¹⁶⁸

7.45. Based on the text of paragraph 1, we consider that a number of the interpretations put forward by the parties are plausible. We recognize that the phrase "any other subsidy" in paragraph 1 can be understood to suggest that all three types of measures (market price support, non-exempt direct payments, and other non-exempt policies) are "subsidies".¹⁶⁹ At the same time, it is equally plausible

¹⁶² The term "market price" is defined as "[t]he current price asked for a product, commodity, or service in a particular market". (Oxford English Dictionary online, definition of "market price, n." <https://www.oed.com/view/Entry/247700> (accessed 22 July 2021))

¹⁶³ Oxford English Dictionary online, definition of "price support, n." <https://www.oed.com/view/Entry/151135> (accessed 22 July 2021).

¹⁶⁴ See paragraphs 7.21 to 7.26 above.

¹⁶⁵ India's second written submission, para. 18. See also India's response to Panel question No. 18(a).

¹⁶⁶ Australia's opening statement at the first substantive meeting, para. 43; Guatemala's second written submission, para. 35.

¹⁶⁷ Brazil's opening statement at the second substantive meeting, paras. 17-18; Guatemala's second written submission, para. 37.

¹⁶⁸ Guatemala's second written submission, para. 36.

¹⁶⁹ We are aware that the panel in *US – Upland Cotton* concluded "that all relevant types of support for the purposes of the Agreement on Agriculture are subsidies". (Panel Report, *US – Upland Cotton*, para. 7.422)

that the phrase "any other subsidy" merely identifies the "non-exempt direct payments" and "other non-exempt policies" as subsidies. Based on its text and syntax, we consider that paragraph 1 does not clarify whether market price support is a "subsidy".¹⁷⁰

7.46. Proceeding to the second pillar of India's argument, concerning paragraph 2 of Annex 3, we note that this paragraph states that "[s]ubsidies under paragraph 1 shall include both budgetary outlays and revenue foregone by governments or their agents." India submits that the words "include both" limit the defined universe of subsidies to budgetary outlays and revenue foregone.¹⁷¹ India argues that otherwise the term "both" would be redundant.¹⁷² Alternatively, assuming that paragraph 2 contains a non-exhaustive list, India argues that subsidies as defined in paragraph 2 should at least have the same "characteristics of governmental expenditure or expense from a public account", because an unlisted type of subsidy must share a "commonality" with the subsidies specifically listed in paragraph 2.¹⁷³ The complainants submit that the term "shall include" merely indicates that subsidies *include*, but are not *limited to*, budgetary outlays and revenue foregone.¹⁷⁴ They point to the ordinary meaning of the term "include" and submit that the word "both" is not redundant, but rather emphasizes the inclusion of the measures specifically identified.¹⁷⁵ In addition, Brazil and Guatemala see no basis to presume that other types of subsidies must share a commonality in the form of government expenditure.¹⁷⁶

7.47. In our view, a textual analysis of paragraph 2 is inconclusive. On the one hand, we agree with India that there are instances of usage where the words "includes both" can be understood to mean "limited to".¹⁷⁷ On the other hand, we also agree with the complainants that the word "both" can function as a signifier of emphasis rather than exclusion, such that the phrase "includes both" is not necessarily synonymous with "includes only".¹⁷⁸ In our view, the significance of the word "both",

We note, however, that this finding constituted an *obiter dicta* observation and the panel itself concluded that it was "inappropriate" and "unnecessary" to give "an exhaustive definition of 'support'". (Ibid. para. 7.423) We do not consider that the observations of the panel in *US – Upland Cotton* relieve us from our duty to make an objective assessment of the matter before us in the present dispute, and we therefore address the parties' interpretative arguments on their merits.

¹⁷⁰ This analysis also holds for the Spanish and French versions of the text, which refer, respectively, to "sostenimiento de los precios del mercado, de pagos directos no exentos o de cualquier otra subvención no exenta del compromiso de reducción" and "soutien des prix du marché, de versements directs non exemptés, ou de toute autre subvention qui n'est pas exemptée de l'engagement de réduction".

¹⁷¹ India's closing statement at the first substantive meeting of the Panel, para. 27; second written submission, para. 22.

¹⁷² India's closing statement at the first substantive meeting of the Panel, para. 27. India adds that, while the term "include" may indicate a non-exhaustive list, when it is followed by the term "both", it loses that function. (India's second written submission, para. 22)

¹⁷³ India's second written submission, paras. 25 and 42.

¹⁷⁴ Brazil's opening statement at the first substantive meeting of the Panel, para. 32; Australia's opening statement at the first substantive meeting of the Panel, para. 45; Australia's second written submission, paras. 59-61; Guatemala's opening statement at the first substantive meeting of the Panel, para. 3.8.

¹⁷⁵ Brazil's opening statement at the second substantive meeting of the Panel, para. 22; Australia's opening statement at the second substantive meeting of the Panel, para. 31; Guatemala's opening statement at the second substantive meeting of the Panel, para. 2.9. As an example of such usage, the complainants submit that the sentence "the food at the buffet shall include both soup and pasta" does not imply that *only* soup and pasta are available at the buffet. (Brazil's opening statement at the second meeting of the Panel, para. 25; Australia's closing statement at the first substantive meeting of the Panel, para. 17; Guatemala's second written submission, para. 20)

¹⁷⁶ Brazil's opening statement at the second meeting of the Panel, para. 26; Guatemala's opening statement at the second substantive meeting of the Panel, para. 2.11. Guatemala notes that the relevant commonality shared by subsidies is "that the measure provides support in favour of agricultural producers and that this support can be expressed in monetary terms". (Guatemala's opening statement at the second substantive meeting of the Panel, para. 2.11) Australia, for its part, argues that the negotiating history of the Agreement on Agriculture reveals that "[t]here is no suggestion that the negotiators sought to limit domestic support to subsidies. On the contrary, during the negotiations, market price support was conceptualised as 'including any measure ... which acts to maintain producer prices at levels above those prevailing in international trade for the same or comparable products'". (Australia's second written submission, para. 66 (quoting Chairman's Note on Options in the Agricultural Negotiations, MTN.GNG/AG/W/1/Add.4 (Exhibit JE-156), para. 4))

¹⁷⁷ This makes sense in circumstances where the universe of things being described consists exclusively of two things, such as India argues is the case here. An example of such usage would be a sentence indicating that "the chemical composition of water includes both hydrogen and oxygen".

¹⁷⁸ See e.g. Oxford English Dictionary online, "both, pron., adv., and adj." <https://www.oed.com/view/Entry/21867> (accessed 22 July 2021). This would be appropriate in circumstances

where it follows the words "include" or "includes", depends on whether the universe of things being described is limited to the things identified in the sentence. In the present proceedings, the very issue we are asked to resolve is whether the two listed items in paragraph 2 represent the complete universe of subsidies (within the meaning of the Agreement on Agriculture). Thus, by relying on the word "both" to define the universe of "subsidies", India's argument seems to put the cart before the horse.¹⁷⁹ We therefore do not consider that, on its face, paragraph 2 limits the scope of subsidies to "budgetary outlays" and "revenue foregone".

7.48. We are also unpersuaded by India's argument that, even if paragraph 2 is merely indicative, it nevertheless necessarily means that "subsidies" must share a commonality with "budgetary outlays" and "revenue foregone" in the form of "government expenditure".¹⁸⁰ If the drafters had intended for such a limitation to appear, they would probably have set it forth explicitly. We note India's contextual argument that "[t]he usage of the phrases 'by virtue of governmental action' and 'whether or not a charge on the public account is involved' in [Article 9.1(c) of the Agreement on Agriculture] ... and the deliberate omission of such wide language in [paragraph 2 of Annex 3] clearly establishes that paragraph 2 of Annex 3 does not include private expenditures."¹⁸¹ We note, however, that Article 9.1(c) refers *exclusively* to "payments ... that are financed by virtue of governmental action".¹⁸² We are therefore not convinced that this language is as "wide" as India assumes. Furthermore, the language of Article 9.1(c) does not, in our view, clarify whether the subsidies referred to in paragraph 2 of Annex 3 must exclusively be in the form of government expenditure or revenue foregone.

7.49. We note, at this juncture, that India has failed to identify any provision that, on its face, unambiguously limits the scope of market price support to measures entailing government purchases of the relevant agricultural product (i.e. through government expenditure or revenue foregone). Rather, both pillars of India's interpretation are premised on language that can easily be interpreted differently. In this regard, we observe that, in contrast to the ambiguities of paragraphs 1 and 2 of Annex 3, other provisions of the Agreement on Agriculture that exclude certain domestic support measures from the scope of Members' reduction commitments do so clearly and explicitly (e.g. Articles 6.2, 6.4, and 6.5, and Annex 2).

7.50. While India's interpretation of the scope of the term "market price support" focuses on paragraphs 1 and 2 of Annex 3, we also consider it pertinent that these are not the only provisions of the Agreement on Agriculture that refer to market price support. Importantly, paragraph 8 of Annex 3 sets out the methodology to quantify the amount of market price support that a Member provides. Under paragraph 8, "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

where the universe of items is larger than the two items identified and the inclusion of the two items identified is surprising or noteworthy. For instance, one might say that "visitors to theme parks include both children and the elderly". We note that such usage is more natural with the use of the word "may", as in "X may include both Y and Z". We nevertheless note that additional ambiguities can arise from the use of the word "may", and consequently the use of the word "shall" instead of "may" in paragraph 2 is not determinative as to the intended significance of the words "include both".

¹⁷⁹ In our view, the French and Spanish versions of the text are also not definitive. The French version states that "[l]es subventions visées au paragraphe 1 comprendront à la fois les dépenses budgétaires et les recettes sacrifiées par les pouvoirs publics ou leurs agents." The definition of "comprendre" includes "[i]nclure, faire entrer dans un ensemble". (Dictionnaire de l'Académie française, 9^e édition (actuelle), definition of "comprendre" <https://www.dictionnaire-academie.fr/article/A9C3297> (accessed 22 July 2021)) The Spanish text states that "[l]as subvenciones a que se refiere el párrafo 1 comprenderán tanto los desembolsos presupuestarios como los ingresos fiscales sacrificados por el gobierno o los organismos públicos." The Spanish verb "comprender" is defined as "[c]ontener o incluir en sí algo." (Real Academia Española, definition of "comprender" <https://dle.rae.es/comprender?m=form> (accessed 22 July 2021)) We observe that the French and Spanish verbs "comprendre" and "comprender" arguably correspond more closely to the English words "comprise" or "consist of" than to "include". We also note, however, that a synonym of "comprise" is "include", which ultimately returns us to the same interpretative difficulties we face with the English version. (Oxford English Dictionary online, definition of "comprise, v." <https://www.oed.com/view/Entry/37893> (accessed 22 July 2021))

¹⁸⁰ See e.g. India's second written submission, paras. 25 and 42.

¹⁸¹ India's opening statement at the second substantive meeting of the Panel, para. 16. (underlining omitted)

¹⁸² Article 9.1(c) states that export subsidies subject to Members' reduction commitments include: "payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived".

production eligible to receive the applied administered price." Furthermore, "[b]udgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS."

7.51. We note India's argument that paragraph 8 concerns the *calculation* of market price support whereas paragraphs 1 and 2 concern the *existence* of market price support.¹⁸³ We are cognizant that, on its face, paragraph 8 explains the calculation methodology for market price support, rather than providing a definition *per se*. In our view, however, by identifying the constituent elements of market price support (i.e. the FERP, AAP, and QEP), the calculation methodology set out in paragraph 8 also provides a definition for market price support. We therefore find it unsurprising that Annex 4 of the Agreement on Agriculture refers to market price support "as defined" in Annex 3. We see no provision in Annex 3, or elsewhere in the Agreement on Agriculture, other than paragraph 8, that can be said to define market price support. We therefore consider paragraph 8 to be highly pertinent to our examination of whether market price support can only exist where the government purchases or procures the agricultural product. Moreover, even if India were correct that paragraph 8 merely sets forth a calculation methodology, since it is one of the few provisions in the Agreement on Agriculture that refers to "market price support", and contains a rather detailed methodology for its calculation, we consider this provision to be highly relevant to our interpretation of the term "market price support".

7.52. We therefore find that, by defining market price support, paragraph 8 describes the circumstances in which market price support can be said to exist.¹⁸⁴ Paragraph 8 refers to situations where an AAP differs from the FERP, and there is a quantity of production eligible to receive that AAP. We note that the word "applied" means "put to practical use".¹⁸⁵ The word "administered" can mean "managed, controlled, effected, kept running".¹⁸⁶ More specifically in the economic sense, and in particular in relation to a price or interest rate, "administered" is defined as "determined not by market forces but by administrative action (as of a large company or a government)".¹⁸⁷ The "applied administered price" therefore refers to a price for agricultural products that is determined by the administrative action of the government and not by market forces.¹⁸⁸ It follows that if an AAP that differs from the FERP can be shown to exist, then market price support can be said to exist, within the meaning of the Agreement on Agriculture, provided that there is domestic production that is eligible to receive that AAP. Under this interpretation of the Agreement on Agriculture, market price support could potentially exist in situations where the government does not purchase the relevant product.

7.53. We further observe that the application of the methodology set out in paragraph 8 entails a relatively complex process of determining the amounts of each component (i.e. AAP, FERP, and QEP) and applying the formula. We note that the quantity of production "eligible" to receive the AAP is not necessarily the same as the quantity of production that actually receives that price.¹⁸⁹ Furthermore, under the second sentence of paragraph 8, "budgetary payments" made to maintain the gap between the AAP and the FERP are not to be taken into account in quantifying the amount of market price support that a Member provides. It is therefore clear to us that paragraph 8 sets out a methodology for calculating market price support that is divorced from any expenditure incurred

¹⁸³ India's response to Panel question Nos. 48(a) and (b).

¹⁸⁴ We note in particular that Annex 4 of the Agreement on Agriculture sets forth a methodology to calculate an "equivalent measurement of support" for market price support in situations "where market price support *as defined in Annex 3 exists* but for which calculation of this component of the AMS is not practicable". (emphasis added) This indicates that the "existence" of market price support is based on the "definition" appearing in Annex 3 and, as explained, the only definition of market price support in Annex 3 is to be found in paragraph 8.

¹⁸⁵ Oxford English Dictionary online, definition of "applied, adj." <https://www.oed.com/view/Entry/9713> (accessed 22 July 2021). See also Panel Report, *China – Agricultural Producers*, para. 7.177.

¹⁸⁶ Oxford English Dictionary online, definition of "administered, adj" <https://www.oed.com/view/Entry/2532> (accessed 22 July 2021).

¹⁸⁷ Oxford English Dictionary online, definition of "administered, adj" <https://www.oed.com/view/Entry/2532> (accessed 22 July 2021). See also Panel Report, *China – Agricultural Producers*, para. 7.177.

¹⁸⁸ In *China – Agricultural Producers*, the panel concluded that "[t]he AAP ... is the price set by the government at which specified entities will purchase certain basic agricultural products". (Panel Report, *China – Agricultural Producers*, para. 7.177)

¹⁸⁹ See e.g. Panel Reports, *Korea – Various Measures on Beef*, para. 831; *China – Agricultural Producers*, para. 7.296; and Appellate Body Report, *Korea – Various Measures on Beef*, para. 120.

by the government in maintaining that market price support, let alone requires that the government should pay the AAP.

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

7.55. We further note that the calculation methodologies set out in Annex 3 for quantifying "non-exempt direct payments" and "other non-exempt policies" specifically indicate that such measures can be quantified using "budgetary outlays".¹⁹⁰ Thus, in the case of quantifying non-exempt direct payments or other non-exempt measures, the Agreement on Agriculture establishes that budgetary outlays, among other approaches, may be used in the first instance¹⁹¹ without necessarily assessing the practicability of any alternative methodologies. It stands to reason that if market price support only came into existence in situations where a government purchases the agricultural product (i.e. through government expenditure or revenue foregone), then the Agreement on Agriculture would similarly set out a hierarchically equivalent calculation methodology based on budgetary outlays rather than first requiring the application of a methodology based on an AAP, FERP, and QEP.¹⁹² The fact that it does not do so strongly suggests that market price support can exist even in the absence of government expenditure or revenue foregone.

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

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

¹⁹⁰ Paragraphs 10-12 of Annex 3 to the Agreement on Agriculture concern the calculation of non-exempt direct payments, and indicate that "non-exempt direct payments which are dependent on a price gap shall be calculated either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays" and "[n]on-exempt direct payments which are based on factors other than price shall be measured using budgetary outlays". (emphasis added) Paragraph 13 of Annex 3, concerning other non-exempt measures, indicates that "the value of such measures shall be measured using government budgetary outlays or, where the use of budgetary outlays does not reflect the full extent of the subsidy concerned, the basis for calculating the subsidy shall be the gap between the price of the subsidized good or service and a representative market price for a similar good or service multiplied by the quantity of the good or service". (emphasis added)

¹⁹¹ Paragraphs 10-13 of Annex 3 of the Agreement on Agriculture indicate that, for purposes of quantifying either of these types of measures, other methodological approaches are hierarchically equivalent to a budgetary outlay approach.

¹⁹² Under paragraphs 1 and 2 of Annex 4, a budgetary outlay methodology for calculating market price support is contemplated only in the event that it is not practicable to apply the methodology in paragraph 8 of Annex 3 and it is not practicable to calculate the amount of market price support using just the AAP and QEP.

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

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

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

7.60. We also wish to note that our foregoing interpretation is consistent with the interpretation relied upon by India itself in concluding its Schedule. Specifically, India's Schedule contains calculations of market price support for the years 1986-88 on the basis of a measure that fixed a minimum price for sugarcane that was payable by private entities, and not the government.¹⁹³ India argues that, "[i]f a Member's Schedule is relied upon to interpret the meaning of 'market price support'..., this will lead to a situation where there will be multiple meanings of the same terminology under the [Agreement on Agriculture] depending upon the Schedule of a Member."¹⁹⁴ India also refers¹⁹⁵ to a statement by the Appellate Body that "[t]he Schedule of one Member, and even the scheduling practice of a number of Members, is not relevant in interpreting the meaning of a treaty provision, unless that practice amounts to 'subsequent practice in the application of the treaty' within the meaning of Article 31(3)(b) of the Vienna Convention."¹⁹⁶ We observe that Members' Schedules have, in the past, been used by panels and the Appellate Body to interpret Members' substantive obligations, on the basis that the Schedules constitute part of the covered agreements.¹⁹⁷ We also note that neither India nor any other party has pointed to any Schedule that evinces an alternative interpretation of market price support. We do not consider it necessary to address, as a general matter, the relevance of Members' Schedules in interpreting the covered agreements. It suffices, for

¹⁹³ G/AG/AGST/IND, p. 28; Sugarcane (Control) Order 1966 (prior to 2009), (Exhibit JE-148), Clause 3(1).

¹⁹⁴ India's second written submission, para. 50.

¹⁹⁵ India's opening statement at the second substantive meeting of the Panel, para. 54.

¹⁹⁶ Appellate Body Report, *Chile - Price Band System*, para. 272.

¹⁹⁷ See e.g. Appellate Body Report, *US - Gambling*, para. 182; Panel Report, *China - Agricultural Producers*, para. 7.263.

our purposes, to note that India's Schedule was concluded on the basis of the same interpretation as our own, and there is no indication that any Member's Schedule contradicts that interpretation.

7.61. We further note that our interpretation of market price support within the meaning of the Agreement on Agriculture is consistent with prior panel reports. In *Korea – Various Measures on Beef*, the panel pointed out that "the quantification of market price support in AMS terms is not based on expenditures by government. Market price support as defined in Annex 3 can exist even where there are no budgetary payments."¹⁹⁸ The panel in *China – Agricultural Producers* similarly found that the AAP "is the price set by the government at which *specified entities* will purchase certain basic agricultural products".¹⁹⁹ We note India's arguments that the findings of these panels are not relevant to the present disputes.²⁰⁰ For the purpose of resolving the present disputes, we do not consider it necessary to address as a general matter the precedential value of prior panel or Appellate Body reports. We simply note that the panels in *Korea – Various Measures on Beef* and *China – Agricultural Producers* interpreted the term "market price support" as we do in this report.

7.1.3.2.3 India's market price support to sugarcane producers

7.62. We recall that, under paragraph 8 of Annex 3 of the Agreement on Agriculture, "market price support shall be calculated using the gap between a fixed external reference price [FERP] and the applied administered price [AAP] multiplied by the quantity of production eligible [QEP] to receive the applied administered price". The determination of India's AMS to sugarcane producers for each season from 2014-15 to 2018-19 requires the application of this methodology.

7.63. In accordance with that approach, the complainants have adduced evidence and argumentation regarding the relevant FERP, AAP, and QEP, and submitted calculations of India's market price support to sugarcane producers, for each season from 2014-15 to 2018-19.²⁰¹

7.64. India does not contest the accuracy of the data or other evidence adduced by the complainants, nor does India contest the accuracy of the complainants' calculations based on that data and evidence. India maintains, however, that the burden is on the complainants to establish that India is acting inconsistently with Article 7.2(b), and that India's silence regarding the complainants' evidence and calculations should not be construed as agreement or assent.²⁰²

7.65. We have closely scrutinized the evidence and data adduced by the complainants, as well as the complainants' calculations. In light of the complexity and level of detail of the complainants' evidence and calculations, we provide a detailed description of our review in the Appendix to this Report. Our findings set out in the Appendix constitute an integral part of this Report.

7.66. As explained in greater detail in the Appendix, we consider that the complainants have sufficiently demonstrated that the FRP and SAPs do indeed constitute AAPs within the meaning of paragraph 8 of Annex 3. Moreover, we consider that the complainants have provided sufficient evidence to determine the FERP and QEP for each season from 2014-15 to 2018-19. We therefore consider that the complainants have adequately met their burden of demonstrating the existence of market price support, as well as the amount of that market price support, for each sugar season from 2014-15 to 2018-19.

7.67. For the reasons set out in full in the Appendix, we find that the total amount of market price support to sugarcane producers maintained by India in each sugar season from 2014-15 to 2018-19 was as follows:

¹⁹⁸ Panel Report, *Korea – Various Measures on Beef*, para. 827.

¹⁹⁹ Panel Report, *China – Agricultural Producers*, para. 7.177. (emphasis added)

²⁰⁰ India argues that: there is no rule of binding precedent in WTO dispute settlement; the ruling of a WTO panel is based on the facts and issues presented before it and does not have any precedential value; neither of these panel reports addressed "the issue that is central to the present disputes i.e. what constitutes market price support or when a market price support can be said to exist within the meaning of Annex 3"; and in all previous instances where panels have adjudicated issues pertaining to market price support, the market price support measures involved government purchases of the agricultural product in question. (India's first written submission, paras. 66-79; closing statement at the first substantive meeting of the Panel, paras. 35-36; second written submission, para. 30)

²⁰¹ See Appendix to the Panel Report.

²⁰² India's responses to questioning at the first substantive meeting of the Panel.

Sugar season	Market price support (INR million)
2014-15	903,750.80
2015-16	880,418.99
2016-17	815,045.69
2017-18	1,072,685.61
2018-19	1,110,085.53

7.68. In section 7.1.4 below, we assess whether India's AMS to sugarcane producers, including its market price support, was in excess of the permitted amount.

7.1.3.2.4 Budgetary payments made to maintain the price gap

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

7.70. The complainants identify a number of measures that, in their view, constitute "budgetary payments made to maintain" India's market price support.²⁰³ Specifically, although the complainants do not include these measures in their quantification of India's market price support, they submit that these are measures through which India provides domestic support to sugarcane producers.²⁰⁴ Australia requests that we explicitly identify these measures as "measures through which India is providing market price support above *de minimis*".²⁰⁵

7.71. India does not comment on Australia's request or the complainants' characterization of these measures.

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

7.73. To the extent that Australia is concerned that our findings with regard to Article 7.2(b) might be read as not covering *all* relevant measures through which India maintains market price support²⁰⁶, we wish to emphasize that, for India to be in compliance with Article 7.2(b), the total amount of non-exempt product-specific domestic support provided to sugarcane producers must not exceed 10% of the total value of sugarcane production in a given season. If India were to eliminate aspects of its market price support regime while continuing to provide budgetary payments that previously maintained the gap between the FERP and the AAP, it might well be that such budgetary payments would, in the absence of a mandatory minimum price, constitute domestic support to sugarcane producers that would be included in the calculation of India's AMS to sugarcane producers. We do

²⁰³ Brazil's first written submission, paras. 161-162 and Appendix A (stating that "the programs listed in Appendix A *may be* direct payments made to maintain the price gap, within the meaning of paragraph 8" (emphasis added)); Australia's first written submission, paras. 181-185 and Annexes A, B, C, D-2, D-3 and E; Guatemala's first written submission, paras. 87-96 and 166-168.

²⁰⁴ Brazil's first written submission, paras. 161-162; Australia's first written submission, paras. 185-186; Guatemala's first written submission, para. 167.

²⁰⁵ Australia's first written submission, para. 186.

²⁰⁶ Australia states that, "[i]f the amount of market price support is inconsistent with India's obligations, then all the measures through which the price 'gap' has been or is being achieved (and that are identified in the relevant panel request) should be covered by the Panel's findings as to whether impermissible levels of non-exempt domestic support have been provided in certain years through the acts or omissions of a Member." (Australia's response to Panel question No. 20(b), para. 50)

not, however, consider it necessary in the present proceedings to identify measures which, it is uncontested, should not be taken into account in calculating India's AMS to sugarcane producers during the sugar seasons 2014-15 to 2018-19.

7.1.3.3 Non-exempt direct payments and other non-exempt policies

7.1.3.3.1 Overview

7.74. In addition to their assertions regarding India's alleged market price support, the complainants submit that a number of State Governments in India maintain other forms of non-exempt product-specific domestic support to sugarcane producers, which must also be included in the calculation of India's AMS to sugarcane producers. Specifically, the complainants identify payments or policies allegedly maintained by three States in India, namely, Tamil Nadu, Andhra Pradesh, and Karnataka, during certain of the sugar seasons from 2014-15 to 2018-19.²⁰⁷ According to the complainants, these three States provide domestic support to sugarcane producers in the form of "non-exempt direct payments" or "other subsidies not exempted from the reduction commitment ('other non-exempt policies')", within the meaning of paragraph 1 of Annex 3 to the Agreement on Agriculture.²⁰⁸ In the complainants' view, none of the alleged direct payments or other policies are exempt under any provision of the Agreement on Agriculture²⁰⁹ and therefore they should be included in the calculation of India's AMS to sugarcane producers.²¹⁰ Moreover, the complainants consider that the State-level support is provided in addition to the Central and State Governments' provision of market price support, thus differentiating it from the measures that are excluded from the calculation of India's AMS because they constitute "budgetary payments made to maintain" a gap within the meaning of paragraph 8 of Annex 3.²¹¹

7.75. India argues that, without prejudice to the complainants' characterization of India's alleged non-exempt direct payments or other non-exempt policies, 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".²¹²

7.76. Our understanding of the rules in the Agreement on Agriculture regarding the calculation of a Member's AMS is set out in section 7.1.3.1 above. To recall, the Agreement on Agriculture prescribes that any measure by a Member that provides support to its agricultural producers should, in principle, be included in the calculation of a Member's AMS unless that measure is shown to be exempted, or otherwise excluded, from that calculation under the Agreement on Agriculture. We further recall that, pursuant to paragraph 1 of Annex 3 of the Agreement on Agriculture, "non-exempt direct payments" and "other non-exempt policies" are to be included in the calculation of a Member's AMS.

7.77. We note, in this respect, that India has not argued that any of the payments or policies allegedly maintained by Tamil Nadu, Andhra Pradesh, and Karnataka are exempt or otherwise excluded from the calculation of India's AMS to sugarcane producers. We therefore understand that India's main argument with respect to these alleged State-level payments and policies is that the complainants have failed to demonstrate that the alleged amounts provided thereunder exceed the

²⁰⁷ See e.g. Brazil's first written submission, para. 163 and Appendix B; Australia's first written submission, paras. 190-194, 195-197, 198-203, Annexes E-1, E-5 and E-8; Guatemala's first written submission, paras. 170-175, 176-179, 180-185, and Table 12(Rev.) Following the second substantive meeting of the Panel, Guatemala withdrew its assertions regarding Karnataka's alleged payments and omitted the alleged amounts from its calculations of India's AMS. (Guatemala's comments on India's response to Guatemala's question No. 3)

²⁰⁸ See e.g. Brazil's first written submission, para. 163; Australia's first written submission, para. 189; Guatemala's first written submission, paras. 167-169 and Table 12(Rev.)

²⁰⁹ Specifically referring to Articles 6.2, 6.5, and Annex 2 of the Agreement on Agriculture.

²¹⁰ Brazil's first written submission, para. 163; Australia's first written submission, paras. 193, 197, and 202; Guatemala's first written submission, paras. 172, 177, and 182.

²¹¹ Brazil's first written submission, para. 163; Australia's first written submission, paras. 193, 197, and 202; Guatemala's first written submission, paras. 173, 177, and 181. To recall, paragraph 8 of Annex 3 states that "[b]udgetary payments made to maintain [the gap between the FERP and the AAP], such as buying-in or storage costs, shall not be included in the AMS." (See section 7.1.3.2.4 above)

²¹² India's first written submission, paras. 81-83; second written submission, para. 6.

de minimis level of product-specific support that India is permitted to provide to sugarcane producers, pursuant to Article 7.2(b) of the Agreement on Agriculture.²¹³

7.78. We are aware of the complainants' argument that, since India exceeds the applicable *de minimis* level through market price support alone, it may not be necessary for us to include the alleged State-level payments or policies in the calculation of India's AMS to sugarcane producers.²¹⁴ The complainants maintain, however, that regardless of whether we include the payments or policies in the calculation, India's compliance obligations with respect to Article 7.2(b) of the Agreement on Agriculture would encompass all non-exempt product-specific domestic support maintained by India.²¹⁵ We note that the complainants assert the existence of the three State-level measures at issue and argue that, together with market price support, such measures contribute to India's alleged violation of its obligation under Article 7.2(b). According to paragraph 1 of Annex 3 of the Agreement on Agriculture, measures in the form of non-exempt direct payments and other non-exempt policies must, in principle, be taken into account in calculating a Member's product-specific AMS. We see such measures as being different from measures such as budgetary payments made to maintain market price support, which, pursuant to paragraph 8 of Annex 3, should not be included in that calculation.²¹⁶ On this basis, we consider it appropriate to address the complainants' arguments regarding the alleged non-exempt direct payments and other non-exempt policies in favour of sugarcane producers in the States of Tamil Nadu, Andhra Pradesh, and Karnataka, in order to secure a positive solution to these disputes.

7.79. With respect to the precise calculation methodologies for "non-exempt direct payments" and "other non-exempt policies", the complainants assert that the Panel may use the "budgetary outlay" approach pursuant to paragraphs 10 to 13 of Annex 3 of the Agreement on Agriculture.²¹⁷ In the complainants' view, this approach is appropriate for the calculation of either form of domestic support.²¹⁸ India does not contest the use of the "budgetary outlay" approach to quantify the alleged State-level support.²¹⁹

7.80. Paragraphs 10 to 12 of Annex 3 of the Agreement on Agriculture contain rules for quantifying the level of domestic support provided through "non-exempt direct payments":

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

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

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

7.81. Regarding the quantification of "other non-exempt policies", paragraph 13 of Annex 3 provides:

13. Other non-exempt measures, including input subsidies and other measures such as marketing-cost reduction measures: the value of such measures shall be measured using government budgetary outlays or, where the use of budgetary outlays does not

²¹³ We recall India's position that the complainants have not demonstrated the existence of any market price support to sugarcane producers in India. (See paras. 7.29-7.30 above)

²¹⁴ Brazil's responses to Panel question No. 23(a), para. 25, and No. 73, paras. 91-94; Australia's first written submission, para. 149; response to Panel question No. 23(a), para. 53; Guatemala's response to Panel question No. 23(a), paras. 45-46.

²¹⁵ See e.g. Brazil's response to Panel question No. 23(a), para. 26; Australia's response to Panel question No. 23(a), para. 54; Guatemala's response to Panel question No. 23(a), para. 47.

²¹⁶ See section 7.1.3.2.4 above.

²¹⁷ Complainants' responses to Panel question No. 49.

²¹⁸ Complainants' responses to Panel question No. 49. The complainants add that, to the extent the Panel finds that the three States provide domestic support in addition to market price support, that support can be calculated using budgetary outlays, regardless of the precise characterization of each payment or policy. (Ibid.) We address this issue in the following subsections, as necessary.

²¹⁹ India's response to Panel question No. 49.

reflect the full extent of the subsidy concerned, the basis for calculating the subsidy shall be the gap between the price of the subsidized good or service and a representative market price for a similar good or service multiplied by the quantity of the good or service.

7.82. In light of the rules set out in paragraphs 10 to 13 of Annex 3, we agree that the "budgetary outlay" approach is an appropriate methodology to calculate the amount of domestic support provided through the alleged non-exempt direct payments and other non-exempt policies. We note, in this respect, that in support of their factual assertions, the complainants adduce official State Government Budget documents for a number of relevant financial years. From an evidentiary point of view, the parties agree that the information contained in the Budget documents for a particular financial year reveals budgetary information relating to the sugar season preceding that financial year.²²⁰

7.83. With these considerations in mind, we proceed to our assessment of the parties' arguments and evidence concerning each of the three alleged State-level policies and payments identified by the complainants.

7.1.3.3.2 Tamil Nadu's transitional production incentives

7.84. The complainants argue that the State Government of Tamil Nadu provides domestic support to sugarcane producers through direct payments, referred to as "transitional production incentives". They also point out that Tamil Nadu is one of a number of Indian States that are transitioning from the SAP to a system of revenue-sharing-based sugarcane prices.²²¹ To facilitate the transition process, the complainants argue that Tamil Nadu provides direct payments to sugarcane farmers. According to the complainants, the funds received by sugarcane farmers through these direct payments are over and above the funds received through the FRP. The complainants submit that Tamil Nadu's Budget Publication indicates certain amounts budgeted under the entry "Production Incentive to Sugarcane Farmers" for the 2017-18 and 2018-19 sugar seasons.²²² The complainants characterize these payments as "non-exempt direct payments", within the meaning of paragraph 1 of Annex 3 of the Agreement on Agriculture.²²³ For the reasons outlined in paragraph 7.74 above, they also argue that the amounts allegedly disbursed to sugarcane farmers for this purpose are not exempt and therefore should be included in the calculation of India's AMS.²²⁴

7.85. India does not raise any arguments regarding Tamil Nadu's alleged transitional production incentives.

7.86. We begin our analysis by observing that, through the Tamil Nadu Sugarcane (Regulation of Purchase Price) Act of 2018, Tamil Nadu did indeed replace its SAP with a system of revenue-sharing-based sugarcane price.²²⁵ We also understand that, as of September 2018, Tamil

²²⁰ Brazil's first written submission, fn 99 to Table 9 on p. 24 and response to Panel question No. 28(a), para. 51; Australia's response to Panel question No. 28(c), para. 85; Guatemala's response to Panel question No. 28(b), fn 102 to Table 12 at para. 67. We note that India's financial year begins in April of a given year and ends in March of the following year, unlike the sugar season which begins in October of a given year and ends in September of the following year. (India's first written submission, para. 18; G/AG/AGST/IND, p. 4, para. 6)

²²¹ Brazil's first written submission, para. 163; Australia's first written submission, para. 198; Guatemala's first written submission, para. 81.

²²² Brazil's first written submission, para. 163 and Appendix B-2; Australia's first written submission, paras. 198-203 and Annex E-8; Guatemala's first written submission, paras. 81-86 and 176-179. See also complainants' responses to Panel question No. 73.

²²³ Brazil's first written submission, para. 163; Australia's first written submission, para. 202; Guatemala's first written submission, paras. 176-177 and Table 12(Rev.). Australia and Guatemala submit, alternatively, that these payments should be included in the calculation "on the basis that they achieve an AAP" (Australia's first written submission, para. 203) or that they "effectively extended the validity of the SAP for sugar season 2016/17 to sugar seasons 2017/18 and 2018/19". (Guatemala's first written submission, para. 179)

²²⁴ Brazil's first written submission, para. 163; Australia's first written submission, para. 202; Guatemala's first written submission, para. 177.

²²⁵ Tamil Nadu Sugarcane (Regulation of Purchase Price) Act, 2018, (Exhibit JE-65), Section 2(1)(o). We understand that the transition to the revenue-sharing system was part of a series of recommendations for the liberalization of India's sugar sector. (Rangarajan Committee Report, (Exhibits AUS-8, GTM-31, para. 5) The Tamil Nadu Sugarcane (Regulation of Purchase Price) Act of 2018 provides that the Sugarcane Control Board "shall ... decide the revenue sharing based sugarcane price payable to the sugarcane growers, by the concerned

Nadu had not yet implemented the revenue-sharing system and continued to be in a transition process.²²⁶ We note that, in order to "facilitate th[at] transition" and to "protect the interests of [sugarcane] farmers", for the 2017-18 sugar season Tamil Nadu introduced the "transitional production incentive".²²⁷ Through the transitional production incentive, the State Government endeavoured to assure sugarcane producers of "a price not less than the 2016-17 crushing season State Advised Price"²²⁸, by paying the difference between the amount of the SAP for the 2016-17 sugar season (i.e. the last SAP prior to the introduction of the transitional production incentive) and the FRP amount for the 2017-18 sugar season.²²⁹ In March 2019, Tamil Nadu extended the application of the "transitional production incentive" to the 2018-19 sugar season.²³⁰ Therefore, similar to the previous season, the State Government paid the difference between the SAP for the 2016-17 sugar season and the FRP for the 2018-19 sugar season.²³¹

7.87. Turning to the precise amounts of budgetary outlays, we note the complainants' assertion that the official Tamil Nadu Budget Publication covering the 2017-18 and 2018-19 sugar seasons indicates certain amounts budgeted for the purpose of the "transitional production incentives".²³² We further note that, in response to a question from the Panel, the complainants submitted more recent evidence, seeking to demonstrate the amounts actually disbursed by the State Government to sugarcane producers, on the basis of which the complainants have updated their calculations of India's AMS to sugarcane producers.²³³ In this regard, we also note Brazil's argument that, under India's budget approach, information on actual government expenditure may be available only two or three years after the initial budget estimate.²³⁴ Thus, based on the most recent information, we understand that, as a "transitional production incentive", Tamil Nadu disbursed INR 1,364.30 million directly to the bank accounts of 146,058 sugarcane farmers for the 2017-18 sugar season²³⁵ and INR 980.30 million to the bank accounts of 100,918 sugarcane farmers for the 2018-19 sugar season.²³⁶

7.88. It is uncontested that these transitional production incentives constitute "direct payments" from the State Government to sugarcane producers. Indeed, we note that, in its ordinary meaning, the term "payment" means "[a] sum of money (or equivalent) paid or payable".²³⁷ In the context of paragraph 1 of Annex 3, the payment must be (i) "non-exempt", meaning that it must not be exempted, or otherwise excluded, from the calculation of a Member's AMS, pursuant to the Agreement on Agriculture, and (ii) "direct", meaning, *inter alia*, that the payment must be made "without intervening factors or intermediaries".²³⁸ We also recall that, pursuant to paragraph 3 of Annex 3 of the Agreement on Agriculture, "[s]upport at both the national and sub-national level shall be included" in the calculation of a Member's product-specific AMS.

7.89. In the circumstances before us, we observe that Tamil Nadu has published, through an official State Order, "Detailed guidelines for implementation of disbursement of transitional production incentive directly to the farmers through Direct Benefit Transfer".²³⁹ We note that these guidelines

sugar factories". Moreover, the sugarcane price is defined as the higher value among the price arrived at a sum equal to (i) 70% of the "ex-factory basic value of sugar and the primary by-products such as bagasse, molasses and press mud"; or (ii) 75% of the "ex-factory basic value of sugar alone". (Tamil Nadu Sugarcane (Regulation of Purchase Price) Act, 2018, (Exhibit JE-65), Sections 6(a), 9(1)(i) and (ii))

²²⁶ Order of 17 September 2018, (Exhibit JE-88), para. 4.

²²⁷ Order of 24 July 2018, (Exhibit AUS-54). See also Order of 7 March 2019, (Exhibit JE-136), p. 1; Budget Speech of 15 March 2018, (Exhibit JE-89), para. 29.

²²⁸ Tamil Nadu Policy Note 2020-21, (Exhibit JE-169), p. 362; Order of 17 September 2018, (Exhibit JE-88), para. 6.

²²⁹ See e.g. Order of 7 March 2019, (Exhibit JE-136), para. 3.

²³⁰ Order of 7 March 2019, (Exhibit JE-136), paras. 7-8.

²³¹ See e.g. Tamil Nadu Policy Note 2020-21, (Exhibit JE-169), p. 362-363.

²³² Tamil Nadu Budget Publication for the 2019-2020 financial year, (Exhibit JE-137), p. 71.

²³³ Complainants' responses to Panel question No. 73 (referring to Tamil Nadu's Policy Note, 2020-21, (Exhibit JE-169), p. 362).

²³⁴ Brazil's response to Panel question No. 28(d), para. 57.

²³⁵ Tamil Nadu Policy Note 2020-21, (Exhibit JE-169), p. 362.

²³⁶ Tamil Nadu Policy Note 2020-21, (Exhibit JE-169), pp. 362-363.

²³⁷ Oxford English Dictionary online, definition of "payment, n.1" <https://www.oed.com/view/Entry/139189> (accessed 22 July 2021). In this regard, we also recall the Appellate Body's finding that the term "payment" denotes "a transfer of economic resources". Appellate Body Report, *Canada – Dairy*, para. 107; *EC – Export Subsidies on Sugar*, para. 259.

²³⁸ Oxford English Dictionary online, definition of "direct, adj. and adv." <https://www.oed.com/view/Entry/53293> (accessed 22 July 2021).

²³⁹ Order of 24 July 2018, (Exhibit AUS-54), Annexure. (underlining added)

describe, *inter alia*, the eligibility criteria for sugarcane farmers to receive the transitional production incentives, the implementation phases, and the procedure for the disbursement of the allocated amounts of money. Specifically, we understand from these guidelines that the State Director of Sugar prepared a database of eligible farmers, based on the information previously submitted by the sugar mills, including information on the quantity of sugarcane supplied by each farmer, along with the farmer's land holding credentials and bank account details.²⁴⁰ Once the database of farmers was verified and published, the State Director of Sugar was mandated to transfer the amount of money directly into the sugarcane farmers' bank accounts.²⁴¹ Furthermore, we note that none of the parties argue, nor can we see any reason to consider, that the payments provided under the transitional production incentive are exempted, or otherwise excluded, from the calculation of India's AMS to sugarcane producers.

7.90. In light of the above, we find that, through the transitional production incentive, Tamil Nadu provided domestic support to sugarcane producers in the form of "non-exempt direct payments", within the meaning of paragraph 1 of Annex 3 of the Agreement on Agriculture, during the 2017-18 and 2018-19 sugar seasons.²⁴² Consequently, and in accordance with the budgetary outlay methodology described in paragraph 10 of Annex 3, we include the amounts indicated in paragraph 7.87 in our calculation of India's AMS to sugarcane producers for those two sugar seasons.²⁴³

7.1.3.3.3 Andhra Pradesh's purchase tax remittances

7.91. The complainants submit that the State Government of Andhra Pradesh remits sugarcane purchase taxes to sugarcane producers, thus providing domestic support that should be included in the calculation of India's AMS to sugarcane producers. Specifically, the complainants argue that Andhra Pradesh budgeted an amount of INR 66 million under the budget entry "Assistance to Co-operative Sugar Factories towards reimbursement of Purchase Tax incentives" for the 2014-15 and 2015-16 sugar seasons.²⁴⁴ The complainants argue that the sugarcane purchase tax that would normally be paid by sugar mills to the State Government was foregone in favour of sugarcane producers.²⁴⁵ As a result, in both of these seasons, sugarcane producers in Andhra Pradesh allegedly received funds over and above the amount of the FRP. Brazil and Australia argue that, there is lack of evidence or clarity as to exactly how these funds were transferred to sugarcane farmers.²⁴⁶ These factual uncertainties result in somewhat different views among the complainants as to whether the purchase tax remittance constitutes a "non-exempt direct payment" or an "other non-exempt policy".²⁴⁷ In any event, all complainants submit that sugarcane producers in Andhra Pradesh

²⁴⁰ Order of 24 July 2018, (Exhibit AUS-54), Annexure, para. III(i).

²⁴¹ Order of 24 July 2018, (Exhibit AUS-54), paras. 3-5, 9, Annexure. para. III. We also note that the terms "direct", or "directly" appear in subsequent official State publications relating to the transitional production incentive. (See e.g. Budget Speech of 15 March 2018, (Exhibit JE-89), para. 29)

²⁴² We therefore do not consider it necessary to engage with Australia and Guatemala's alternative arguments regarding Tamil Nadu's transitional production incentive, outlined in fn 223 to para. 7.84 above.

²⁴³ See sections 7.1.3.3.5 and 7.1.3.4 below.

²⁴⁴ Brazil's first written submission, para. 163 and Appendix B-1; Australia's first written submission, paras. 190-194 and Annex E-1; Guatemala's first written submission, paras. 97-99 and 180-184. Initially, the complainants argued that Andhra Pradesh remitted sugarcane purchase taxes also during the 2016-17 sugar season. (Brazil's first written submission, para. 163; Australia's first written submission, para. 191; Guatemala's first written submission, paras. 98 and 183) They subsequently withdrew those arguments and omitted the alleged amounts from their calculations of India's AMS to sugarcane producers. (Complainants' responses to Panel question No. 28(d))

²⁴⁵ Brazil's first written submission, para 163; Australia's first written submission, para. 190; Guatemala's first written submission, paras. 97 and 180.

²⁴⁶ Brazil's responses to Panel question No. 50, para. 26, and No. 74(b), para. 98; Australia's response to Panel question No. 50, para. 8.

²⁴⁷ Brazil and Australia describe two possibilities: (i) the purchase tax amount that would normally "be remitted by the sugar factories to the [government]" was waived and instead "passed on to the cane suppliers" or sugarcane farmers, in which case it would be an "other non-exempt policy" in the form of revenue foregone; or (ii) it may be that the State Government reimbursed the sugar mills the purchase tax amount so that it could be paid to the sugarcane farmers, in which case it would qualify as "non-exempt direct payment". (Brazil's first written submission, para. 163; and response to Panel question No. 50; Australia's first written submission, para. 193; and response to Panel question No. 50 (referring to CACP Price Policy for Sugarcane: 2018-19 Sugar Season, (Exhibit JE-52), p. 57, Annex Table 2.2)) In Guatemala's view, Andhra Pradesh provides support in the form of an "other non-exempt policy", because "measures consisting of revenue foregone would not fall within the category of 'direct payment', but rather under the category of an 'other subsidy'." We note that Guatemala

received non-exempt domestic support over and above the FRP and which therefore should be included in India's AMS to sugarcane producers.²⁴⁸

7.92. India argues that the Andhra Pradesh purchase tax remittance was discontinued as of November 2018.²⁴⁹ India also contends that no amounts were disbursed to sugarcane producers for this budget entry for the 2015-16 sugar season, and that "no ... document has been placed on record showing actual receipt and disbursement for [the] 2014-15 sugar season".²⁵⁰

7.93. We begin our analysis by noting that the alleged domestic support measure at issue, which the complainants assert should be included in the calculation of India's AMS, is the set of so-called "purchase tax remittances" referred to by the complainants. According to the complainants, these purchase tax remittances were in the form of budgetary disbursements by the State Government in favour of sugarcane producers. Hence, the question of whether we must include such remittances in the calculation of India's AMS to sugarcane producers, depends on whether such purchase tax remittances existed – in other words, whether such disbursements were actually made.

7.94. In seeking to substantiate their arguments regarding the existence and amounts of support allegedly provided by Andhra Pradesh to sugarcane producers, the complainants mainly rely on two types of evidence: (i) two annual publications by the Commission for Agricultural Costs and Prices (CACP)²⁵¹, concerning India's "Price Policy for Sugarcane" for the 2018-19 and 2019-20 sugar seasons that also include certain information relating to past sugar seasons, and (ii) the annual publications of Andhra Pradesh's Budget Estimates for five consecutive financial years (2015-16 to 2019-20), covering the 2014-15 to 2018-19 sugar seasons. Below, we examine the complainants' arguments in relation to these two types of evidence in turn.

7.95. Regarding the annual CACP publications, we observe that, in support of their assertions concerning the 2014-15 sugar season, the complainants rely on a single entry contained in the CACP publication for the 2018-19 sugar season, which indicates that the sugarcane price paid by sugar mills to sugarcane producers in Andhra Pradesh in the 2014-15 sugar season included the "FRP & purchase tax incentive of Rs.6 per quintal".²⁵² The publication goes on to indicate that the purchase tax was "to be remitted by the sugar factories to the Govt [and was] being passed on to the cane suppliers".²⁵³ For the 2015-16 sugar season, the complainants rely on an entry contained in the CACP publications for both the 2018-19 and 2019-20 sugar seasons. This entry merely states that sugar mills paid the "FRP with incentives which differ from factory to factory".²⁵⁴ We understand that, in the complainants' view, the CACP publications demonstrate that the purchase tax remittance existed in Andhra Pradesh.²⁵⁵ In our view, however, the CACP publications alone do not suffice to demonstrate that any disbursements were actually made by the State Government to sugarcane producers.

7.96. Turning to Andhra Pradesh's Budget Estimates, we consider it useful to begin by explaining how such Estimates should be read, based on what we have learned from the parties through responses to questions, as well as from Andhra Pradesh's own Budget Manual. First, we note that an amount budgeted for a particular financial year actually shows the payments made for the sugar season preceding that financial year.²⁵⁶ Furthermore, Andhra Pradesh's Budget Estimates contain three columns. Each annual publication of Budget Estimates for a *forthcoming financial year* includes a column indicating the "Budget Estimate" (column 2) for the previous financial year, as well as a "Revised Estimate" for that previous financial year (column 3). While those two columns relate to,

stated that it would not object to the Panel finding it to be a "non-exempt direct payment". (Guatemala's response to Panel question No. 50, paras. 12-14)

²⁴⁸ The complainants argue, alternatively, that the alleged support should be included in India's AMS to sugarcane producers as administered prices providing market price support. (Brazil's first written submission, fn 360 to para. 254; Australia's first written submission, para. 194; Guatemala's first written submission, para. 184)

²⁴⁹ India's first written submission, para. 43; response to Panel question No. 50.

²⁵⁰ India's response to Panel question No. 74(b).

²⁵¹ To recall, the CACP is a body attached to the Ministry of Agriculture and Farmers' Welfare in India.

²⁵² CACP Price Policy for Sugarcane: 2018-19 Sugar Season, (Exhibit JE-52), p. 57, Annex Table 2.2.

²⁵³ CACP Price Policy for Sugarcane: 2018-19 Sugar Season, (Exhibit JE-52), p. 57, Annex Table 2.2.

²⁵⁴ CACP Price Policy for Sugarcane: 2018-19 Sugar Season, (Exhibit JE-52), p. 57, Annex Table 2.2; CACP Price Policy for Sugarcane: 2019-20 Sugar Season, (Exhibit JE-53), p. 56, Annex Table 1.3.

²⁵⁵ Complainants' responses to Panel question No. 74(b).

²⁵⁶ See para. 7.82 above.

and reconcile, the *previous* financial year, a final column (column 4) indicates the "Budget Estimate" for the *forthcoming* financial year. In addition to these "estimate" columns, most (but not all) of Andhra Pradesh's Budget Estimates include a column (column 1) that indicates the "Accounts"²⁵⁷ for the financial year that occurred *two years prior*. All parties agree that this column reflects actual disbursements of funds.²⁵⁸ Thus, in light of the measure at issue and in the circumstances of this case, we consider it appropriate to focus our attention on the "Accounts" columns in the most recently available Budget Estimates in order to discern the amounts of budgetary outlays, if any, that Andhra Pradesh actually disbursed during the 2014-15 and 2015-16 sugar seasons.

7.97. We note that certain budget columns, for certain entries, in the relevant Budget Estimates do not contain an amount, but contain two dots. Australia and Guatemala submit that the meaning of these two dots is "ambiguous" or "not immediately clear".²⁵⁹ India, for its part, submits that where a budget column contains two dots, this means that no amounts have been disbursed towards the specific entry.²⁶⁰ For Australia and Guatemala, India's response is insufficient, due to its choice of words, to demonstrate that no disbursements were actually made.²⁶¹ We note that Australia and Guatemala's assertions contradict those made by all complainants earlier in these proceedings. We recall that, until the second substantive meeting of the Panel, the complainants themselves considered that budget columns containing two dots demonstrated that no amounts had actually been disbursed.²⁶² Based on the evidence on record and the parties' arguments, we interpret the Budget Estimates such that if a relevant budget column contains an amount, it indicates that that amount has been budgeted or disbursed, and, conversely, if it does not contain any amount (or contains two dots) it indicates that no amounts have been budgeted or disbursed. We apply this understanding in our assessment of the relevant budget columns covering the 2014-15 and 2015-16 sugar seasons.

7.98. With respect to the 2014-15 sugar season, an amount of INR 65.97 million was initially budgeted under the entry "Assistance to Co-operative Sugar Factories towards reimbursement of Purchase Tax incentives".²⁶³ The same amount appears in the corresponding "Revised Estimate" column.²⁶⁴ However, we note that the "Accounts" column for the 2015-16 financial year, which corresponds to the budgetary outlays made during 2014-15 sugar season, contains no amount.²⁶⁵ This indicates that although an amount was initially budgeted, no such disbursement was actually made. With respect to the 2015-16 sugar season, an amount of INR 65.97 million was initially budgeted under the entry "Assistance to Co-operative Sugar Factories towards reimbursement of Purchase Tax incentives".²⁶⁶ The same amount appears in the "Revised Estimate" column.²⁶⁷ However, as was the case for the preceding season, the "Accounts" column for the 2016-17 financial year, which corresponds to the budgetary outlays made during 2015-16 sugar season, contains no amount.²⁶⁸ This indicates that although an amount was initially budgeted, no such disbursement was actually made.

7.99. We therefore understand that no budgetary outlay was ever made with respect to the alleged Andhra Pradesh purchase tax remittance. We note the complainants' argument that India's assertion that the purchase tax remittance has been discontinued as of 2018 reveals the existence of that

²⁵⁷ Pursuant to Andhra Pradesh's Budget Manual, "[a]ccounts or actuals of a year are the amounts of receipts and disbursements for the financial year beginning on April 1st and ending on March 31st following, as finally recorded in the Accountant-General's books". (Andhra Pradesh Budget Manual, (Exhibit JE-170), Article 2.1(1))

²⁵⁸ Parties' responses to Panel question No. 74(a).

²⁵⁹ Australia's response to Panel question No. 74(b), para. 80; Guatemala's response to Panel question No. 74(b), para. 75.

²⁶⁰ India's response to Panel question No. 74(b); response to Guatemala's question No. 2.

²⁶¹ Australia and Guatemala's comments on India's response to Panel question No. 74(b).

²⁶² Specifically, in withdrawing their initial assertions regarding the 2016-17 sugar season (see fn 244 to para. 7.91 above), the complainants considered, *inter alia*, the "Accounts" column for the corresponding 2017-18 financial year (which also contains two dots) to demonstrate that no amounts had actually been disbursed. (Complainants' responses to Panel question No. 28(d) (referring to Andhra Pradesh Budget Estimates for the 2019-20 financial year, (Exhibit JE-146)))

²⁶³ Andhra Pradesh Budget Estimates for the 2015-16 financial year, (Exhibit JE-86), p. 18.

²⁶⁴ Andhra Pradesh Budget Estimates for the 2016-17 financial year, (Exhibit JE-134), p. 17.

²⁶⁵ Andhra Pradesh Budget Estimates for the 2017-18 financial year, (Exhibit JE-135), p. 30.

²⁶⁶ Andhra Pradesh Budget Estimates for the 2016-17 financial year, (Exhibit JE-134), p. 17.

²⁶⁷ Andhra Pradesh Budget Estimates for the 2017-18 financial year, (Exhibit JE-135), p. 30.

²⁶⁸ Andhra Pradesh Budget Estimates for the 2018-19 financial year, (Exhibit JE-85), p. 33.

purchase tax remittance.²⁶⁹ However, we are not persuaded that India's statement as to when this scheme was discontinued necessarily demonstrates that disbursements were made under that scheme in the sugar seasons preceding the date of discontinuation. In our view, if the alleged purchase tax remittances were disbursed, they would be reflected in the relevant Andhra Pradesh Budget Estimates.

7.100. In light of the foregoing, we find that the complainants have failed to demonstrate that the State Government of Andhra Pradesh remitted purchase taxes in favour of, or to, sugarcane producers during the 2014-15 and 2015-16 sugar seasons.²⁷⁰ Consequently, we do not include the alleged amounts in our calculation of India's AMS to sugarcane producers.

7.1.3.3.4 Karnataka's incentive price payments

7.101. Brazil and Australia²⁷¹ submit that the State Government of Karnataka provides domestic support to sugarcane producers through "incentive price payments". They assert that Karnataka budgeted an amount of INR 100,000 for this purpose during the 2017-18 sugar season.²⁷² They also assert that the funds provided by Karnataka to sugarcane producers through these incentive price payments were separate from the FRP, and constituted "non-exempt direct payments" within the meaning of paragraph 1 of Annex 3 of the Agreement on Agriculture.²⁷³ Moreover, Brazil and Australia submit that these payments were not made to maintain the price gap, within the meaning of paragraph 8 of Annex 3, because, *inter alia*, although they were made "through Sugar Factories", as indicated in the Budget Estimates, they ultimately benefitted sugarcane producers, not sugar mills.²⁷⁴ Recalling that paragraph 7 of Annex 3 provides that measures "directed at agricultural processors shall be included" in the calculation of AMS "to the extent that such measures benefit the producers of the basic agricultural products", Brazil and Australia submit that these incentive price payments should be included in the calculation of India's AMS to sugarcane producers.²⁷⁵

7.102. India has not contested Brazil and Australia's characterization of the alleged payments, nor has it argued that they are exempt, or otherwise excluded, from the calculation of India's AMS under any provision of the Agreement on Agriculture. Regarding the fact that the payments were made through sugar mills, India asserts that "[t]he complainants bear the burden to prove [the] necessary elements of their claims."²⁷⁶ Moreover, India asserts that Brazil and Australia failed "to produce any official notification/order in support of their contention on incentive payments over and above the FRP".²⁷⁷ In any event, India asserts, Karnataka "did not provide funds under this programme."²⁷⁸

7.103. We begin our analysis by noting that, in seeking to substantiate their arguments regarding the existence and precise amounts of support to sugarcane farmers allegedly provided by Karnataka, Brazil and Australia mainly rely on an entry in Karnataka's Budget Estimates for the 2019-20 financial

²⁶⁹ Complainants' responses to Panel question No. 74(b). 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." (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)))

²⁷⁰ For these reasons, we do not consider it necessary to address the complainants' alternative arguments with respect to Andhra Pradesh's alleged domestic support outlined in fn 248 to para. 7.91 above.

²⁷¹ As noted above, following the second substantive meeting of the Panel, Guatemala withdrew its assertions regarding Karnataka's "incentive price payments" and omitted the alleged amounts from its calculation of India's AMS to sugarcane producers. (Guatemala's comments on India's response to Guatemala's question No. 3 (referring to Exhibit GTM-45 (revised 12 May 2021)).

²⁷² Brazil's first written submission, para. 163 and Appendix B-3; Australia's first written submission, paras. 195-197 and Annex E-5 (referring to Karnataka Budget Estimates for the 2019-20 financial year, (Exhibit JE-90, p. 44)).

²⁷³ Brazil's first written submission, para. 163; Australia's first written submission, para. 197. Both complainants submit that even if the alleged payments are to be characterized as "other non-exempt policies", they would still need to be included in the calculation of India's AMS to sugarcane producers (Brazil and Australia's responses to Panel question 27(b)). Australia argues, alternatively, that the alleged payments are directed at maintaining the sugarcane price "gap" and requests the Panel to find that "it is a measure through which India is providing domestic support above *de minimis*". (Australia's response to Panel question No. 27(a), para. 77)

²⁷⁴ Brazil and Australia's responses to Panel question No. 27(b).

²⁷⁵ Brazil and Australia's responses to Panel question No. 27(b).

²⁷⁶ India's response to Panel question No. 27.

²⁷⁷ India's comments on the complainants' responses to Panel question Nos. 75-77, para. 10.

²⁷⁸ India's comments on the complainants' responses to Panel question Nos. 75-77, para. 10.

year, i.e. the "Payment of Incentive Price for Sugar Cane through Sugar Factories. Subsidies".²⁷⁹ Additionally, Brazil and Australia provide certain supporting arguments and evidence, which, we understand, do not, on their own, establish the existence or the amounts of the alleged payments. Rather, we understand that these arguments and evidence seek to demonstrate the purpose, as well as the legal characterization of the alleged payments, i.e. that they do not constitute payments made to maintain the price gap within the meaning of paragraph 8 of Annex 3²⁸⁰, and should be included in the calculation of India's AMS to sugarcane producers. Therefore, we consider it reasonable to first address the arguments and evidence relating to the existence and amounts of the alleged payments, i.e. Karnataka's Budget Estimates. We then turn to address the supporting arguments and evidence.

7.104. With respect to Karnataka's Budget Estimates, we recall our discussion relating to the interpretation of the Indian States' Budget documents in the context of Andhra Pradesh's alleged support to sugarcane producers. In particular, we recall our discussion on the relevance of the "Accounts" column of the Budget Estimates with respect to any governmental expenditures.²⁸¹ All parties agree that the "Accounts" column, as interpreted in Andhra Pradesh's Budget Estimates, is likely to have the same meaning in Karnataka's Budget Estimates.²⁸² From the parties' responses, as well as our own assessment of Karnataka's Budget Manual²⁸³, we understand that, indeed, actual expenditures related to a certain budget entry during a particular sugar season will be reflected in the "Accounts" column for the corresponding financial year. In this regard, we recall Brazil's argument that, "under India's budget approach, information on actual government expenditure may be available only two or three years after the initial budget estimate".²⁸⁴ Therefore, as was the case for Andhra Pradesh, in light of the measure at issue and in the circumstances of this case, we consider it appropriate to focus our analysis on the "Accounts" column in the most recently available Budget Estimates in order to discern the amounts of budgetary outlays, if any, that Karnataka actually disbursed during the 2017-18 sugar season.

7.105. Regarding the 2017-18 sugar season, Karnataka's Budget Estimates for the 2019-20 financial year indicate an amount of 1 lakh (i.e. INR 100,000.00) under the columns "Budget 2018-19" and "Revised 2018-19", for the entry "Payment of Incentive Price for Sugar Cane through Sugar Factories. Subsidies".²⁸⁵ We note that in response to a Panel question, the complainants submitted a more recent publication of Karnataka's Budget Estimates, for the 2020-21 financial year, containing the "Accounts" column for the 2018-19 financial year (which should reveal actual government disbursements for the 2017-18 sugar season, if any).²⁸⁶ As pointed out by Brazil and Australia, the entry "Payment of Incentive Price for Sugar Cane through Sugar Factories. Subsidies" does not appear in these newly-submitted Budget Estimates, indicating that no amounts were disbursed for this particular budget entry.²⁸⁷ Our understanding of the Budget Estimates reveals that the fact that the State initially budgeted a certain amount in its Budget Estimates does not necessarily mean that payments were actually made to sugarcane producers. Moreover, we

²⁷⁹ Karnataka Budget Estimates for the 2019-20 financial year, (Exhibit JE-90), p. 44.

²⁸⁰ In this respect, Brazil states that "the evidence substantiates that [the incentive price payments] are non-exempt direct payments that should be calculated towards the AMS." (Brazil's response to Panel question Nos. 76-77, paras. 111-112) Australia relies on this evidence "to support its assertion that the incentive price payments identified in Exhibit JE-90 constitute a form of non-exempt support that paragraph 1 of Annex 3 of the Agreement on Agriculture stipulates may be included in the calculation of India's AMS for sugarcane". (Australia's response to Panel question Nos. 76-77, para. 96) See also fn 298 to para. 7.107 below.

²⁸¹ See para. 7.96 above.

²⁸² Parties' responses to Panel question No. 74(c).

²⁸³ We note that the "[a]ccounts or actuals of a year" are the amounts of receipts and disbursements for the year beginning on first April and ending on the last day of March following as finally recorded in the books of the Accountant General." (Karnataka Budget Manual, (Exhibit JE-172), Article 32)

²⁸⁴ Brazil's response to Panel question No. 28(d), para. 57.

²⁸⁵ Karnataka Budget Estimates for the 2019-20 financial year, (Exhibit JE-90), p. 44. We recall that any estimates, or expenditures made for the 2017-18 sugar season, will be reflected under the 2018-19 financial year. See also para. 7.82 above.

²⁸⁶ Karnataka Budget Estimates for the 2020-21 financial year, (Exhibit JE-173).

²⁸⁷ We note that, in response to a question from Guatemala, India submits that the absence of the relevant entry in the Budget Estimates indicates that no amounts were disbursed by the State. (India's response to Guatemala's question No. 3) We also note that, based on India's explanation and the most recent Budget Estimates, Guatemala withdrew its arguments regarding Karnataka's alleged payments. (See fn 271 to para. 7.101 above)

emphasize that the 2020-21 Budget Estimates reveal that no such payments were, in fact, disbursed.²⁸⁸

7.106. At this juncture, we turn to also assess Brazil and Australia's supporting arguments and evidence.²⁸⁹ We recall that in conducting our assessment of Tamil Nadu's direct payments²⁹⁰, we analysed, *inter alia*, Tamil Nadu's transition from the SAP to the revenue-sharing-based sugarcane price. That analysis revealed important information relating to the disbursement of direct payments to sugarcane producers, which ultimately, along with other exhibits on the record, demonstrated that such payments were made. We observe that, similarly to Tamil Nadu, Karnataka is among the States that have transitioned (or are transitioning) from the SAP to a system of revenue-sharing-based sugarcane prices. The revenue-sharing system was introduced through the Karnataka Sugarcane (Regulation of Purchase and Supply) Act²⁹¹, subsequently amended by the Karnataka Sugarcane (Regulation of Purchase and Supply) Amendment Act in 2014.²⁹² Pursuant to the Karnataka Sugarcane Amendment Act, the payment of the sugarcane price is divided into two stages. First, sugarcane producers receive the Central Government's FRP. Second, they receive an "additional sugarcane price".²⁹³ The additional sugarcane price is defined as the price "to be paid by the occupier of the factory to the sugarcane grower for the sugarcane delivered over and above [the] Fair and Remunerative Price".²⁹⁴

7.107. We understand that, in the view of Brazil and Australia, the amounts budgeted for the incentive price payments, as identified in Karnataka's Budget Estimates for the 2019-20 financial year, may be connected to the system of revenue-sharing-based sugarcane prices, or, more specifically, to the "additional sugarcane price".²⁹⁵ We observe, however, that nothing in the evidence demonstrates that the initially estimated amounts for the incentive price payments were budgeted for the purpose of supporting sugar mills in paying the "additional sugarcane price" under the second stage of the revenue-sharing system. Furthermore, nothing in the Budget Estimates or any other evidence on the record indicates any relationship between the alleged incentive price payments and Karnataka's transition from the SAP to the system of revenue-sharing-based sugarcane prices. In comparison, in the case of Tamil Nadu²⁹⁶, relevant State Orders clearly demonstrate the purpose and operation of the transitional production incentives. Moreover, with respect to Tamil Nadu, all other supporting evidence explicitly refers to the "transitional production incentives", while providing additional information that led us to conclude that those payments were indeed made, and for that particular purpose.²⁹⁷ In any event, and particularly in light of Karnataka's Budget Estimates as described in paragraphs 7.104-7.105, we do not see how the existence of the

²⁸⁸ We note Brazil and Australia's agreement that, where different publications of the same type of document contain contradictory factual information, the most recently published one is likely to be more accurate and up-to-date than older publications. (Brazil and Australia's responses to Panel question No. 64)

²⁸⁹ See para. 7.103 above.

²⁹⁰ See section 7.1.3.3.2 above.

²⁹¹ Karnataka Sugarcane Act, (Exhibit AUS-52), Section 4(f).

²⁹² Karnataka Sugarcane Amendment Act, (Exhibit GTM-28).

²⁹³ Karnataka Sugarcane Amendment Act, (Exhibit GTM-28), pp. 4-5, Section 8, amending Sections 9(1) and 9(1A) of the Karnataka Sugarcane Act.

²⁹⁴ Karnataka Sugarcane Amendment Act, (Exhibit GTM-28), p. 2, Section 2, amending Section 2 of the Karnataka Sugarcane Act. See also Cane Commissioner's Annual Report, 2017-18, (Exhibit JE-139), para. 8.

²⁹⁵ Brazil states that Karnataka's payments to farmers were made to ensure "higher-than-FRP revenues" under the revenue-sharing system. (Brazil's response to Panel question No. 27(c), para. 50) Australia compares Karnataka's payments to the "transitional production incentives" in Tamil Nadu and suggests that they may also have been made to assist sugarcane farmers with the transition from the SAP to the revenue-sharing system. (Australia's response to Panel question No. 27(a), para. 74) Australia also submits, alternatively, that Karnataka's payments supported sugar mills in paying the "additional sugarcane price" under the revenue-sharing system. (Ibid. para. 75)

²⁹⁶ See section 7.1.3.3.2 above.

²⁹⁷ We note Brazil and Australia's arguments that there is limited evidence regarding the exact operation of the incentive price payments. (Brazil's response to Panel question No. 75, paras. 106-108; Australia's response to Panel question No. 75, paras. 88-89) The complainants add that India "has refused to assist the Panel with information in its exclusive possession", or that "India has not helped improve Australia's understanding of the Karnataka Scheme". (Ibid.) India, on the other hand, argues that "if the complainants consider any document as evidence, it is the complainants' burden to explain those documents". (India's comments on the complainants' responses to Panel question Nos. 75-77)

revenue-sharing system or the "additional sugarcane price" supports a finding that incentive price payments were actually made during the 2017-18 sugar season.²⁹⁸

7.108. As a result, we find that Brazil and Australia have failed to demonstrate that the State of Karnataka provided incentive price payments to sugarcane producers during the 2017-18 sugar season.²⁹⁹ Consequently, we do not include the alleged amount in our calculation of India's AMS to sugarcane producers.

7.1.3.3.5 Amount of non-exempt direct payments or other non-exempt policies to sugarcane producers

7.109. For the foregoing reasons, we find that India provided non-exempt direct payments to sugarcane producers during the 2017-18 and 2018-19 sugar seasons, and we include these amounts in our calculation of India's AMS to sugarcane producers, as follows³⁰⁰:

Sugar season	Non-exempt direct payments or other non-exempt policies (INR million)
2014-15	n/a
2015-16	n/a
2016-17	n/a
2017-18	1,364.30
2018-19	980.30

7.1.3.4 Overall calculation

7.110. We recall that the calculation of a Member's product-specific AMS should take into account market price support, non-exempt direct payments, and other non-exempt policies. Based on our findings above, we therefore find that India's AMS to sugarcane producers was as follows³⁰¹:

Sugar season	Market price support (INR million)	Non-exempt direct payments and other non-exempt policies (INR million)	AMS to sugarcane producers (INR million)
2014-15	903,750.80	n/a	903,750.80
2015-16	880,418.99	n/a	880,418.99
2016-17	815,045.69	n/a	815,045.69
2017-18	1,072,685.61	1,364.30	1,074,049.91
2018-19	1,110,085.53	980.30	1,111,065.83

7.1.4 Comparison and conclusion

7.111. We recall that the assessment of India's compliance with Article 7.2(b) of the Agreement on Agriculture entails comparing India's actual AMS to sugarcane producers with the level of product-specific domestic support that India is permitted to provide. As explained above, we consider it relevant and appropriate to make this comparison for five recent sugar seasons, from 2014-15 to 2018-19.³⁰² We summarize this comparison as follows³⁰³:

²⁹⁸ As noted in para. 7.103 above, Brazil and Australia submitted further supporting arguments and evidence, seeking to demonstrate the legal characterization of the alleged payments. (Brazil's response to Panel question Nos. 27(a), fn 103 to para. 46, and 27(c), fn 110, to para. 50; Australia's response to Panel question No. 27(a), fn 112 to para. 73 (referring to Cane Commissioner's Annual Report, 2017-18, (Exhibit JE-139), note to para. 5; and CACP Price Policy for Sugarcane: 2019-20 Sugar Season, (Exhibit JE-53), p. 56, Annex Table 1.3) Having found that no such payments were made to sugarcane producers in the 2017-18 sugar season, we do not consider it necessary to further address those arguments and evidence.

²⁹⁹ Therefore, we do not consider it necessary to address Australia's alternative arguments regarding Karnataka's alleged domestic support to sugarcane producers, outlined in fn 273 to para. 7.101 above.

³⁰⁰ See para. 7.90 above.

³⁰¹ See paras. 7.67 and 7.109 above.

³⁰² See para. 7.11 above.

³⁰³ See paras. 7.17 and 7.110 above.

Sugar season	Actual AMS to sugarcane producers (INR million)	Permitted level of product-specific support (INR million)
2014-15	903,750.80	96,529.00
2015-16	880,418.99	95,864.00
2016-17	815,045.69	94,698.00
2017-18	1,074,049.91	117,351.00
2018-19	1,111,065.83	123,049.00

7.112. In view of the fact that, for five consecutive sugar seasons, from 2014-15 to 2018-19, India provided non-exempt domestic support to sugarcane producers in excess of the permitted level of 10% of the total value of sugarcane production, we conclude that India is acting inconsistently with Article 7.2(b) of the Agreement on Agriculture.

7.2 Export subsidies

7.2.1 Introduction

7.113. The complainants challenge certain of India's federal-level measures pertaining to sugar or sugarcane, which are implemented through a number of legal instruments.³⁰⁴ The complainants argue that the measures at issue are export subsidies inconsistent with India's obligations under the Agreement on Agriculture and the SCM Agreement.

7.114. As an initial point, we wish to address certain differences in the way the complainants frame the measures at issue and their requests for findings.

7.115. Brazil requests that the Panel make separate findings with respect to the following "measures"³⁰⁵: (i) Scheme for assistance to sugar mills for the 2018-19 sugar season; (ii) Scheme for creation and maintenance of buffer stock in 2018; (iii) Scheme for creation and maintenance of buffer stock in 2019; (iv) Scheme for assistance to sugar mills for the 2017-18 sugar season; (v) Scheme for extending production subsidy to sugar mills for the 2015-16 sugar season; and (vi) the Marketing and Transportation Scheme.³⁰⁶ Brazil underscores that the first five of these schemes operate together with the Minimum Indicative Export Quotas (MIEQs), whereas the Marketing and Transportation Scheme operates together with the Maximum Admissible Export Quantity (MAEQ).³⁰⁷ Brazil claims that these schemes constitute export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture and are inconsistent with India's obligations under Articles 3.3 and 8 of that Agreement.³⁰⁸

7.116. Australia submits that India provides export subsidies through the following subsidy schemes: (i) the Production Assistance Scheme, operating in conjunction with the MIEQs; (ii) the Buffer Stock Scheme, operating in conjunction with the MIEQs; (iii) the Marketing and Transportation Scheme, operating in conjunction with the MAEQ; and (iv) the Duty Free Import Authorization (DFIA) Scheme for sugar.³⁰⁹ Australia requests that the Panel find that these schemes constitute export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture and are inconsistent with India's obligations under Articles 3.3 and 8 (or, in the alternative, Articles 8 and 10.1) of the Agreement on Agriculture, and with Articles 3.1(a) and 3.2 of the SCM Agreement.³¹⁰

7.117. Guatemala maintains that India provides export subsidies through: (i) the Production Assistance Scheme, operating in conjunction with the MIEQs; (ii) the Buffer Stock Scheme, operating

³⁰⁴ Brazil's panel request, para. 14; Australia's panel request, para. 19 and para. 9 of Annex A thereto; Guatemala's panel request, para. 9 and para. 9 of the Annex thereto.

³⁰⁵ Brazil's second written submission, para. 82. See also *ibid.* para. 89.

³⁰⁶ Brazil's second written submission, paras. 82-83; response to Panel question No. 79.

³⁰⁷ Brazil's first written submission, paras. 177-179. As explained in section 7.2.2.1 below, the MIEQ orders allocate to sugar mills minimum sugar export quotas, whereas the MAEQ allocates maximum sugar export quotas, on a per-mill basis. The complainants do not challenge the MIEQs and the MAEQ as such. (See para. 7.122 below)

³⁰⁸ Brazil's first written submission, para. 233.

³⁰⁹ Australia's first written submission, para. 223.

³¹⁰ Australia's first written submission, para. 468.

in conjunction with the MIEQs³¹¹; and (iii) the Marketing and Transportation Scheme, operating in conjunction with the MAEQ.³¹² Guatemala claims that these schemes constitute export subsidies within the meaning of Articles 9.1(a) and 9.1(c) of the Agreement on Agriculture and are inconsistent with India's obligations under Articles 3.3, 8, and 9.1 of that Agreement, as well as with Article 3.1(a) of the SCM Agreement.³¹³

7.118. We note that, unlike Australia and Guatemala, Brazil identifies as "measures", and requests separate findings of WTO-inconsistency regarding, what appear to be annual iterations of certain schemes.³¹⁴ We recall, in this regard, our findings in our preliminary ruling in Annex E-1 that the complainants' panel requests, including that of Brazil, define the measures at issue as federal-level export subsidies pertaining to sugar or sugarcane.³¹⁵ We understand that such federal-level export subsidies include, *inter alia*, the Production Assistance Scheme, the Buffer Stock Scheme, and the Marketing and Transportation Scheme. These schemes are implemented on a seasonal basis through a number of legal instruments. In particular, the complainants submitted evidence with respect to the Production Assistance Scheme for the 2015-16³¹⁶, 2017-18³¹⁷, and 2018-19 sugar seasons.³¹⁸ Similarly, the complainants provided evidence with respect to the Buffer Stock Scheme for the 2018-19 ("Buffer Stock Scheme 2018")³¹⁹ and 2019-20 ("Buffer Stock Scheme 2019")³²⁰ sugar seasons. Brazil's panel request also identifies some of these pieces of evidence as legal instruments that implement the measures at issue.³²¹

7.119. In this connection, we recall our understanding of the difference between measures and legal instruments, set out in our preliminary ruling in Annex E-1. As explained there, the measures at issue as set out in the panel request, together with a summary of the legal basis of the complaint, define a panel's terms of reference. By contrast, legal instruments usually constitute evidence of the existence and operation of a particular measure.³²² A panel has to make findings regarding the WTO-consistency of the measures at issue, which may not necessarily be coterminous with the legal instruments that implement such measures.

7.120. In line with the approach suggested by Australia and Guatemala, and in accordance with Brazil's identification of the measures at issue in its panel request, we consider it appropriate to make findings on the WTO-consistency of the subsidy schemes that form part of India's alleged federal-level subsidies contingent on export performance, namely, the Production Assistance Scheme, the Buffer Stock Scheme, and the Marketing and Transportation Scheme. As part of our assessment of the WTO-consistency of these schemes, we will determine their design and operation by examining the legal instruments that implement them in different sugar seasons. After assessing the claims brought by all complainants with respect to these three schemes, we will examine the WTO-consistency of the DFIA Scheme for sugar, which is challenged by Australia only.

³¹¹ In response to a question from the Panel, Guatemala clarified that it does not consider the Buffer Stock Scheme 2018 and the Buffer Stock Scheme 2019 to be stand-alone measures. Rather, in Guatemala's view, they are part of the legal instruments that implement India's federal-level export subsidies. Guatemala explained that, given the proximity of these two Schemes, it would not object to the Panel making findings with respect to the Buffer Stock Schemes collectively. (Guatemala's response to Panel question No. 80, paras. 84-89)

³¹² Guatemala's first written submission, paras. 192, 200, 240; second written submission, para. 54.

³¹³ In the alternative, Guatemala submits that the schemes at issue are domestic support measures that directly or indirectly benefit sugarcane growers and, as such, should be included in the calculation of India's AMS to sugarcane producers. (Guatemala's first written submission, para. 195)

³¹⁴ In its first written submission, Brazil itself draws a distinction between the schemes that existed at the time of the establishment of the Panel and the expired schemes. (Brazil's first written submission, Sections IV.C.1 and IV.C.2)

³¹⁵ See Annex E-1.

³¹⁶ Notification of 2 December 2015, (Exhibit JE-76).

³¹⁷ Notification of 9 May 2018, (Exhibit JE-75).

³¹⁸ Notification of 5 October 2018, (Exhibit JE-74).

³¹⁹ Notification of 15 June 2018, (Exhibit JE-78), para. 1.

³²⁰ Notification of 31 July 2019, (Exhibit JE-77), preamble.

³²¹ See Brazil's panel request, para. 14. Brazil's panel request does not refer to the Buffer Stock Scheme 2019. However, since we consider the Buffer Stock Scheme 2019 to be a legal instrument and not a measure at issue, we do not find the absence of a reference to it in Brazil's panel request problematic.

³²² See Annex E-1.

7.2.2 Measures at issue

7.121. As noted, the complainants challenge India's federal-level measures pertaining to sugar or sugarcane.³²³ In particular, all complainants take issue with three alleged assistance schemes: (i) the Production Assistance Scheme, which operates jointly with the MIEQs; (ii) the Buffer Stock Scheme, which operates jointly with the MIEQs; and (iii) the Marketing and Transportation Scheme, which operates jointly with the MAEQ. In addition, Australia challenges the DFIA Scheme, which is not linked to the MIEQs or the MAEQ.

7.122. The complainants explain that the MIEQs and the MAEQ alone do not provide subsidies contingent on export performance.³²⁴ Rather, the complainants take issue with "India's recurring policy of tying MIEQ and MAEQ export quotas to various direct payment schemes, in a manner that causes those payments to be export subsidies".³²⁵ Accordingly, the complainants consider that the combined operation of the Production Assistance Scheme, Buffer Stock Scheme, and Marketing and Transportation Scheme with the MIEQs and the MAEQ constitutes subsidies contingent on export performance.³²⁶

7.123. This section provides an overview of the MIEQs and the MAEQ, as well as the alleged export subsidy schemes challenged by the complainants.³²⁷

7.2.2.1 MIEQs and MAEQ

7.124. We recall that "MIEQs" stand for "Minimum Indicative Export Quotas" and that "MAEQ" stands for "Maximum Admissible Export Quantity". The MIEQs and the MAEQ are adopted through orders issued by the Department of Food and Public Distribution (DFPD), which is part of the Ministry of Consumer Affairs, Food and Public Distribution.³²⁸ The MIEQ orders allocate to sugar mills minimum sugar export quotas, whereas the MAEQ allocates maximum sugar export quotas, on a per-mill basis.

7.125. The legal basis for the MIEQ and MAEQ orders is found in the Essential Commodities Act 1955 and the Sugar (Control) Order 1966.³²⁹ Specifically, Section 3 of the Essential Commodities Act authorizes the Central Government to issue orders for the control of the production, supply and distribution of certain commodities.³³⁰ 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.³³¹ Clause 14 of the Sugar (Control) Order provides that compliance with the orders issued pursuant to the Sugar (Control) Order is mandatory.³³²

³²³ Brazil's panel request, para. 14; Australia's panel request, para. 19 and para. 9 of Annex A thereto; Guatemala's panel request, para. 9 and para. 9 of the Annex thereto.

³²⁴ Australia's first written submission, para. 219; Guatemala's first written submission, para. 207.

³²⁵ Australia's first written submission, para. 219. See also Brazil's first written submission, paras. 172 and 177.

³²⁶ Australia's first written submission, paras. 220-221; Guatemala's first written submission, para. 207.

³²⁷ India stated that it agrees with the complainants' factual descriptions of the measures at issue to the extent they reflect the text of the relevant instruments. (India's response to Panel question No. 29)

³²⁸ Australia's first written submission, para. 225; Guatemala's first written submission, para. 202; India's response to Panel question No. 31.

³²⁹ Brazil's first written submission, para. 202; Australia's first written submission, paras. 224-225; Guatemala's first written submission, paras. 202-203 (referring to Clause 5 of the Sugar (Control) Order, 1966, (Exhibit JE-44)); and India's response to Panel question No. 31.

³³⁰ 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, weighing, disposal, delivery and distribution of any kind of sugar in the manner specified in the direction.

(Exhibit JE-43, Section (3E))

³³¹ Sugar (Control) Order, 1966, (Exhibit JE-44), Clause 5, p. 42.

³³² Sugar (Control) Order, 1966, (Exhibit JE-44), Clause 14, pp. 47-48. Moreover, Section 7 of the Essential Commodities Act provides for fines or imprisonment for violations of the orders issued under the authority granted pursuant to its Section (3E). (Exhibit JE-43, Section 7)

7.126. The MIEQs are determined "[i]n view of the inventory levels within the sugar industry and to facilitate achievement of financial liquidity".³³³ The MIEQs allocate a total minimum quantity of sugar that must be exported and distribute that quantity among individual sugar mills operating in India (mill-wise allocations).³³⁴

7.127. The MIEQs are issued on a seasonal basis. The complainants submit evidence on the MIEQs for the 2015-16³³⁵, 2017-18³³⁶, and 2018-19³³⁷ sugar seasons. The total amount of the MIEQ for all sugar mills was 4 million tonnes of sugar for the 2015-16 season³³⁸; 2 million tonnes for the 2017-18 season³³⁹; and 5 million tonnes for the 2018-19 season.³⁴⁰ To demonstrate compliance with their individual MIEQ allocations, sugar mills are required to provide the DFPD with supporting documents, such as shipping bills and agreements between the sugar mill and the exporter.³⁴¹

7.128. As explained below, the Production Assistance and Buffer Stock Schemes are linked to the MIEQ orders. Specifically, compliance with the MIEQ orders is an eligibility criterion for receiving assistance under all seasonal iterations of the Production Assistance Scheme and the Buffer Stock Scheme 2018.³⁴²

7.129. In the 2019-20 sugar season, India introduced the MAEQ, which imposes the maximum admissible export quantity of sugar at 6 million tonnes.³⁴³ Like the MIEQs, the MAEQ was adopted through a DFPD order. The MAEQ order contains an Annex that lists the amount of MAEQ allocated to each sugar mill in India.³⁴⁴ The MAEQ order is linked to the Marketing and Transportation Scheme such that to become eligible to receive assistance under that Scheme, a sugar mill is required to export at least 50% of its MAEQ allocation.³⁴⁵

7.2.2.2 Production Assistance Scheme

7.130. Under the Production Assistance Scheme, the government provides assistance to sugar mills on a seasonal basis. The assistance is provided through notifications issued by the DFPD. The complainants submitted evidence with respect to the Production Assistance Scheme for the 2015-16³⁴⁶, 2017-18,³⁴⁷ and 2018-19 sugar seasons.³⁴⁸

7.131. The purpose of the Production Assistance Scheme is "to offset the cost of cane and facilitate timely payment of cane price dues of farmers" for the relevant sugar season.³⁴⁹ The assistance thus has to be used for the payment of cane price dues of farmers related to the FRP.³⁵⁰ Mills are required to submit a utilization certificate to demonstrate that the assistance has been used for this

³³³ MIEQ Order of 28 March 2018, (Exhibit JE-107), preamble; MIEQ Order of 28 September 2018, (Exhibit JE-108), preamble; and MIEQ Order of 18 September 2015, (Exhibit JE-109), preamble.

³³⁴ The mill-wise allocations are contained in an annex to each MIEQ Order. (See Exhibits JE-108, JE-109, and JE-111)

³³⁵ MIEQ Order of 18 September 2015, (Exhibit JE-109).

³³⁶ MIEQ Order of 28 March 2018, (Exhibit JE-107).

³³⁷ MIEQ Order of 28 September 2018, (Exhibit JE-108).

³³⁸ MIEQ Order of 18 September 2015, (Exhibit JE-109), para. 1.

³³⁹ MIEQ Order of 28 March 2018, (Exhibit JE-107), para. 1; Notification of 9 May 2018, (Exhibit JE-111), para. 2.

³⁴⁰ MIEQ Order of 28 September 2018, (Exhibit JE-108), para. 1.

³⁴¹ MIEQ Order of 28 September 2018, (Exhibit JE-108), para. 4. See also MIEQ Order of 28 March 2018, (Exhibit JE-107), para. 3 and MIEQ Order of 18 September 2015, (Exhibit JE-109), para. 3.

³⁴² See paras. 7.133 and 7.138 below.

³⁴³ Cabinet Committee on Economic Affairs Announcement of Sugar export policy for evacuation of surplus stocks during sugar season 2019-20, (Exhibit JE-113).

³⁴⁴ MAEQ Order of 16 September 2019, (Exhibit JE-115), Annexure.

³⁴⁵ Notification of 12 September 2019, (Exhibit JE-114), para. 2(a). See also MAEQ Order of 16 September 2019, (Exhibit JE-115).

³⁴⁶ Notification of 2 December 2015, (Exhibit JE-76).

³⁴⁷ Notification of 9 May 2018, (Exhibit JE-75).

³⁴⁸ Notification of 5 October 2018, (Exhibit JE-74).

³⁴⁹ 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.

³⁵⁰ Notification of 2 December 2015, (Exhibit JE-76), paras. 1 and 2.v; Notification of 9 May 2018, (Exhibit JE-75), paras. 1 and 3(iii); and Notification of 5 October 2018, (Exhibit JE-74), paras. 1 and 3(iii).

purpose.³⁵¹ The assistance is paid directly to farmers on behalf of sugar mills.³⁵² To this end, sugar mills are required to open separate no-lien bank accounts to which farmers have access and into which the DFPD deposits the monies.³⁵³ Any remaining balance is credited to the account of the sugar mill itself.³⁵⁴

7.132. The amount of assistance is calculated either based on the actual volume of sugarcane the mills crushed in the relevant sugar season or based on their average sugar production over the previous three sugar seasons, whichever is lower.³⁵⁵ The rate of the production subsidy was INR 4.50 per quintal of sugarcane crushed in the 2015-16 sugar season³⁵⁶, INR 5.50 per quintal of sugarcane crushed in the 2017-18 sugar season³⁵⁷, and INR 13.88 per quintal of sugarcane crushed in the 2018-19 sugar season.³⁵⁸

7.133. With respect to the eligibility for the subsidy, the Notifications for the 2017-18 and 2018-19 sugar seasons stipulate that "[t]he mill should have fully complied with all the orders/directives of [the DFPD] to the sugar mills" for the relevant sugar season.³⁵⁹ Similarly, the Notification for the 2015-16 sugar season states that mills that have achieved at least 80% of their MIEQ target shall be eligible for the production subsidy.³⁶⁰

7.2.2.3 Buffer Stock Scheme

7.134. Under the Buffer Stock Scheme, sugar mills receive a subsidy for the quantity of buffer stock maintained. In support of their assertions regarding this scheme, the complainants provide the Notifications implementing the Buffer Stock Scheme for the 2018-19 and 2019-20 sugar seasons.³⁶¹

7.135. The Buffer Stock Scheme was introduced "with a view to improve liquidity of the sugar industry; enabling them to clear cane price arrears of farmers and to stabilize [the] domestic sugar price".³⁶² Similarly, with respect to the purpose of the assistance, the Buffer Stock Scheme states that "[t]he funds to be provided to the sugar mills as reimbursement of the carrying cost towards maintenance of the buffer stock are to be used firstly for payment of cane price dues of farmers for the current sugar season ... [and] for arrears of previous sugar seasons."³⁶³

7.136. The Buffer Stock Scheme 2019 provides for sugar mills storing a buffer stock of 4 million tonnes of sugar, which is divided into mill-wise allocations.³⁶⁴ Every sugar mill "shall set apart the quantity allocated as buffer stock and store it in separate and distinctly identifiable lots and stock

³⁵¹ Notification of 2 December 2015, (Exhibit JE-76), para. 3; Notification of 9 May 2018, (Exhibit JE-75), para. 4; and Notification of 5 October 2018, (Exhibit JE-74), para. 4.

³⁵² Notification of 2 December 2015, (Exhibit JE-76), para. 2.ii; Notification of 9 May 2018, (Exhibit JE-75), para. 3(iv); Notification of 5 October 2018, (Exhibit JE-74), para. 3(iv).

³⁵³ Notification of 2 December 2015, (Exhibit JE-76), para. 2.v; Notification of 5 October 2018, (Exhibit JE-74), para. 3(v); and Notification of 9 May 2018, (Exhibit JE-75), para. 3(iv).

³⁵⁴ Notification of 2 December 2015, (Exhibit JE-76), paras. 2.ii and 2.vi; Notification of 9 May 2018, (Exhibit JE-75), para. 3(iv); and Notification of 5 October 2018, (Exhibit JE-74), para. 3(iv).

³⁵⁵ Notification of 2 December 2015, (Exhibit JE-76), para. 2.i; Notification of 9 May 2018, (Exhibit JE-75), para. 3(ii); and Notification of 5 October 2018, (Exhibit JE-74), para. 3(ii).

³⁵⁶ Notification of 2 December 2015, (Exhibit JE-76), para. 2.i.

³⁵⁷ Notification of 9 May 2018, (Exhibit JE-75), para. 3(i).

³⁵⁸ Notification of 5 October 2018, (Exhibit JE-74), para. 3(i).

³⁵⁹ Notification of 9 May 2018, (Exhibit JE-75), para. 2(c); and Notification of 5 October 2018, (Exhibit JE-74), para. 2(c).

³⁶⁰ Notification of 2 December 2015, (Exhibit JE-76), p. 1, para. 2.iii.

³⁶¹ Notification of 15 June 2018, (Exhibit JE-78); and Notification of 31 July 2019, (Exhibit JE-77). The Buffer Stock Scheme 2019 replicates the provisions of the Buffer Stock Scheme 2018 to a great extent.

³⁶² Notification of 31 July 2019, (Exhibit JE-77), preamble; and Notification of 15 June 2018, (Exhibit JE-78), p.1, preamble.

³⁶³ Notification of 31 July 2019, (Exhibit JE-77), para. 1; and Notification of 15 June 2018, (Exhibit JE-78), para. 1.

³⁶⁴ Notification of 31 July 2019, (Exhibit JE-77), preamble; and Order of 26 July 2019, (Exhibit JE 127). Likewise, the Buffer Stock Scheme 2018 provided for sugar mills storing an overall quantity of 3 million tonnes of sugar, which was divided into mill-wise allocations. (Notification of 15 June 2018, (Exhibit JE-78), preamble; Order of 29 June 2018, (Exhibit JE-123))

within the mill premises".³⁶⁵ A mill may opt for a partial quantity of the offered quota, but it would not be allowed to increase its quota subsequently.³⁶⁶

7.137. The extent of assistance is determined based on the value of the buffer stock held. The rate for determining the value of stock was INR 29 and INR 31 per kg of sugar under Buffer Stock Scheme 2018 and Buffer Stock Scheme 2019, respectively.³⁶⁷

7.138. To be eligible for assistance, a sugar mill must have: (i) maintained the allocated buffer stock for the entire period (in full or in part, unless permitted to dismantle it); (ii) submitted the utilization certificates in respect of buffer stock subsidies disbursed for earlier quarters; (iii) filed timely monthly statutory returns relating to data on sugarcane crushing, sugar production, stocks, etc.; and (iv) fully complied with the DFPD's orders/directives issued in the 2017-18 and 2018-19 sugar seasons regarding the minimum selling price for sugar and maintaining minimum stocks of sugar after sales of the maximum specified quantity for the month of June 2018, as well as similar orders to be issued in subsequent periods.³⁶⁸ In addition to these requirements, the Buffer Stock Scheme 2018 requires sugar mills "to fully comply with all orders/directives issued by [DFPD] for compliance during 2018-19 sugar season".³⁶⁹

7.139. With respect to the allocation of buffer stock subsidies, the Buffer Stock Scheme 2019 provides:

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 vi[a] directive dated 28.09.2018 of DFPD, its stock shall be considered after deducting the quantity equivalent to its allocated MIEQ.³⁷⁰

7.2.2.4 Marketing and Transportation Scheme

7.140. On 12 September 2019, India introduced the Marketing and Transportation Scheme. With respect to the purpose of the assistance, the Marketing and Transportation Scheme states that "[t]he funds to be provided as assistance to facilitate export [are] to be used for payment of cane price dues of farmers for the sugar season 2019-20 and cane price arrears of previous sugar seasons, if any."³⁷¹

7.141. Under the Marketing and Transportation Scheme, the Central Government provides a "lump sum assistance for expenses on export of sugar limited to MAEQ of sugar mills for the sugar season 2019-20, in the following manner": (i) for "marketing including handling, quality up-gradation, debagging [and] re-bagging and other processing costs etc.", an amount of INR 4400 per tonne; (ii) for "internal transport and freight charges including loading, unloading, and fobbing etc.", an amount of INR 3428 per tonne; and (iii) for "ocean freight against shipment from Indian ports to the ports of destination countries etc.", an amount of INR 2620 per tonne of sugar.³⁷²

7.142. The Marketing and Transportation Scheme further provides that "the assistance ... would not be reimbursement but assistance" for the expenses incurred under the above-mentioned

³⁶⁵ Notification of 31 July 2019, (Exhibit JE-77), para. 2; and Notification of 15 June 2018, (Exhibit JE-78), para. 2.

³⁶⁶ Notification of 31 July 2019, (Exhibit JE-77), para. 2; and Notification of 15 June 2018, (Exhibit JE-78), para. 2.

³⁶⁷ Notification of 31 July 2019, (Exhibit JE-77), para. 3(d); and Notification of 15 June 2018, (Exhibit JE-78), para. 3(d).

³⁶⁸ Notification of 31 July 2019, (Exhibit JE-77), para. 2. See also Notification of 15 June 2018, (Exhibit JE-78), para. 4.

³⁶⁹ Notification of 31 December 2018, (Exhibit JE-112), p. 1.

³⁷⁰ Notification of 31 July 2019, (Exhibit JE-77), para. 2.

³⁷¹ Notification of 12 September 2019, (Exhibit JE-114), para. 1. Similarly, the preamble to the Marketing and Transportation Scheme states that the assistance is provided "with a view to facilitate[ing] export of sugar during the sugar season 2019-20 ... thereby improving the liquidity position of sugar mills enabling them to clear cane price dues of farmers for sugar season 2019-20". Paragraph 5 also states that "[t]he 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 sugar seasons, if any." (Ibid. preamble, para. 5)

³⁷² Notification of 12 September 2019, (Exhibit JE-114), para. 3(i).

categories.³⁷³ Sugar mills are not entitled to claim assistance on any other expenses, or beyond the prescribed rate.³⁷⁴

7.143. To ensure that the assistance is directly credited into the accounts of farmers, sugar mills must open separate no-lien accounts and furnish to the bank the details and extent of the sugarcane price dues for the 2019-20 and previous sugar seasons. The bank shall credit the amounts of assistance directly into the accounts of farmers "on behalf of mills against cane dues payable and subsequent balance, if any, shall be credited into mill's account".³⁷⁵ Sugar mills must submit utilization certificates confirming that the subsidy was used for the payment of farmers' sugarcane price dues within three months from the date of the payment of the subsidy.³⁷⁶

7.144. Eligibility to claim assistance is conditioned, *inter alia*, upon mills exporting at least 50% of their MAEQ allocations. Specifically, the Marketing and Transportation Scheme provides:

The Sugar mills should have exported sugar up to the extent of their Maximum Admissible Export Quantity (MAEQ) determined by the Central Government for such mills for the sugar season 2019-20, either themselves or through a merchant exporter. However, to become eligible to get assistance a sugar mill would be required to export at least 50% of its MAEQ.³⁷⁷

7.145. On 16 September 2019, the DFPD determined the MAEQ for each sugar mill.³⁷⁸

7.2.2.5 Duty Free Import Authorization (DFIA) Scheme

7.146. The DFIA Scheme is set out in the Foreign Trade Policy 2015-2020 issued by the Central Government on 1 April 2015.³⁷⁹ Chapter 4 of the Foreign Trade Policy, titled "Duty Exemption/Remission Schemes" provides that "[s]chemes under this Chapter enable duty free import of inputs for export production."³⁸⁰ The DFIA Scheme is one such duty exemption scheme.

7.147. The DFIA Scheme provides for issuance of authorizations to allow duty free imports of inputs that are to be used for production of goods for exports.³⁸¹ Authorization under the DFIA Scheme provides exemption from payment of the basic customs duty.³⁸² The DFIA is issued "on [a] post-export basis for products for which Standard Input Output Norms have been notified".³⁸³

7.148. As a result of the amendments to the Foreign Trade Policy introduced in March 2018³⁸⁴, sugar mills that exported white sugar between 28 March 2018 and 30 September 2018 are eligible to import raw sugar duty-free between 1 October 2019 and 30 September 2021.³⁸⁵

7.149. The DFIA can be transferred from one entity to another. To that end, a DFIA holder may request the issuance of a transferrable DFIA from a regional authority. Such requests can be made

³⁷³ Notification of 12 September 2019, (Exhibit JE-114), para. 3(iii).

³⁷⁴ Notification of 12 September 2019, (Exhibit JE-114), para. 3(iii).

³⁷⁵ Notification of 12 September 2019, (Exhibit JE-114), para. 5(ii).

³⁷⁶ Notification of 12 September 2019, (Exhibit JE-114), para. 6.

³⁷⁷ Notification of 12 September 2019, (Exhibit JE-114), para. 2(a). Sugar mills can submit their claims for assistance in two tranches. The first claim can be submitted after the sugar mill has exported at least 50% of its MAEQ. (Ibid. para. 4(i))

³⁷⁸ MAEQ Order of 16 September 2019, (Exhibit JE-115).

³⁷⁹ Foreign Trade Policy 2015-2020, (Exhibit AUS-40).

³⁸⁰ Foreign Trade Policy 2015-2020, (Exhibit AUS-40), para. 4.00.

³⁸¹ Foreign Trade Policy 2015-2020, (Exhibit AUS-40), para. 4.25(a).

³⁸² Foreign Trade Policy 2015-2020, (Exhibit AUS-40), para. 4.26(i).

³⁸³ Foreign Trade Policy 2015-2020, (Exhibit AUS-40), para. 4.27(i).

³⁸⁴ Amendment to the Foreign Trade Policy 2015-2020, (Exhibit AUS-41).

³⁸⁵ Paragraph 4.25(c) of the Foreign Trade Policy reads:

Export of white sugar under DFIA is allowed under SION SI.No-E 52 till 30.9.2018 and DFIA in such cases shall be issued only on or after 1.10.2019. Such DFIA's shall be valid for imports till 30.9.2021.

(Amendment to the Foreign Trade Policy 2015-2020, (Exhibit AUS-41))

within a period of 12 months from the date of export or six months from the date of realization of export proceeds, whichever is later.³⁸⁶

7.2.3 Order of analysis

7.150. As noted above³⁸⁷, Australia and Guatemala raise claims under both the Agreement on Agriculture and the SCM Agreement. In this section, we address the relationship between the two Agreements and our order of analysis.

7.151. Both the Agreement on Agriculture and the SCM Agreement contain disciplines regulating export subsidies. While the Agreement on Agriculture regulates export subsidies for agricultural products, the SCM Agreement contains general disciplines on export subsidies. 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" of that Agreement. Article 9.1 of the Agreement on Agriculture, in turn, lists subsidies that are subject to reduction commitments. Article 3.1(a) of the SCM Agreement prohibits subsidies contingent upon export performance, "[e]xcept as provided in the Agreement on Agriculture".³⁸⁸

7.152. Article 21.1 of the Agreement on Agriculture, which governs the relationship between the Agreement on Agriculture and other Agreements in Annex 1A to the WTO Agreement, states:

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.

7.153. The SCM Agreement is contained in Annex 1A to the WTO Agreement. Accordingly, the SCM Agreement applies "subject to the provisions" of the Agreement on Agriculture.

7.154. An export subsidy for agricultural products can, in principle, be subject to both the Agreement on Agriculture and the SCM Agreement. However, pursuant to Article 21.1³⁸⁹, in the event of a conflict between the two Agreements, the disciplines of the Agreement on Agriculture would prevail over those of the SCM Agreement.³⁹⁰ Accordingly, if an export subsidy were prohibited under the SCM Agreement but permitted under the Agreement on Agriculture, giving rise to a conflict, that measure would be WTO-consistent because the Agreement on Agriculture would prevail over the SCM Agreement. By contrast, if an export subsidy were prohibited under both the Agreement on Agriculture and the SCM Agreement, no conflict would arise, and the measure would be inconsistent with both Agreements.

7.155. Consequently, the WTO-consistency of an alleged export subsidy for agricultural products has to be examined, in the first place, under the Agreement on Agriculture, followed by the SCM Agreement, if necessary.³⁹¹ We will follow this order of analysis in our examination of the complainants' claims.

³⁸⁶ India's response to Panel question No. 86.a; Foreign Trade Policy 2015-2020, (Exhibit AUS-40), para. 4.29(iv).

³⁸⁷ See paras. 7.116-7.117 above.

³⁸⁸ Furthermore, Article 1.1 of the SCM Agreement provides that "a subsidy shall be deemed to exist if ... there is a financial contribution by a government or any public body within the territory of a Member ... and ... a benefit is thereby conferred."

³⁸⁹ Furthermore, the opening clause of Article 3.1 of the SCM Agreement provides that the subsidies referred to in paragraphs (a) and (b) of that provision shall be prohibited "[e]xcept as provided in the Agreement on Agriculture".

³⁹⁰ This could be the case, for example, where "there is an explicit authorization in the text of the Agreement on Agriculture that would authorize a measure that, in the absence of such an express authorization, would be prohibited by Article 3.1(b) of the SCM Agreement". (Appellate Body Report, *US – Upland Cotton*, para. 532 (quoting Panel Report, *US – Upland Cotton*, para. 7.1038))

³⁹¹ Appellate Body Reports, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 123; and *US – Upland Cotton*, para. 570.

7.2.4 Claims under the Agreement on Agriculture

7.2.4.1 Introduction

7.156. The complainants argue that, because India has no export subsidy reduction commitments in its Schedule, and consequently no export subsidy entitlements, its measures are inconsistent with the obligations set forth in Articles 3.3 and 8 of the Agreement on Agriculture.³⁹²

7.157. Brazil and Australia submit that India's assistance schemes are subsidies contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture.³⁹³ For its part, Guatemala argues that India's assistance schemes constitute an export subsidy under Articles 9.1(a) and (c) of the Agreement on Agriculture.³⁹⁴

7.158. In the alternative, Australia claims that, if the Panel were to find that the four assistance schemes challenged by Australia do not fall within the scope of Article 9.1(a), these schemes would be inconsistent with India's obligations under Articles 8 and 10.1 of the Agreement on Agriculture.³⁹⁵ Guatemala argues that, if the Panel were to find that the production subsidies and buffer stock subsidies are not export contingent, they would constitute domestic support measures and should be included in the calculation of India's AMS for sugarcane.³⁹⁶

7.159. In response, India argues, first, that the complainants have failed to demonstrate the existence of a financial contribution and benefit with respect to all challenged schemes.³⁹⁷ In particular, India submits that "the complainants have not met their burden to demonstrate [the] 'making' of [a] financial contribution such that they can show [that] there is a financial contribution".³⁹⁸ India further submits that the complainants failed to identify any benchmark in a relevant market to demonstrate the existence of a benefit and have merely presumed that a benefit exists.³⁹⁹

7.160. Furthermore, India maintains that, as a developing country, it is entitled to grant export subsidies for marketing and transportation costs in accordance with Article 9.4 of the Agreement on Agriculture.⁴⁰⁰ India submits that the Marketing and Transportation Scheme falls within the scope of Articles 9.1(d) and 9.1(e) of the Agreement on Agriculture and is therefore permitted under Article 9.4 of that Agreement.⁴⁰¹

7.161. Finally, India considers that the DFIA Scheme does not constitute a subsidy. In this respect, India points out that, pursuant to footnote 1 to the SCM Agreement, an exemption or remission of duties and taxes levied on like products destined for domestic consumption is not a subsidy, to the extent that it does not constitute an "excess remission".⁴⁰² According to India, the DFIA Scheme falls under the scope of footnote 1 of the SCM Agreement, read together with paragraph (i) of Annex I to the SCM Agreement, and therefore does not constitute a subsidy within the meaning of the Agreement on Agriculture.⁴⁰³

7.162. We begin by providing an overview of relevant provisions of the Agreement on Agriculture. Then we will determine whether India's Schedule contains export subsidy reduction commitments. Thereafter, we will examine whether each of the four assistance schemes identified by the complainants is inconsistent with the Agreement on Agriculture.

³⁹² Brazil's first written submission, para. 169; Australia's first written submission, para. 285; Guatemala's first written submission, para. 193.

³⁹³ Brazil's first written submission, para. 169; Australia's first written submission, para. 286.

³⁹⁴ Guatemala's first written submission, para. 193.

³⁹⁵ Australia's first written submission, para. 367.

³⁹⁶ Guatemala's first written submission, para. 195.

³⁹⁷ India's first written submission, para. 110; response to Panel question No. 39.

³⁹⁸ India's first written submission, para. 107; response to Panel question No. 39. (emphasis and underlining original) See also India's second written submission, paras. 70-89.

³⁹⁹ India's first written submission, para. 112; second written submission, paras. 90-97.

⁴⁰⁰ India's first written submission, para. 103.

⁴⁰¹ India's first written submission, para. 116; second written submission, paras. 98-106.

⁴⁰² India's first written submission, paras. 97-98.

⁴⁰³ India's first written submission, paras. 124-125; second written submission, paras. 107-110.

7.2.4.2 Overview of the relevant provisions

7.163. We consider it useful to begin by providing an overview of the provisions of the Agreement on Agriculture relevant to the export subsidy claims in these disputes.

7.164. Article 1(e) of the Agreement on Agriculture defines the term "export subsidies" as "subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement". The rules governing export competition are set out in Articles 3, 8, 9, and 10 of the Agreement on Agriculture.

7.165. Article 8 limits the export subsidies that a Member can provide to those that are consistent with the provisions of the Agreement on Agriculture and with that Member's Schedule.⁴⁰⁴ Accordingly, a Member providing an export subsidy that is inconsistent with the Agreement on Agriculture and its own Schedule will act inconsistently with Article 8.

7.166. The level of export subsidies that a Member can provide is determined by what is inscribed in that Member's Schedule. In this regard, Article 3.1 of the Agreement on Agriculture states that "export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994".

7.167. Article 3.3 distinguishes between two types of commitments with respect to export subsidies:

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.

7.168. Under the first part of Article 3.3, Members have committed not to provide export subsidies listed in Article 9.1 in respect of *scheduled* agricultural products⁴⁰⁵ in excess of budgetary outlays and quantity commitment levels specified in the relevant Member's Schedule. Article 9.1 of the Agreement on Agriculture refers to scheduled agricultural product commitments as "reduction commitments". Under the second part of Article 3.3, Members have committed not to provide any export subsidies listed in Article 9.1 with respect to *unscheduled* agricultural products, i.e. those that are not specified in the Member's Schedule. Article 3.3 thus prohibits providing export subsidies within the meaning of Article 9.1 on unscheduled agricultural products.⁴⁰⁶

7.169. As noted above, the Agreement on Agriculture distinguishes between the commitments for scheduled and unscheduled products. Therefore, to determine a Member's commitment with respect to export subsidies on an agricultural product, it has to be established whether the agricultural product in question is included in Section II of Part IV of the Member's Schedule and, if so, what commitment has been undertaken therein for that product.

7.170. Article 3.3 applies "subject to" the provisions of Articles 9.2(b) and 9.4, which provide two further avenues for Members to grant export subsidies in conformity with the Agreement on Agriculture. Article 9.4, which is relevant to these disputes, stipulates that, "[d]uring the implementation period, developing country Members shall not be required to undertake commitments in respect of the export subsidies listed in subparagraphs (d) and (e) of paragraph 1 above, provided that these are not applied in a manner that would circumvent reduction commitments." The subsidies referred to in paragraphs (d) and (e) of Article 9.1 of the Agreement on Agriculture are:

(d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including

⁴⁰⁴ Article 8, titled "Export Competition Commitments", reads:

Each 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.

⁴⁰⁵ Scheduled agricultural products are those specified in Section II of Part IV of Members' Schedules.

⁴⁰⁶ Appellate Body Report, *US – FSC*, paras. 145-146.

handling, upgrading and other processing costs, and the costs of international transport and freight; and

(e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments[.]

7.171. Paragraph 1 of Article 9 of the Agreement on Agriculture, titled "Export Subsidy Commitments", lists the kinds of export subsidies that are subject to reduction commitments (for scheduled products) or are inconsistent (for unscheduled products) with Article 3.3. The complainants allege that India grants export subsidies within the meaning of Articles 9.1(a) and (c), which read:

1. The following export subsidies are subject to reduction commitments under this Agreement:

(a) 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;

...

(c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived[.]

7.172. Article 9.1(a) provides that direct subsidies that are contingent on export performance are subject to reduction commitments under the Agreement on Agriculture. Article 9.1(c) stipulates that payments on exports financed by virtue of governmental action are also subject to reduction commitments under the Agreement on Agriculture.

7.173. As noted, the inconsistency of export subsidies with Article 3.3 relates only to the export subsidies listed in Article 9.1. All other subsidies contingent upon export performance, as defined in Article 1(e) of the Agreement, are subject to the provisions of Article 10.⁴⁰⁷ Article 10.1, which is designed to prevent circumvention of export subsidy commitments, does not permit granting of export subsidies not listed in Article 9.1 in a way that would lead, or threaten to lead, to the circumvention of export subsidy commitments. It also stipulates that non-commercial transactions should not be used to circumvent export subsidy commitments.⁴⁰⁸

7.2.4.3 India's export subsidy commitments

7.174. As observed above, pursuant to Article 3.3 of the Agreement on Agriculture, the level at which India can provide export subsidies listed in Article 9.1 depends on whether India's Schedule contains an export subsidy reduction commitment.

7.175. The parties agree that sugar is an unscheduled agricultural product for India.⁴⁰⁹ Our own review of India's Schedule and Supporting Tables also demonstrates that India did not make export

⁴⁰⁷ Article 10.1, titled "Prevention of Circumvention of Export Subsidy Commitments", reads: Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

⁴⁰⁸ In *US – FSC*, the Appellate Body understood the term "export subsidy commitments" to have "a wider reach [than reduction commitments] that covers commitments and obligations relating to both scheduled and unscheduled agricultural products". (Appellate Body Report, *US – FSC*, para. 147)

⁴⁰⁹ Brazil's first written submission, paras. 183-184; Australia's first written submission, paras. 248-251; Guatemala's first written submission, paras. 256-257; India's response to Panel question No. 38.

subsidy reduction commitments with respect to sugar.⁴¹⁰ As a result, if we find that India provides export subsidies within the meaning of Article 9.1 of the Agreement on Agriculture, these subsidies would be inconsistent with Articles 3.3 and 8 of that Agreement.

7.176. We proceed to examine whether the alleged subsidy schemes identified by the complainants fall under Articles 9.1(a) and (c) of the Agreement on Agriculture. As a threshold issue, however, we first address India's contention that the Marketing and Transportation Scheme is permitted under Article 9.4 of the Agreement on Agriculture.

7.2.4.4 Whether the Marketing and Transportation Scheme falls under Article 9.4 of the Agreement on Agriculture

7.2.4.4.1 Introduction

7.177. As noted above, the complainants claim, *inter alia*, that India's Marketing and Transportation Scheme is inconsistent with Articles 9.1(a) and (c) of the Agreement on Agriculture. In response, India submits that the Marketing and Transportation Scheme falls within the scope of Articles 9.1(d) and (e) of the Agreement on Agriculture and is therefore permitted under Article 9.4 of that Agreement.⁴¹¹

7.178. In addressing the parties' claims and arguments, we consider it appropriate to examine, first, whether the Marketing and Transportation Scheme falls within the scope of Articles 9.1(d) and (e) of the Agreement on Agriculture and, if so, whether it meets the requirements of Article 9.4 of that Agreement. If we find that it does not, we will address the complainants' claims regarding the Marketing and Transportation Scheme, together with the other schemes challenged by the complainants, under Articles 9.1(a) and (c) of the Agreement on Agriculture.

7.2.4.4.2 Burden of proof

7.179. The parties disagree as to who bears the burden of proof under Article 9.4 of the Agreement on Agriculture. India considers Article 9.4 to be an "autonomous right", not an exception, and contends that the complainants had to demonstrate, in their first written submissions, that the Marketing and Transportation Scheme is inconsistent with Article 9.4, which they failed to do.⁴¹² In this regard, India submits that "[i]f it is [the] complainants' view that the subsidies under Marketing and Transportation Scheme are not related to costs/items set out in Articles 9.1(d) and (e), they must demonstrate their claim with evidence."⁴¹³ India explains that paragraph 3(1) of the Panel's Working Procedures requires the complainants to set out their case in chief, including an explanation why the Marketing and Transportation Scheme does not fall under Article 9.4 of the Agreement on Agriculture, in their first written submissions.⁴¹⁴ India also submits that "[t]he complainants have failed to provide any argument/evidence to substantiate their claim that [the] Marketing and Transportation Scheme does not fall under Article 9.1(d) and 9.1(e)."⁴¹⁵

7.180. By contrast, Brazil considers that characterization of Article 9.4 as an "autonomous right" or an "exception", and any implication of such characterization on the allocation of the initial burden of proof, is not determinative of the Panel's resolution of this dispute.⁴¹⁶ This is because, according to Brazil, the underlying issue was fully debated by the parties, and the evidence compellingly demonstrates that the Marketing and Transportation Scheme does not fall within the scope of Articles 9.1(d) and (e).⁴¹⁷ For its part, Australia considers that Article 9.4 is an exception to the export subsidy obligations in Articles 3.3 and 8 of the Agreement on Agriculture, but does not consider the characterization of Article 9.4 determinative of which party bears the initial burden of

⁴¹⁰ Part IV, Section II of India's Schedule, which is relevant to export subsidies, is blank, except for a reference in its Column 8 to relevant Supporting Tables. In turn, India's Supporting Tables state that India "does not maintain any export subsidy" within the meaning of Article 9 of the Agreement on Agriculture. (G/AG/AGST/IND, p. 4, para. 7) The only subsidy available to agricultural producers is the exemption from income tax of profits from export sales, which also applies to the exports of industrial goods. (Ibid.)

⁴¹¹ India's first written submission, para. 116; second written submission, para. 98.

⁴¹² India's opening statement at the second substantive meeting of the Panel, paras. 81, 105, and 109.

⁴¹³ India's response to Panel question No. 57.

⁴¹⁴ India's opening statement at the second substantive meeting of the Panel, para. 82.

⁴¹⁵ India's first written submission, para. 123.

⁴¹⁶ Brazil's response to Panel question No. 92, para. 133.

⁴¹⁷ Brazil's response to Panel question No. 92, para. 134.

raising the provision.⁴¹⁸ Guatemala also disagrees with India's characterization of Article 9.4 as an autonomous right and submits that the usual rules on burden of proof apply, whereby a party to a dispute bears the burden of proving its claim or defence.⁴¹⁹ Irrespective of whether Article 9.4 is an exception or an autonomous right, the complainants submit that they have comprehensively demonstrated that the Marketing and Transportation Scheme does not satisfy the terms of Article 9.4, read together with Articles 9.1(d) and (e).⁴²⁰

7.181. In assessing the complainants' claims regarding the Marketing and Transportation Scheme, and India's contention that this Scheme is permitted under Article 9.4 of the Agreement on Agriculture, read in conjunction with its Articles 9.1(d) and (e), we do not find it necessary to make a finding on the legal nature of Article 9.4 of the Agreement on Agriculture. Nor do we consider it necessary to decide which party bears the burden of proof on the issue of whether the Marketing and Transportation Scheme falls within Articles 9.1(d) and (e), and therefore is permitted under Article 9.4. Regardless of the nature of Article 9.4 and who bears the burden of proof, both the complainants and India have submitted extensive arguments and evidence on the issue of whether the Marketing and Transportation Scheme falls under Articles 9.1(d) and (e) and whether it is hence permitted under Article 9.4.⁴²¹ As explained in section 7.2.4.4.5 below, having examined these arguments and evidence, we found the complainants' position to be more persuasive and sufficient for us to conclude that the Marketing and Transportation Scheme does not fall under Article 9.4.

7.182. We disagree with India's argument that the complainants were required to submit their evidence and arguments in their first written submissions. Contrary to what India argues, paragraph 3(1) of the Panel's Working Procedures does not require the complainants to present exhaustively their arguments in the first written submissions. Rather, it requires "each party [to] submit a written submission in which it presents the facts of the case and its arguments".⁴²² Furthermore, India has not shown that it was somehow prejudiced by the complainants' alleged late submission of evidence and arguments on this issue. Rather, regardless of whether Article 9.4 provides an autonomous right or grants an exception, the parties have exchanged considerable evidence and arguments on this issue, and, in our view, India has not demonstrated that the timing of these exchanges restricted its ability to respond to the complainants' assertions, or otherwise limited the Panel's ability to objectively examine those arguments and evidence in order to assess whether the Marketing and Transportation Scheme falls within the scope of Article 9.4.⁴²³

7.183. We will therefore examine the totality of arguments and evidence submitted by the complainants and India to decide whether the Marketing and Transportation Scheme falls under Article 9.4 of the Agreement on Agriculture.

7.2.4.4.3 Main arguments of the parties and third parties

7.184. As noted, India submits that the Marketing and Transportation Scheme falls within the scope of Articles 9.1(d) and (e) of the Agreement on Agriculture and is therefore permitted under Article 9.4 of that Agreement.⁴²⁴ India argues that the Marketing and Transportation Scheme

⁴¹⁸ Australia's response to Panel question No. 92, paras. 143 and 149-153.

⁴¹⁹ Guatemala's response to Panel question No. 92.

⁴²⁰ Brazil's response to Panel question No. 92, para. 141; Australia's response to Panel question No. 92, para. 148; Guatemala's response to Panel question No. 92, para. 110.

⁴²¹ Brazil's second written submission, paras. 107-149; Australia's second written submission, paras. 120-169; Guatemala's second written submission, paras. 79-111; complainants' responses to Panel questions Nos. 82 and 84; India's first written submission, paras. 116-123; opening statement at the first substantive meeting of the Panel, paras. 14-17; closing statement at the first substantive meeting of the Panel, paras. 40-41; second written submission, paras. 98-106; opening statement at the second substantive meeting of the Panel, paras. 77-83; and response to Panel question No. 92.

⁴²² Working Procedures of the Panel, para. 3(1). We further note that Australia and Brazil state, in their first written submissions, that Article 9.4 is not relevant to the present disputes. (Australia's first written submission, para. 245; Brazil's first written submission, para. 185)

⁴²³ We note that, in similar circumstances, panels and the Appellate Body have taken into account the extent to which the other party was given an opportunity to respond to new evidence adduced by a party. See e.g. Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 79-81; and Panel Reports, *Korea – Alcoholic Beverages*, paras. 5.24-5.25; *China – Autos (US)*, para. 7.81; *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)*, Annex D-1, para. 18.

⁴²⁴ India's first written submission, para. 116; second written submission, para. 98. India argues that paragraph 8 of the Nairobi Ministerial Decision on Export Competition extended the application of Article 9.4 for developing countries until 2023. (India's first written submission, fn. 87 to para. 102)

"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".⁴²⁵ In India's view, these costs "fall squarely within the meaning of Article 9.1(d) as specific costs incurred as part of and during the process of selling sugar on the export market".⁴²⁶ India further points out that payment towards ocean freight, envisaged under the Marketing and Transportation Scheme, "falls squarely within the meaning of 'international transport and freight'" under Article 9.1(d).⁴²⁷ Finally, according to India, payments at specified rates towards internal transport and freight charges, including loading, unloading, and fobbing, envisaged under the Marketing and Transportation Scheme, "fall[] squarely within the ambit of Article 9.1(e)".⁴²⁸

7.185. The complainants argue that the design and structure of the Marketing and Transportation Scheme demonstrate that the purpose of the assistance is to pay sugarcane arrears to farmers and not to offset marketing and transportation costs⁴²⁹, and that the amount of assistance provided under the Marketing and Transportation Scheme is not limited to the costs of marketing and transportation actually incurred by sugar mills.⁴³⁰

7.186. In particular, Brazil submits that the legal standard under Articles 9.1(d) and (e) requires "both a qualitative and a quantitative relationship between the receipt of the subsidy at issue and incurrence of the types of costs or charges listed under Articles 9.1(d) and (e)".⁴³¹ In this regard, Brazil maintains that the structure, design and operation of the Marketing and Transportation Scheme reveal that it does not fall under Articles 9.1(d) and (e) because neither the qualitative nor the quantitative aspect is satisfied.⁴³² Australia maintains that, to fall under Article 9.1(d), "a subsidy must be provided for the distinct purpose of covering 'costs of marketing exports of agricultural products' including 'the costs of international transport and freight'".⁴³³ Likewise, Australia submits that, to fall under Article 9.1(e), the subsidy must have "the distinct purpose of creating advantageous conditions for 'internal transport and freight charges on export shipments'".⁴³⁴ Furthermore, assuming that the assistance under the Marketing and Transportation Scheme falls under Articles 9.1(d) and (e), Australia argues that the Marketing and Transportation Scheme does not ensure that the amount of assistance does not exceed the costs incurred.⁴³⁵ For its part, Guatemala argues that, to fall under Article 9.1(d) or (e), a subsidy "must correspond qualitatively to the types of costs specified therein and must be limited quantitatively to the amount of such costs".⁴³⁶ According to Guatemala, the design and structure of the Marketing and Transportation

⁴²⁵ India's first written submission, para. 119.

⁴²⁶ India's first written submission, para. 119 (referring to Notification of 12 September 2019, (Exhibit JE-114), para. 3(i)(a)). (emphasis omitted); second written submission, para. 99.

⁴²⁷ India's first written submission, para. 120 (referring to Notification of 12 September 2019, (Exhibit JE-114), para. 3(i)(c)); second written submission, para. 99.

⁴²⁸ India's first written submission, para. 122 (referring to Notification of 12 September 2019, (Exhibit JE-114), para. 3(i)(b)); second written submission, para. 99.

⁴²⁹ Brazil's second written submission, paras. 127-130; Australia's second written submission, paras. 130-131; Guatemala's second written submission, para. 81.

⁴³⁰ Brazil's second written submission, paras. 134-143; Australia's second written submission, paras. 147-169; Guatemala's second written submission, paras. 95-108.

⁴³¹ According to Brazil, qualitatively, Article 9.1(d) requires a rational relationship between the subsidies at issue, on the one hand, and the "costs of marketing", on the other hand. Similarly, and again qualitatively, Article 9.1(e) requires that the subsidies must take the form of "internal transport and freight charges" that are "more favourable than for domestic shipment". In terms of the required quantitative relationship, Brazil argues that both provisions require, at a minimum, that the subsidy amount not exceed the actual costs under the relevant cost categories or charges. Finally, Brazil argues that these requirements and the resulting scope of Articles 9.1(d) and (e) must be interpreted strictly and narrowly in order to ensure that there is no circumvention of the export subsidy reduction commitments. (Brazil's second written submission, paras. 118 and 119-121)

⁴³² Specifically, Brazil argues that (i) the actual purpose of the Marketing and Transportation Scheme is the payment of cane price dues of farmers; (ii) this purpose cannot be reconciled with the required relationship to the relevant costs and charges under Articles 9.1(d) and (e); and (iii) the Marketing and Transportation Scheme fails to consider, and in fact far exceeds, the actual costs of the relevant cost items. (Brazil's second written submission, paras. 125, 131, 133, and 143)

⁴³³ Australia's second written submission, para. 121. (underlining omitted) See also Australia's response to Panel question No. 56, para. 36.

⁴³⁴ Australia's second written submission, para. 122; response to Panel question No. 56, paras. 43-44.

⁴³⁵ Australia's second written submission, para. 149. Australia explains that, given the clear lack of a relationship between the Marketing and Transportation Scheme and the kinds of costs identified in Articles 9.1(d) and (e), it is unnecessary for the Panel to examine whether payments under the Marketing and Transportation Scheme exceed those actual costs. (Ibid. para. 148)

⁴³⁶ Guatemala's second written submission, para. 80. (emphasis omitted)

Scheme reveals that the assistance under that Scheme is provided for the purpose of paying sugarcane arrears owed to farmers, and not for the purpose of offsetting costs reflected in Articles 9.1(d) and (e). Furthermore, in Guatemala's view, even if the assistance under the Marketing and Transportation Scheme was granted for a purpose reflected in Article 9.1(d) or (e), the amount of assistance exceeds the costs actually incurred by sugar mills for the marketing or transportation of sugar exports.⁴³⁷

7.187. As a third party, the European Union does not take a position on whether the Marketing and Transportation Scheme falls within the scope of Articles 9.1(d) and (e).⁴³⁸ Nevertheless, the European Union invites the Panel to carefully examine Australia's allegation that the amounts of assistance are not linked to the actual costs of marketing and transportation.⁴³⁹ According to the European Union, the mere fact that the granting authority describes a subsidy as one that covers transport or marketing expenses is not sufficient to bring that subsidy within the scope of Article 9.1 (d) or (e). Instead, in the European Union's view, "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."⁴⁴⁰

7.2.4.4.4 Legal standard

7.188. Article 9.4 of the Agreement on Agriculture provides:

During the implementation period, developing country Members shall not be required to undertake commitments in respect of the export subsidies listed in subparagraphs (d) and (e) of paragraph 1 above, provided that these are not applied in a manner that would circumvent reduction commitments.

7.189. Articles 9.1(d) and (e) of the Agreement on Agriculture refer to:

(d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;

(e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments[.]

7.190. Both Articles 9.1(d) and (e) mention specific types of costs related to exportation. In particular, Article 9.1(d) refers to costs of marketing and international transport and freight, whereas Article 9.1(e) refers to charges on internal transport and freight on export shipments. Therefore, we are of the view that, for a subsidy programme to fall within the scope of either of these provisions, it must be related to one of the types of costs addressed in these two provisions.

7.191. The same view was expressed by the Appellate Body in *US – FSC*. According to the Appellate Body, Article 9.1(d) does not merely refer to any costs that effectively reduce the cost of marketing. Rather, it covers "specific types of costs that are incurred as part of and during the process of selling a product."⁴⁴¹ The costs referred to in Article 9.1(d) thus "differ from general business costs, such as administrative overhead and debt financing costs, which are not specific to the process of putting a product on the market, and which are, therefore, related to the marketing of exports only in the broadest sense."⁴⁴² In our view, the same logic applies to Article 9.1(e): to fall under that provision, a governmental action must bring about a price advantage for internal transport and freight charges on export shipments.

⁴³⁷ Guatemala's second written submission, para. 81.

⁴³⁸ European Union's third-party submission, para. 66.

⁴³⁹ European Union's third-party submission, paras. 66-67.

⁴⁴⁰ European Union's third-party submission, para. 67.

⁴⁴¹ Appellate Body Report, *US – FSC*, para. 130. In that dispute, the United States appealed the panel's finding that, by reducing an exporter's income tax liability, FSC subsidies effectively reduced the cost of marketing agricultural products. The United States argued that although income taxes may be a cost of doing business, they are not part of the "costs of marketing exports" under Article 9.1(d). The Appellate Body reversed the panel's finding. (Ibid. paras. 122-132)

⁴⁴² Appellate Body Report, *US – FSC*, para. 130.

7.192. Furthermore, in our view, the requirements of Articles 9.1(d) and (e) involve a limitation on the amount of assistance provided under a given subsidy programme.⁴⁴³ In this regard, Article 9.1(d) stipulates that the purpose of the subsidy is "to reduce" (which means "to make smaller, diminish"⁴⁴⁴) the costs of marketing as well as international transport and freight. Accordingly, to fall under Article 9.1(d), the amount of the subsidy should not exceed the actual costs of marketing and international transport and freight. Otherwise, it cannot be said that the purpose of the subsidy is to "reduce" such costs, as required under this provision. While Article 9.1(e) does not contain specific language regarding the amount of the subsidy, it indicates that the subsidy has to be one that involves internal transport and freight charges on export shipments, provided on terms more favourable than for domestic shipments.⁴⁴⁵ Logically, therefore, to fall under Article 9.1(e), the amount of the subsidy should not exceed the amount of internal transport and freight charges for domestic shipments. The contrary view would defeat the purpose of Article 9.4 of the Agreement on Agriculture, which sets forth a time-limited exception for developing country Members to provide export subsidies for specific types of costs subject to the requirement that "these are not applied in a manner that would circumvent reduction commitments".

7.193. With these considerations in mind, we now assess whether the Marketing and Transportation Scheme falls within the scope of Articles 9.1(d) and (e) of the Agreement on Agriculture.

7.2.4.4.5 Assessment of the Marketing and Transportation Scheme under Articles 9.1(d) and 9.1(e) of the Agreement on Agriculture

7.194. The parties disagree whether the assistance provided under the Marketing and Transportation Scheme relates to one of the types of costs listed in those provisions and whether the amount of assistance provided under this Scheme exceeds the actual relevant costs incurred by sugar mills.

7.195. India argues, first, that the assistance under the Marketing and Transportation Scheme falls under the types of costs identified in Articles 9.1(d) and (e).⁴⁴⁶ Second, according to India, "the amount of assistance provided has been calculated based on extensive stakeholder consultation such that the lump sum amount arrived at does not exceed the costs typically incurred by a sugar mill towards such expenses."⁴⁴⁷ In support of its position, India submits "a few sample communications sent to various stakeholders seeking relevant information in order to frame the Marketing and Transportation Scheme".⁴⁴⁸

7.196. The complainants submit that the design, structure and operation of the Marketing and Transportation Scheme demonstrate that the purpose of the assistance provided is to pay sugarcane arrears to farmers and not to offset marketing and transportation costs.⁴⁴⁹ According to the complainants, the amount of assistance provided under the Marketing and Transportation Scheme is not limited to the costs of marketing and transportation actually incurred by sugar mills.⁴⁵⁰

7.197. We address, in turn, whether (i) the assistance provided under the Marketing and Transportation Scheme relates to one of the types of costs listed in Articles 9.1(d) and (e), and (ii) the amount of assistance provided under this Scheme exceeds the actual costs incurred by sugar mills.

⁴⁴³ The parties agree that the amount of the subsidy should not exceed the actual expenses of marketing and transportation. (Brazil's second written submission, para. 120; Australia's second written submission, para. 121; Guatemala's second written submission, para. 80; India's response to Panel questions Nos. 35 and 81)

⁴⁴⁴ Oxford English Dictionary online, definition of "reduce" <https://www.oed.com/view/Entry/160503?rskey=M9oHcY&result=2#eid> (accessed 22 July 2021).

⁴⁴⁵ As the panel in *Canada – Dairy* observed, "Article 9.1(e) is directed at *reduced* internal transport and freight *charges* on export shipments." (Panel Report, *Canada – Dairy*, para. 7.95 (emphasis original))

⁴⁴⁶ India's first written submission, para. 123.

⁴⁴⁷ India's opening statement at the first substantive meeting of the Panel, para. 17.

⁴⁴⁸ India's response to Panel question No. 57 (referring to Exhibits IND-15, IND-16, IND-17, and IND-18).

⁴⁴⁹ Brazil's second written submission, paras. 127-130; Australia's second written submission, paras. 130-131; Guatemala's second written submission, para. 81.

⁴⁵⁰ Brazil's second written submission, paras. 134-143; Australia's second written submission, paras. 147-169; Guatemala's second written submission, paras. 95-108.

7.2.4.4.5.1 Whether the assistance under the Marketing and Transportation Scheme relates to the types of costs in Articles 9.1(d) and (e)

7.198. Consistent with the legal standard articulated above, we start by examining whether the assistance provided under the Marketing and Transportation Scheme relates to the types of costs listed in Article 9.1(d) and (e) of the Agreement on Agriculture.

7.199. As an initial point, we note that, as India argues, the Marketing and Transportation Scheme contains elements that refer to costs of marketing and transportation.⁴⁵¹ First, the full title of the Marketing and Transportation Scheme is "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".⁴⁵² Furthermore, we recall that, under the Marketing and Transportation Scheme, the Central Government provides a "lump sum assistance for expenses on export of sugar limited to MAEQ of sugar mills for the sugar season 2019-20, in the following manner": (i) for "marketing including handling, quality up-gradation, debagging [and] re-bagging and other processing costs etc.", an amount of INR 4400 per tonne; (ii) for "internal transport and freight charges including loading, unloading, and fobbing etc.", an amount of INR 3428 per tonne; and (iii) for "ocean freight against shipment from Indian ports to the ports of destination countries etc.", an amount of INR 2620 per tonne of sugar.⁴⁵³

7.200. The above-mentioned categories of expenses relate to marketing, and internal and international transportation costs. Thus, certain provisions of the Marketing and Transportation Scheme specify that assistance under this Scheme is provided for marketing and transportation expenses incurred on exports of sugar.

7.201. However, other elements of the Marketing and Transportation Scheme indicate that its actual purpose is to pay the sugarcane price dues of farmers. In particular, paragraph 1 of the Marketing and Transportation Scheme, titled "Purpose of assistance", states that "[t]he funds to be provided as assistance to facilitate export [are] to be used for payment of cane price dues of farmers for the sugar season 2019-20 and cane price arrears of previous sugar seasons, if any."⁴⁵⁴ Likewise, the preamble to the Marketing and Transportation Scheme states that the assistance is provided "with a view to facilitat[ing] export of sugar during the sugar season 2019-20 ... thereby improving the liquidity position of sugar mills enabling them to clear cane price dues of farmers for sugar season 2019-20".⁴⁵⁵ Paragraph 5 of the Marketing and Transportation Scheme also states that "[t]he 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 sugar seasons, if any."⁴⁵⁶

7.202. Furthermore, in order to ensure that the assistance under the Marketing and Transportation Scheme is directly credited to the accounts of sugarcane farmers, sugar mills must open separate no-lien accounts and furnish to the bank the details and extent of the sugarcane price dues for the 2019-20 and previous sugar seasons. The bank credits the amounts of assistance directly into the accounts of sugarcane farmers "on behalf of mills against cane dues payable and subsequent balance, if any, shall be credited into [the] mill's account".⁴⁵⁷ Within three months from the date of the subsidy payment, the sugar mill must submit to the DFPD a utilization certificate certifying that the subsidy was used for the payment of farmers' sugarcane price dues.⁴⁵⁸ If a sugar mill were to fail to submit the utilization certificate, the unduly received amount of assistance would be recovered and the mill would be prevented from benefiting from future schemes announced by the Central Government.⁴⁵⁹

7.203. Notably, there is no requirement that sugar mills certify in the utilization certificate that the assistance was used to reduce the costs of marketing or transportation. Rather, sugar mills must certify that the assistance was used for paying sugarcane price dues of farmers. Thus, based on the

⁴⁵¹ By referring to "marketing and transportation", we refer to both costs of international transport and freight and internal transport and freight charges.

⁴⁵² Notification of 12 September 2019, (Exhibit JE-114). (underlining added)

⁴⁵³ Notification of 12 September 2019, (Exhibit JE-114), para. 3(i).

⁴⁵⁴ Notification of 12 September 2019, (Exhibit JE-114), para. 1.

⁴⁵⁵ Notification of 12 September 2019, (Exhibit JE-114), preamble.

⁴⁵⁶ Notification of 12 September 2019, (Exhibit JE-114), para. 5(i).

⁴⁵⁷ Notification of 12 September 2019, (Exhibit JE-114), para. 5(ii).

⁴⁵⁸ Notification of 12 September 2019, (Exhibit JE-114), para. 6.

⁴⁵⁹ Notification of 12 September 2019, (Exhibit JE-114), para. 6.

text of the Marketing and Transportation Scheme, the principal purpose for which the assistance must be used seems to be the payment of sugarcane price dues of farmers. Using it for other purposes would be inconsistent with the relevant regulatory prescriptions and would result in the Central Government recovering the payment from the sugar mill and prohibiting it from applying for future assistance schemes. Although the Scheme indicates that any money left after payment of sugarcane price arrears will be paid to the mill, there seems to be no requirement that such amounts be used towards marketing or transportation costs.

7.204. India argues that, by "improv[ing] the liquidity of the sugar mills", the assistance under the Marketing and Transportation Scheme "ultimately reduc[es] the ... transport and marketing costs incurred".⁴⁶⁰ We are not convinced by this argument. Even if the assistance under the Marketing and Transportation Scheme may ultimately contribute to the reduction of marketing and transportation costs, the purpose of the assistance, as stated in various provisions of the Marketing and Transportation Scheme, is the payment of sugarcane price arrears.⁴⁶¹

7.205. In light of the above, we conclude that the assistance provided under the Marketing and Transportation Scheme does not relate to the types of costs listed in Articles 9.1(d) and (e) of the Agreement on Agriculture.⁴⁶²

7.2.4.4.5.2 Whether the amount of assistance provided under the Marketing and Transportation Scheme exceeds the actual marketing and transportation costs

7.206. Our conclusion above that the assistance under the Marketing and Transportation Scheme does not relate to the types of costs listed in Articles 9.1(d) and (e), in principle, suffices to find that the Marketing and Transportation Scheme does not fall within the scope of those provisions. However, for the sake of completeness, we also examine the parties' arguments regarding the amount of assistance provided under this Scheme.

7.207. India submits that the amount of assistance provided under the Marketing and Transportation Scheme was determined based on extensive consultations with relevant stakeholders, and does not exceed the costs typically incurred by a sugar mill on marketing and transportation.⁴⁶³ By contrast, the complainants argue that the application of a single and unchanging rate of assistance for all exports indicates that the Marketing and Transportation Scheme is not linked to the actual marketing and transportation costs.⁴⁶⁴

7.208. As noted above, we consider that, under Article 9.1(d) of the Agreement on Agriculture, the amount of the subsidy should not exceed the actual costs of marketing and international transportation, and under Article 9.1(e) the amount of the subsidy should not exceed the internal transport and freight charges for domestic shipments. The parties also agree with this view.⁴⁶⁵

7.209. We note that, pursuant to paragraph 3 of the Marketing and Transportation Scheme, assistance is provided in the form of a lump sum according to a set rate per tonne of sugar exported. Accordingly, the amount of assistance is determined based on the volume of sugar exports, and not the actual costs of marketing and transportation borne by the sugar mills. Furthermore, the assistance is provided in the form of a lump sum and there is no mechanism in place to ensure that the amount of assistance does not exceed the costs of transportation incurred by a sugar mill.

⁴⁶⁰ India's opening statement at the first substantive meeting with the Panel, para. 15.

⁴⁶¹ As noted, Article 9.1(d) does not merely refer to any costs that effectively reduce the cost of marketing. Rather, it covers specific types of costs that are incurred as part of and during the process of selling a product. Such costs differ from general business costs, which are not specific to the process of putting a product on the market. Likewise, to fall under Article 9.1(e), a governmental action must bring about a price advantage for internal transport and freight charges on export shipments. (See para. 7.191 above)

⁴⁶² Our conclusion finds support in the Appellate Body's findings in *US – FSC* that Article 9.1(d) does not merely refer to "any 'cost of doing business' that 'effectively reduce[s] the cost of marketing' products". (Appellate Body Report, *US – FSC*, para. 130 (emphasis original))

⁴⁶³ India's closing statement at the first substantive meeting of the Panel, para. 42; response to Panel question No. 57 (referring to Exhibits IND-15, IND-16, IND-17, and IND-18).

⁴⁶⁴ Brazil's second written submission, paras. 134-143; Australia's second written submission, paras. 147-169; Guatemala's second written submission, paras. 95-108.

⁴⁶⁵ Brazil's second written submission, para. 120; Australia's second written submission, para. 121; Guatemala's second written submission, para. 80; India's response to Panel question No. 35.

7.210. The complainants' evidence demonstrates that sugar mills are located in different parts of India and export sugar on different delivery terms, hence incurring different amounts of transportation costs. In particular, the complainants have submitted evidence demonstrating that sugar mills export sugar on: (i) an ex Works (EXW)⁴⁶⁶ basis, which means that the seller incurs neither internal nor international transportation costs⁴⁶⁷; (ii) a Free on Board (FOB)⁴⁶⁸ basis, which means that the seller does not pay the cost of international shipping from the port of departure to the final destination⁴⁶⁹; or (iii) a Cost Insurance & Freight (CIF)⁴⁷⁰ basis, which means that the seller covers the costs and freight necessary to deliver the goods to the port named by the buyer.⁴⁷¹ The use of such different terms in their sales contracts indicates that not all mills will incur transportation costs in all sales and that transportation costs incurred by mills will differ. Logically, therefore, lump sum payments, the amount of which is based on the quantity of tonnes of sugar exported by each mill, are not related to the actual transportation costs incurred by the mills.

7.211. Furthermore, the complainants have submitted evidence demonstrating that, at least for some sugar mills, the amount of the lump sum provided under the Marketing and Transportation Scheme exceeds the actual costs of transportation.⁴⁷² This evidence further supports our view that the Marketing and Transportation Scheme does not ensure that the amount of assistance does not exceed the actual costs of transportation.

7.212. India submits that "the amount of assistance provided has been calculated based on extensive stakeholder consultation such that the lump sum amount arrived at does not exceed the costs typically incurred by a sugar mill towards such expenses."⁴⁷³ In support of its assertion, India provided communications from the DFPD requesting information from several entities (Ministry of Railways, Food Corporation of India, Metals and Minerals Trading Corporation of India Limited (MMTC), and State Trading Corporation of India Ltd (STC)) regarding estimated costs of marketing and transportation in the context of sugar exports in order to determine the amount of a subsidy.⁴⁷⁴

7.213. However, India did not provide any further evidence that would demonstrate what kind of replies the DFPD received and how those replies were taken into account in determining the rates of assistance under the Marketing and Transportation Scheme. In response to a question from the

⁴⁶⁶ This rule of INCOTERMS places minimum responsibility on the seller, who merely has to make the goods available, suitably packaged, at the specified place, usually the seller's factory or depot. The buyer is responsible for: loading the goods onto a vehicle; all export procedures; onward transport; and all costs arising after collection of the goods. (See International Chamber of Commerce (ICC), Incoterms Rules, (Exhibit JE-159))

⁴⁶⁷ Tender Notice for Export of Sugar (Jawahar S.S.S.K. Ltd), (Exhibit JE-160), para. 4; Tender Notice for Sale of Raw Sugar or White Sugar for Export (Shree Datta S.S.S.K. Ltd), (Exhibit JE-161); and HPCL Biofuels Ltd Sugar Export Contracts Specifications, (Exhibit JE-162), Annexure 1, paras. 1.6, 3.12 and 5.2.

⁴⁶⁸ Under the FOB rule, the seller delivers the goods when they are cleared for export and loaded on board the vessel at the named port. Once the goods have been loaded on board, risk transfers to the buyer, who bears all costs thereafter. (See International Chamber of Commerce (ICC), Incoterms Rules, (Exhibit JE-159))

⁴⁶⁹ Reuters, "Indian sugar mills clinch export deals as prices jump – industry", 7 January 2021, (Exhibit JE-163); and Reuters, "Indian sugar exports poised to hit record 5 million tonnes this year", 17 December 2019, (Exhibit JE-164).

⁴⁷⁰ Under the CIF rule, the seller arranges and pays for transport to named port. The seller delivers the goods when they are cleared for export and loaded on board the vessel. The seller also arranges and pays for insurance for the goods for carriage to the named port. (See International Chamber of Commerce (ICC), Incoterms Rules, (Exhibit JE-159))

⁴⁷¹ Brazil's second written submission, para. 138; Australia's second written submission, paras. 165-168; Guatemala's second written submission, paras. 101 and 104. See also Avadh Sugar & Energy Limited Annual Report 2019-20, (Exhibit JE-158); Balrampur Chini Mills Limited Annual Report 2019-20, (Exhibit JE-157); Dhampur Sugar Mills Limited Annual Report 2019-20, (Exhibit JE-149).

⁴⁷² In particular, the Consultancy Report by Green Pool Commodity Specialists, submitted by the complainants, demonstrates that the average freight rail cost from eleven mills in Maharashtra, which is the second largest exporting State in India, to the two Maharashtra ports (Jawaharlal Nehru Port (JNPT) and Jaigad) is INR 489 and INR 817 per tonne, respectively. The fobbing costs of the Maharashtra mills, such as storage and handling, are between INR 800 and INR 1000 per tonne. (Consultancy Report, February 2021, (Exhibit JE-165), Table 4 and p. 5, note 4) Thus, with the higher fobbing cost of INR 1000 factored in, the average cost of internal transportation and fobbing would be INR 1489 and INR 1817 per tonne, which is lower than the lump sum of INR 3428 per tonne under paragraph 3(i)(b) of the Marketing and Transportation Scheme. (See Brazil's second written submission, para. 140; Australia's second written submission, paras. 158-161; Guatemala's second written submission, para. 104)

⁴⁷³ India's opening statement at the first substantive meeting of the Panel, para. 17.

⁴⁷⁴ DFPD's Letter to Food Corporation of India of 25 June 2019, (Exhibit IND-15); DFPD's Letter to Ministry of Railways of 26 June 2019, (Exhibit IND-16); DFPD's Office Memorandum to MMTC of 11 July 2019, (Exhibit IND-17), and DFPD's Office Memorandum to STC of 11 July 2019, (Exhibit IND-18).

Panel, India stated that it was unable to share the responses from the relevant stakeholders, or how they were reflected in determining the rate of assistance due to the business confidential nature of such information.⁴⁷⁵ In this regard, we note that the DSU contains rules regarding confidentiality of information submitted by the parties.⁴⁷⁶ Furthermore, if India considered the general level of protection provided by the DSU insufficient, it could have requested the Panel to adopt additional procedures for the treatment and handling of business confidential information pursuant to paragraph 2(3) of the Working Procedures.

7.214. The only response that India has submitted is an office memorandum from the Ministry of Railways, which identifies "per ton[n]e freight rate for foodgrains at different distances".⁴⁷⁷ This piece of evidence provides information regarding the base transportation rate per tonne of foodgrains for the distances of 500, 1,000, 1500, 2,000, and 2,500 kilometres.⁴⁷⁸ However, we do not see how this information supports India's assertion that the amount of assistance under the Marketing and Transportation Scheme does not exceed the actual marketing and transportation expenses. As noted, since this Scheme involves lump sum payments based on the volume of sugar exported, it does not take into account the differences in transportation expenses among sugar mills and thus does not ensure that the amount of assistance does not exceed the actual costs of transportation.

7.215. In light of the above, we conclude that the Marketing and Transportation Scheme does not ensure that the amount of assistance provided does not exceed the actual costs of marketing and international transportation in terms of Article 9.1(d), and the actual costs of internal transport and freight charges for domestic shipments in terms of Article 9.1(e).

7.2.4.4.6 Conclusion

7.216. We have concluded that the assistance provided under the Marketing and Transportation Scheme does not relate to the types of costs listed in Articles 9.1(d) and (e) of the Agreement on Agriculture. We have also concluded that the Marketing and Transportation Scheme does not ensure that the amount of assistance does not exceed the actual costs of marketing and international transportation in terms of Article 9.1(d), and the actual costs of internal transport and freight charges for domestic shipments in terms of Article 9.1(e). We therefore reject India's argument that the Marketing and Transportation Scheme falls under Articles 9.1(d) and (e), and, as a result, under Article 9.4 of the Agreement on Agriculture.

7.2.4.5 Whether India's assistance schemes are subsidies contingent on export performance under Article 9.1(a) of the Agreement on Agriculture

7.2.4.5.1 Introduction

7.217. As noted, the complainants argue that India's Production Assistance, Buffer Stock, Marketing and Transportation, and DFIA Schemes constitute export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture because they grant assistance on the condition that sugar mills export a certain quantity of sugar each year.⁴⁷⁹ The complainants assert that, consistent with the requirements of Article 9.1(a), the aforementioned Schemes are (i) direct subsidies, including payments in kind; (ii) provided by a government or its agency; (iii) provided "to a firm, to

⁴⁷⁵ India's response to Panel question No. 82(c).

⁴⁷⁶ Article 18.2 of the DSU specifically provides that "[w]ritten submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute." Parties to a dispute are free to disclose statements of their own positions to the public, but "shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential". Article 13.1 of the DSU further provides that "[a] panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate". WTO Members "should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate". Confidential information that is provided to a panel under Article 13.1 "shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information".

⁴⁷⁷ Office Memorandum from Ministry of Railways to DFPD of 28 June 2019, (Exhibit IND-23).

⁴⁷⁸ We note that the parties disagree as to whether the term "foodgrains" covers sugar. (Guatemala's closing statement at the second substantive meeting of the Panel, para. 3.6; India's response to Panel question No. 82(b)) We do not find it necessary to address this issue since, in any event, we do not consider that Exhibit IND-23 supports India's position.

⁴⁷⁹ The DFIA Scheme is challenged only by Australia.

an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board"; and (iv) contingent on export performance.⁴⁸⁰

7.218. In response, India argues that the complainants have failed to demonstrate the existence of a financial contribution and benefit with respect to the Production Assistance, Buffer Stock, and Marketing and Transportation Schemes.⁴⁸¹ In this regard, India considers that Article 1.1(a)(1) of the SCM Agreement constitutes relevant context for construing the meaning of the term "export subsidies" in Article 9.1 of the Agreement on Agriculture.⁴⁸² India explains that "the complainants have not met their burden to demonstrate [the] 'making' of [a] financial contribution such that they can show that there *is* a financial contribution".⁴⁸³ In India's view, "[t]he use of the operative term 'is' in Article 1.1(a)(1) [of the SCM Agreement] indicates that a subsidy can be said to 'exist' only where the government has *actually* made a 'financial contribution' under the challenged measures."⁴⁸⁴ Thus, according to India, a demonstration of an actual transfer of funds is required to establish the existence of a subsidy.⁴⁸⁵ Moreover, India submits that the complainants failed to identify any benchmark in a relevant market to demonstrate the existence of a benefit and have merely presumed that a benefit exists.⁴⁸⁶

7.219. In addition, with respect to the DFIA Scheme challenged by Australia, India argues that it falls under the scope of footnote 1 to the SCM Agreement, read together with item (i) of Annex I to the SCM Agreement, and therefore does not constitute a subsidy within the meaning of the Agreement on Agriculture.⁴⁸⁷

7.220. In addressing the complainants' claims, we will first set out the legal standard under Article 9.1(a) of the Agreement on Agriculture. We will then examine the consistency with that provision of each of the four assistance programmes challenged by the complainants.

7.2.4.5.2 Legal standard

7.221. Article 9.1(a) reads:

1. The following export subsidies are subject to reduction commitments under this Agreement:

(a) 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[.]

7.222. Based on the text of the provision, to fall under Article 9.1(a), assistance must (i) be provided by a government or its agency; (ii) 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; (iii) be a direct subsidy, including payments in kind; and (iv) be contingent on export performance. We examine each of these elements in turn.

7.223. First, Article 9.1(a) requires the grantor of the subsidy to be a government or its agency. The term "government" is defined, *inter alia*, as "[t]he governing power in a country or state; the body of people charged with the duty of governing", or "[t]he continuous exercise of authority over a person, group, etc.; guardianship, protection; control".⁴⁸⁸ In turn, a government agency is "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of

⁴⁸⁰ Brazil's first written submission, paras. 200-229; Australia's first written submission, paras. 288-365; Guatemala's first written submission, paras. 208-241.

⁴⁸¹ India's first written submission, para. 110.

⁴⁸² India's first written submission, para. 105.

⁴⁸³ India's first written submission, para. 107. (emphasis and underlining original)

⁴⁸⁴ India's first written submission, para. 107. (emphasis original)

⁴⁸⁵ India's second written submission, paras. 67-89.

⁴⁸⁶ India's first written submission, para. 112; second written submission, para. 94.

⁴⁸⁷ India's first written submission, paras. 124 and 97.

⁴⁸⁸ Oxford English Dictionary online, definition of "government" <https://www.oed.com/view/Entry/80321?redirectedFrom=government#eid> (accessed 22 July 2021).

private citizens".⁴⁸⁹ A granting entity therefore has to be vested with such power and perform such functions in order for the assistance it provides to fall under Article 9.1(a).

7.224. Second, the recipient of a subsidy must be a firm, an industry, producers of an agricultural product, a cooperative or other association of such producers, or a marketing board. The Agreement on Agriculture does not contain separate definitions for these categories of recipients. Based on its ordinary meaning, we consider that the term "producers of an agricultural product" refers to entities that "make" or "grow"⁴⁹⁰ agricultural products within the meaning of the Agreement on Agriculture.⁴⁹¹

7.225. Third, under Article 9.1(a), the assistance must be in the form of a direct subsidy.⁴⁹² The term "direct" is defined, *inter alia*, as "straightforward, uninterrupted, immediate".⁴⁹³ In our view, in the context of Article 9.1(a), this term indicates that the subsidy must be provided from the grantor to the recipient in a straightforward and immediate manner. With respect to the term "subsidy", we note that it is not defined in the Agreement on Agriculture. However, the definition of a "subsidy" in Article 1.1 of the SCM Agreement constitutes relevant context for interpreting the term "subsidies" in Article 9.1(a) of the Agreement on Agriculture.⁴⁹⁴ Pursuant to Article 1.1 of the SCM Agreement, a "subsidy" shall be deemed to exist if there is a "financial contribution by a government or any public body" and "a benefit is thereby conferred".⁴⁹⁵ Below, we elaborate on the elements of Article 1.1 of the SCM Agreement that are relevant to these disputes.

7.226. Article 1.1(a)(1) of the SCM Agreement lists government practices that constitute a financial contribution for the purposes of that Agreement, which include a "direct transfer of funds", "potential direct transfers of funds", and "government revenue that is otherwise due [that] is forgone or not collected".⁴⁹⁶ Direct transfers of funds can take the form of a grant.⁴⁹⁷ Grants consist of transactions in which money or money's worth is given to a recipient, normally without an obligation or expectation that anything will be provided to the grantor in return.⁴⁹⁸

7.227. Under Article 1.1(b) of the SCM Agreement, a financial contribution by a government is a subsidy if "a benefit is thereby conferred". A benefit within the meaning of Article 1.1(b) is an "advantage"⁴⁹⁹ to the recipient of the financial contribution. The term "benefit", as used in Article 1.1(b), "implies some kind of comparison" to determine whether "the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution".⁵⁰⁰ The

⁴⁸⁹ Appellate Body Report, *Canada – Dairy*, para. 97.

⁴⁹⁰ The term "producer" is defined as "[a] person, company, or country that makes, grows, or supplies goods or commodities for sale". Oxford English Dictionary online, definition of "producer" <https://www.oed.com/view/Entry/151981?redirectedFrom=producer#eid> (accessed 22 July 2021).

⁴⁹¹ Article 2 of the Agreement on Agriculture provides: "This Agreement applies to the products listed in Annex 1 to this Agreement, hereinafter referred to as agricultural products." In turn, Annex 1 defines the product coverage of the Agreement on Agriculture.

⁴⁹² Payments-in-kind is one of the forms in which "direct subsidies" may be granted. The word "payments" denotes a transfer of economic resources from the grantor to the recipient. (Appellate Body Report, *Canada – Dairy*, para. 87)

⁴⁹³ Oxford English Dictionary online, definition of "direct" <https://www.oed.com/view/Entry/53293?rskey=R6QbSx&result=2#eid> (accessed 22 July 2021).

⁴⁹⁴ Previous panels and the Appellate Body have also considered the definition of the term "subsidy" in Article 1.1 of the SCM Agreement to be relevant context for interpreting the term "subsidy" in the Agreement on Agriculture. (Panel Report, *US – FSC*, para. 7.150; Appellate Body Report, *Canada – Dairy*, para. 87)

⁴⁹⁵ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.8. In line with this definition, a "subsidy" within the meaning of Article 9.1(a) "involves a transfer of economic resources from the grantor to the recipient for less than full consideration". (Appellate Body Report, *Canada – Dairy*, para. 87)

⁴⁹⁶ Articles 1.1(a)(1)(i) and (ii) of the SCM Agreement.

⁴⁹⁷ Article 1.1(a)(1)(i) lists in brackets examples of direct transfers of funds ("e.g. grants, loans, and equity infusion").

⁴⁹⁸ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 616; Panel Report, *India – Export Related Measures*, para. 7.436. Since grants do not involve a reciprocal obligation on the part of the recipient, they would typically not be provided by a private entity acting pursuant to commercial considerations. (Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 617; Panel Reports, *India – Export Related Measures*, para. 7.436; *US – Large Civil Aircraft (2nd complaint)*, para. 7.1229)

⁴⁹⁹ Appellate Body Reports, *Canada – Aircraft*, paras. 154-156; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.150; and Panel Report, *US – Tax Incentives*, para. 7.159.

⁵⁰⁰ Appellate Body Report, *Canada – Aircraft*, para. 157. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.107; Panel Report, *US – Tax Incentives*, para. 7.159.

marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.⁵⁰¹ Article 14 of the SCM Agreement, which addresses the "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient" by an investigating authority, provides context for the interpretation of the term "benefit" in Article 1.1(b).⁵⁰²

7.228. Finally, with respect to the term "contingent on export performance", we note that Article 9.1(a) of the Agreement on Agriculture and Article 3.1(a) of the SCM Agreement contain virtually identical wording denoting export contingency.⁵⁰³ We therefore see no reason to read the requirement of export contingency under Article 9.1(a) of the Agreement on Agriculture differently from that under Article 3.1(a) of the SCM Agreement.⁵⁰⁴ We note that the ordinary meaning of the term "contingent" is "dependent for its occurrence or character on or upon some prior occurrence or condition".⁵⁰⁵ Article 3.1(a) of the SCM Agreement therefore prohibits subsidies that are conditional upon export performance, or are dependent for their existence on export performance.⁵⁰⁶ To demonstrate such a relationship of conditionality or dependence, it has to be shown that the granting of the subsidy is "tied to" the export performance.⁵⁰⁷

7.229. With these considerations in mind, we now assess whether India's assistance schemes are inconsistent with Article 9.1(a) of the Agreement on Agriculture.

7.2.4.5.3 Production Assistance Scheme, Buffer Stock Scheme, and Marketing and Transportation Scheme

7.230. The Production Assistance Scheme, the Buffer Stock Scheme, and the Marketing and Transportation Scheme share certain common features, such as the grantor and the recipient of the assistance, the mechanism of payment of the assistance, and the operation in conjunction with the MIEQs or the MAEQ. We therefore examine the consistency of these three Schemes with Article 9.1(a) jointly. In doing so, we follow the legal test articulated in paragraph 7.222 above.

7.2.4.5.3.1 Whether the assistance is provided by a government or its agency

7.231. The complainants argue that the assistance under the Production Assistance Scheme, the Buffer Stock Scheme, and the Marketing and Transportation Scheme is provided "by governments or their agencies" within the meaning of Article 9.1(a) of the Agreement on Agriculture. In particular, the complainants explain that the assistance under the three Schemes is provided and administered by the DFPD, which is a government agency that is part of the Ministry of Consumer Affairs, Food and Public Distribution.⁵⁰⁸ Furthermore, Guatemala points out that the introductory paragraphs of the various instruments implementing the measures at issue indicate that they are being notified by the "Central Government".⁵⁰⁹

⁵⁰¹ Appellate Body Report, *Canada – Aircraft*, para. 157. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.107; Panel Report, *US – Tax Incentives*, para. 7.159.

⁵⁰² Appellate Body Reports, *Canada – Aircraft*, para. 155 and 158; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.163. Article 14 confirms, in particular, that the focus of the analysis is on the recipient, and that benefit is assessed by reference to the conditions that would exist in the market in the absence of the financial contribution. (Appellate Body Report, *Canada – Aircraft*, paras. 155 and 158)

⁵⁰³ Article 9.1(a) of the Agreement on Agriculture refers to subsidies "contingent on export performance", while Article 3.1(a) of the SCM Agreement refers to subsidies "contingent upon ... export performance". In our view, the difference in the prepositions does not lead to a difference in the legal tests under the two provisions.

⁵⁰⁴ The Appellate Body in *US – Upland Cotton* and *US – FSC* relied on Article 3.1(a) of the SCM Agreement in interpreting Articles 9.1(a) and 9.1(e) of the Agreement on Agriculture. (Appellate Body Reports, *US – Upland Cotton*, para. 571; *US – FSC*, para. 141)

⁵⁰⁵ Oxford English Dictionary online, definition of "contingent" <https://www.oed.com/view/Entry/40248?redirectedFrom=contingent#eid> (accessed 22 July 2021).

⁵⁰⁶ Appellate Body Report, *Canada – Aircraft*, para. 166.

⁵⁰⁷ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 111.

⁵⁰⁸ Australia's first written submission, paras. 290, 306, and 344; Guatemala's first written submission, para. 287. See also Brazil's first written submission, paras. 201, 206, and 211.

⁵⁰⁹ Guatemala's first written submission, para. 287.

7.232. India does not submit any arguments in response to the complainants' assertions.

7.233. We note that preambles to the legal instruments implementing the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes state that the Schemes are notified by the Central Government.⁵¹⁰ The assistance under the Schemes is administered, or operationalised⁵¹¹, by the DFPD. In particular, sugar mills are required to submit claims to the DFPD to receive the subsidy.⁵¹² The DFPD is part of India's Ministry of Consumer Affairs, Food and Public Distribution, which, in turn, is part of the Central Government.⁵¹³ We therefore understand that the assistance under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes is provided by the Central Government through a specialized agency, the DFPD.

7.234. We therefore conclude that the assistance under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes is provided "by governments or their agencies" within the meaning of Article 9.1(a) of the Agreement on Agriculture.

7.2.4.5.3.2 Whether assistance 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"

7.235. The complainants argue that, under the Production Assistance, Buffer Stock, and Marketing and Transportation Schemes, assistance is provided to entities that qualify as recipients recognized under Article 9.1(a).⁵¹⁴ Brazil and Australia assert that assistance is paid to sugar mills, which qualify as "producers of an agricultural product", or, alternatively, as "an industry", "a cooperative or other association of such producers", or "firms".⁵¹⁵ Guatemala submits that assistance is provided to sugar mills, which are "producers of an agricultural product".⁵¹⁶ Guatemala also argues that sugar mills could be considered "an industry".⁵¹⁷

7.236. India does not submit any arguments in response to the complainants' allegations in this respect.⁵¹⁸

7.237. To begin with, we agree with the complainants that the recipients of the assistance under the three Schemes are sugar mills.⁵¹⁹ Even though the assistance is credited directly to the bank accounts of sugarcane farmers, the recipients of the subsidy for the purpose of analysis under Article 9.1(a) are sugar mills. This is because the legal instruments that implement these schemes provide that: (i) sugar mills are eligible for assistance⁵²⁰; (ii) it is sugar mills that must satisfy the eligibility criteria for assistance⁵²¹; (iii) the assistance is paid on a mill-specific basis⁵²²; and (iv) sugar mills must present utilization certificates to the DFPD to demonstrate that the assistance was

⁵¹⁰ Notification of 5 October 2018, (Exhibit JE-74), preamble; Notification of 31 July 2019, (Exhibit JE-77), preamble; Notification of 12 September 2019, (Exhibit JE-114), preamble.

⁵¹¹ See Notification of 5 October 2018, (Exhibit JE-74), paras. 5-6; Notification of 31 July 2019, (Exhibit JE-77), paras. 7-8; Notification of 12 September 2019, (Exhibit JE-114), paras. 6-11.

⁵¹² Notification of 5 October 2018, (Exhibit JE-74), para. 3(vi); Notification of 31 July 2019, (Exhibit JE-77), para. 9(b); Notification of 12 September 2019, (Exhibit JE-114), para. 4.

⁵¹³ DFPD Functions, (Exhibit AUS-45).

⁵¹⁴ Australia's first written submission, para. 295; Guatemala's first written submission, para. 288.

⁵¹⁵ Australia's first written submission, para. 296; response to Panel question No. 54; Brazil's first written submission, para. 201 and fn 252 thereto and fn 214 to para. 168; response to Panel question No. 54.

⁵¹⁶ Guatemala's first written submission, para. 288; response to Panel question No. 54.

⁵¹⁷ Guatemala's response to Panel question No. 54.

⁵¹⁸ In response to a question from the Panel, India simply stated that, to establish the existence of a subsidy under Article 9.1 (a), each of the requirements of that provision must be met. (India's response to Panel question No. 54)

⁵¹⁹ See complainants' response to Panel question No. 9.

⁵²⁰ E.g. Notification of 9 May 2018, (Exhibit JE-75), implements "the Scheme for Assistance to Sugar Mills" in the 2017-18 sugar season; Notification of 31 July 2019, (Exhibit JE-77), stipulates that "[t]he funds [are] to be provided to sugar mills"; Notification of 12 September 2019, (Exhibit JE-114), implements "the Scheme for providing assistance to sugar mills for expenses on marketing [and transportation] costs". (underlining added)

⁵²¹ See e.g. Notification of 9 May 2018, (Exhibit JE-75), para. 2; Notification of 31 July 2019, (Exhibit JE-77), para. 4; Notification of 12 September 2019, (Exhibit JE-114), para. 2.

⁵²² See e.g. Notification of 9 May 2018, (Exhibit JE-75), paras. 3 and 4; Notification of 31 July 2019, (Exhibit JE-77), para. 4; Notification of 12 September 2019, (Exhibit JE-114), paras. 2 and 6.

used in accordance with its purpose (i.e. to pay arrears owed to sugarcane farmers).⁵²³ Furthermore, if a sugar mill does not have any sugarcane arrears, the assistance is credited to the mill's account.⁵²⁴ In our view, the fact that, in the case of sugar mills that owe sugarcane dues, the assistance is credited directly into farmers' accounts does not make them the recipients of assistance. Rather, it simply reflects the purpose for which the assistance is provided to sugar mills, i.e. to alleviate the mills from financial obligation towards the farmers.

7.238. We recall that, under Article 9.1(a), a subsidy must be provided to one of the following categories of recipients: a firm, an industry, producers of an agricultural product, a cooperative or other association of such producers, or to a marketing board. We further recall our understanding that "producers of an agricultural product" are entities that "make" or "grow" agricultural products within the meaning of the Agreement on Agriculture.

7.239. As explained above, pursuant to the terms of the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes, the recipients of assistance are sugar mills.⁵²⁵ Sugar mills produce sugar from sugarcane. Sugar falls under Chapter 17 of the Harmonized System (HS), titled "Sugars and sugar confectionery"⁵²⁶, and is therefore an agricultural product that falls within the scope of Annex 1 of the Agreement on Agriculture.⁵²⁷

7.240. We therefore conclude that, under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes, assistance is provided to "producers of an agricultural product" within the meaning of Article 9.1(a) of the Agreement on Agriculture.⁵²⁸

7.2.4.5.3.3 Whether the assistance is a "direct subsid[y]"

7.241. The complainants submit that the assistance under the Production Assistance Scheme, the Buffer Stock Scheme, and the Marketing and Transportation Scheme constitutes a "direct subsid[y], including payments in kind" within the meaning of Article 9.1(a) of the Agreement on Agriculture. In particular, Brazil argues that, under the three Schemes, there is a transfer of financial resources in the form of money from the Central Government to sugar mills, which is made without full consideration and therefore constitutes a "direct subsid[y]" within the meaning of Article 9.1(a) of the Agreement on Agriculture.⁵²⁹ Australia contends that the assistance is paid by the Central Government, on behalf of eligible sugar mills, into sugarcane farmers' bank accounts, and any remaining funds are credited directly to the mill accounts.⁵³⁰ For its part, Guatemala submits that, under the three Schemes, "the monies provided by India to sugar mills constitute a transfer of economic resources from the Indian Government (the grantor) to sugar mills (the recipient)."⁵³¹ In the complainants' view, the assistance under the three Schemes is in the form of a grant, which confers a benefit on sugar mills, making them better off than they would have been in the absence of the assistance.⁵³² In response to India's argument that an actual disbursement of funds is required to demonstrate the existence of a subsidy, the complainants argue that the commitment to disburse

⁵²³ See e.g. Notification of 9 May 2018, (Exhibit JE-75), para. 4; Notification of 31 July 2019, (Exhibit JE-77), para. 10; Notification of 12 September 2019, (Exhibit JE-114), para. 6.

⁵²⁴ Notification of 2 December 2015, (Exhibit JE-76), para. 2(vi); Notification of 9 May 2018, (Exhibit JE-75), para. 3(iv); Notification of 5 October 2018, (Exhibit JE-74), para. 3(iv); Notification of 31 July 2019, (Exhibit JE-77), para. 9(a); Notification of 15 June 2018, (Exhibit JE-78), para. 9(a); Notification of 12 September 2019, (Exhibit JE-114), para. 5(ii).

⁵²⁵ See para. 7.237 above.

⁵²⁶ World Customs Organization, HS Nomenclature 2017 edition, (Exhibit JE-118), Chapter 17.

⁵²⁷ Annex 1 of the Agreement on Agriculture, titled "Product Coverage", refers, *inter alia*, to Chapters 1-24 of the HS. (See para. 7.224 and fn 491 thereto, above)

⁵²⁸ The complainants argue that sugar mills can also be described as "an industry", or, depending on the form of their organization, as cooperatives or firms. For our purposes, it suffices to conclude that sugar mills fall under one of the categories or recipients listed in Article 9.1(a).

⁵²⁹ Brazil's first written submission, paras. 201, 206, 211, 215, 220, and 226.

⁵³⁰ Australia's first written submission, para. 292; opening statement at the first substantive meeting of the Panel, para. 59.

⁵³¹ Guatemala's first written submission, para. 283.

⁵³² Brazil's second written submission, para. 89 and response to Panel question No. 55; Australia's first written submission, paras. 293-294 and second written submission, para. 110; Guatemala's second written submission, paras. 73-78, response to Panel question No. 55.

a subsidy is sufficient for there to be "the provision" of a subsidy within the meaning of Article 9.1(a) of the Agreement on Agriculture.⁵³³

7.242. In response, India argues that the complainants failed to demonstrate the existence of a financial contribution and benefit with respect to the three Schemes.⁵³⁴ First, India explains that "the complainants have not met their burden to demonstrate [the] 'making' of [a] financial contribution such that they can show [that] there *is* a financial contribution".⁵³⁵ In India's view, "[t]he use of the operative term 'is' in Article 1.1(a)(1) [of the SCM Agreement] indicates that a subsidy can be said to 'exist' only where the government has *actually* made a 'financial contribution' under the challenged measures."⁵³⁶ Thus, according to India, actual transfers of funds are required for a subsidy to exist.⁵³⁷ Second, India submits that the complainants failed to identify any benchmark in a relevant market to demonstrate the existence of a benefit, and merely presumed that a benefit exists.⁵³⁸ India disagrees with the complainants' assertion that grants, by their very nature, confer a benefit on a recipient.⁵³⁹ In India's view, "[t]here is no such universal principle that grants *always* and *automatically* result in conferring a benefit on their recipient, without any further need to undertake an assessment as required under the SCM Agreement."⁵⁴⁰

7.243. We recall that, to fall under Article 9.1(a) of the Agreement on Agriculture, a measure must be "a direct subsid[y], including payments in kind". There are two elements in this enquiry: first, the measure must be a "subsid[y]", and second, the subsidy must be "direct". The parties agree⁵⁴¹, and we share their view, that Article 1.1 of the SCM Agreement provides relevant context for interpreting the term "subsid[y]" in Article 9.1 of the Agreement on Agriculture.⁵⁴² Pursuant to Article 1.1 of the SCM Agreement, a subsidy shall be deemed to exist if there is a financial contribution by a government or any public body and a benefit is thereby conferred.⁵⁴³ India argues that the complainants have failed to demonstrate the existence of both financial contribution and benefit.

7.244. In our assessment, we first examine whether the assistance under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes is a "subsidy", i.e. whether there is a financial contribution that confers a "benefit". If we find that these Schemes constitute subsidies, we will then assess whether such subsidies are "direct" within the meaning of Article 9.1(a) of the Agreement on Agriculture.

Whether there is "a financial contribution"

7.245. The complainants assert that, under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes, there is a financial contribution in the form of a direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.⁵⁴⁴ More specifically, the complainants argue that sugar mills receive a financial contribution in the form of a

⁵³³ Brazil's second written submission, paras. 92-97; Australia's second written submission, paras. 104-107; Guatemala's second written submission, paras. 61-72. Costa Rica, Japan, and the United States support the complainants' view. (Costa Rica's third-party submission, paras. 17-25; Japan's third-party statement, paras. 7-9; United States' third-party submission, paras. 47-54)

⁵³⁴ India's first written submission, para. 110 and response to Panel question No. 39.

⁵³⁵ India's first written submission, para. 107. (emphasis and underlining original)

⁵³⁶ India's first written submission, para. 107. (emphasis original)

⁵³⁷ India's second written submission, paras. 67-89.

⁵³⁸ India's first written submission, para. 112; second written submission, para. 94.

⁵³⁹ India's second written submission, para. 92 (referring to Australia's first written submission, para. 269 and Guatemala's opening statement at the first substantive meeting of the Panel, para. 4.18).

⁵⁴⁰ India's second written submission, para. 93. (emphasis original) In this regard, India submits that the assessment of benefit in the context of a marketplace is necessary. According to India, while certain prior panels have observed that grants place a recipient in a better position, this is not *a priori* true for all cases. (Ibid. para. 94 (referring to Appellate Body Report, *Canada – Aircraft*, para. 157))

⁵⁴¹ Brazil's first written submission, para. 191; Australia's first written submission, para. 266; Guatemala's first written submission, para. 263; India's first written submission, para. 105

⁵⁴² We note that, in previous disputes, the definition of the term "subsidy" in Article 1.1 of the SCM Agreement was also considered to be relevant context for interpreting the term "subsidy" in the Agreement on Agriculture. (Panel Report, *US – FSC*, para. 7.150; Appellate Body Reports, *Canada – Dairy*, para. 87; *US – Upland Cotton*, para. 571)

⁵⁴³ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.8.

⁵⁴⁴ Australia's first written submission, para. 394; Guatemala's first written submission, para. 314.

grant.⁵⁴⁵ The complainants further submit that India's argument that evidence of actual disbursements is required to demonstrate the existence of a "financial contribution" within the meaning of Article 1.1(a)(1) of the SCM Agreement and, therefore, "direct subsidies" under Article 9.1(a) of the Agreement on Agriculture, is not supported by the text of either Agreement. According to the complainants, a promise by a government to make payments under a scheme, combined with a budgetary allocation towards the scheme, are actions by which the government makes funds available to eligible recipients.⁵⁴⁶ In support of their position, the complainants note that, pursuant to Article 9.2(a)(i) of the Agreement on Agriculture, the existence of a subsidy may be demonstrated on the basis of an allocation of funds alone.⁵⁴⁷ They also point out that, pursuant to Article 1.1(a)(1)(i) of the SCM Agreement, a "financial contribution" may be made through "potential direct transfers of funds".⁵⁴⁸ The complainants also argue that, in any event, the record in these proceedings contains evidence showing that the Indian government has made disbursements pursuant to the challenged export subsidy schemes.⁵⁴⁹

7.246. India argues that, to establish the existence of an export subsidy under Article 9.1 of the Agreement on Agriculture, it is necessary to demonstrate that an actual disbursement of funds took place.⁵⁵⁰ India stresses that the use of the operative term "is" in Article 1.1(a)(1) of the SCM Agreement indicates that a subsidy can only be said to exist where the government "has actually made" a financial contribution.⁵⁵¹

7.247. As for the third parties, Costa Rica, Japan, and the United States disagree with India's argument that Article 1.1(a)(1) of the SCM Agreement requires a demonstration that the financial contribution has actually been made to establish the existence of a subsidy.⁵⁵² In this regard, the United States notes that, pursuant to Article 9.2(a)(i) of the Agreement on Agriculture, export subsidy commitments are measured based on allocation or incurrence. Furthermore, the United States points out that demonstrating the existence of a subsidy under the SCM Agreement does not require showing that a direct transfer of funds has been made to, or received by, the recipient.⁵⁵³ The United States submits that it "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."⁵⁵⁴ Finally, the United States notes that Members can challenge subsidies under the SCM Agreement on an "as such" basis.⁵⁵⁵

7.248. We first address India's interpretative argument that it is necessary to provide evidence of an actual disbursement of funds to establish the existence of a financial contribution. We note that Article 9.1(a) of the Agreement on Agriculture concerns "the provision ... of direct subsidies" by governments or their agencies. The verb "provide" is defined, *inter alia*, as "to supply (something) for use" or "to make available".⁵⁵⁶ This definition suggests that something is "provided" not only when it has been supplied or distributed to the recipient, but also when it has simply been made available.

7.249. Turning to the immediate context of Article 9.1(a), we note that Article 9.2(a)(i) of the Agreement on Agriculture stipulates that Members may have expressed their scheduled export subsidy reduction commitments in terms of budgetary outlay reduction commitments, and recognizes that compliance with these commitments in any given year is measurable on the basis

⁵⁴⁵ Brazil's first written submission, paras. 201, 206, 211, 215-216, 220-221, and 223-224; Australia's first written submission, paras. 294, 307-308, and 346; Guatemala's first written submission, para. 314.

⁵⁴⁶ Australia's second written submission, para. 105; Guatemala's second written submission, para. 67.

⁵⁴⁷ Australia's second written submission, para. 106.

⁵⁴⁸ Australia's second written submission, para. 107; Guatemala's second written submission, para. 69.

⁵⁴⁹ Notes on Demands for Grants, 2020-2021, (Exhibit JE-142), Notes 10 and 13; Dhampur Sugar Mills Limited Annual Report 2019-20, (Exhibit JE-149), p. 161, sub-note 1(i).

⁵⁵⁰ India's second written submission, paras. 67 and 72-73.

⁵⁵¹ India's first written submission, para. 107. (emphasis original)

⁵⁵² Costa Rica's third-party submission, paras. 17-25; Japan's third-party statement paras. 7-9; United States' third-party submission, para. 48.

⁵⁵³ United States' third-party submission, paras. 49-50.

⁵⁵⁴ United States' third-party submission, para. 51 (referring to Panel Report, *India – Export Related Measures*).

⁵⁵⁵ United States' third-party submission, para. 53.

⁵⁵⁶ Oxford English Dictionary online, definition of "provide" (<https://www.oed.com/view/Entry/153448?rskey=sAYZXB&result=2&isAdvanced=false#eid> (accessed 22 July 2021)).

of budgetary outlays "allocated or incurred". This provision demonstrates that export subsidy commitments may be measured based on an allocation of budgetary outlays. Accordingly, in our view, the existence of a subsidy for purposes of Article 9.1(a) may be demonstrated based on allocation of funds towards that subsidy and does not necessarily require a demonstration of an actual disbursement of such funds.

7.250. India underscores the use of the verb "is" in Article 1.1(a)(1) of the SCM Agreement. We note that, pursuant to Article 1.1(a)(1)(i), there "*is* a financial contribution"⁵⁵⁷, *inter alia*, where a "government practice" "involves a direct transfer of funds" or "potential direct transfers of funds", such as loan guarantees. Thus, a financial contribution is deemed to exist if a government practice is shown to "involve[]" either a direct transfer of funds, or potential direct transfers of funds. The verb "involve" is defined as "to include; to contain, imply" or to "entail".⁵⁵⁸ Accordingly, a financial contribution may be found to exist where a government practice entails or implies a direct transfer of funds, which, in our view, does not necessarily require an actual disbursement of funds. Indeed, had the drafters intended to indicate that an actual direct transfer of funds is necessary for a financial contribution to exist, different wording (e.g. "a government practice consists of an actual direct transfer of funds") would have been used in Article 1.1(a)(1)(i).⁵⁵⁹

7.251. Furthermore, Article 1.1(a)(1)(i) provides that a financial contribution may take the form of "potential direct transfers of funds". This provision thus contemplates that a financial contribution may be made through possible transfers of funds in the future. This context further confirms that, contrary to India's arguments, the demonstration of an actual disbursement of funds is not necessary to establish the existence of a financial contribution under Article 1.1(a)(1) of the SCM Agreement. Rather, the existence of a financial contribution may be established based on the text of a legal instrument implementing a subsidy, which commits a government to provide a financial contribution to a recipient.⁵⁶⁰ This view is also supported by findings made in previous disputes.⁵⁶¹

7.252. Each of the legal instruments implementing the three Schemes envisages a provision of funds from the Central Government to sugar mills.⁵⁶² Furthermore, the complainants have provided evidence showing that the Central Government made budgetary allocations and actual disbursements under the three Schemes.⁵⁶³ In our view, this evidence clearly demonstrates that the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes "involve[]"

⁵⁵⁷ Emphasis added.

⁵⁵⁸ Oxford English Dictionary online, definition of "involve" <https://www.oed.com/view/Entry/99206?redirectedFrom=involve#eid> (accessed 22 July 2021).

⁵⁵⁹ In the same vein, the panel in *Brazil - Aircraft* stated:

[A]ccording to Article 1:1(i) a subsidy exists if a government practice involves a direct transfer of funds or a potential direct transfer of funds and not only when a government actually effectuates such a transfer or potential transfer (otherwise the text of (i) would read: "a government directly transfers funds ... or engages in potential direct transfers of funds or liabilities").

(Panel Report, *Brazil - Aircraft*, para. 7.13)

⁵⁶⁰ We agree with the United States' observation that, if India's arguments were accepted, a complainant would be prevented from demonstrating the existence of a subsidy because it did not have access to specific evidence of payment information, which would shield respondents from potential liability under the WTO Agreements and incentivize non-transparency. (United States third-party submission, para. 50)

⁵⁶¹ For example, the Appellate Body in *US - Large Civil Aircraft (2nd complaint)* stated that a "direct transfer of funds" refers to "conduct on the part of the government by which money, financial resources, and/or financial claims are *made available to a recipient*". (Appellate Body Report, *US - Large Civil Aircraft (2nd complaint)*, para. 614 (emphasis added)) Furthermore, the panel in *EC and certain member States - Large Civil Aircraft (Article 21.5 - US)* considered that the fact that some disbursements under a subsidy programme were yet to be made, did not "preclude the entirety of the envisaged ... measures from being characterised as a direct transfer of funds". (Panel Report *EC and certain member States - Large Civil Aircraft (Article 21.5 - US)*, para. 6.290)

⁵⁶² For example, the Notification implementing the Marketing and Transportation Scheme states that "[s]ugar mills ... will be eligible for assistance". (Notification of 12 September 2019, (Exhibit JE-114), para. 2) Likewise, legal instruments implementing the Production Assistance Scheme state "[m]ills ... will be eligible for assistance" and that "sugar mills shall be entitled for the production subsidy". (Notification of 9 May 2018, (Exhibit JE-75), para. 2; Notification of 2 December 2015, (Exhibit JE-76), para. 2(i); Notification of 5 October 2018, (Exhibit JE-74), para. 2) Legal instruments implementing the Buffer Stock Scheme state that "funds [are] to be provided to the sugar mills". (Notification of 31 July 2019, (Exhibit JE-77), para. 1; Notification of 15 June 2018, (Exhibit JE-78), para. 1)

⁵⁶³ Notes on Demands for Grants, 2018-2019, (Exhibit AUS-48); Notes on Demands for Grants, 2019-2020, (Exhibit JE-121); Notes on Demands for Grants, 2020-2021, (Exhibit JE-142); Dhampur Sugar Mills Limited Annual Report 2019-2020, (Exhibit JE-149); Balrampur Chini Mills Limited Annual Report 2019-2020, (Exhibit JE-157); Avadh Sugar & Energy Limited Annual Report 2019-2020, (Exhibit JE-158).

a direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. As explained below, the funds are provided to sugar mills without an obligation to provide anything in return and therefore constitute grants.⁵⁶⁴

7.253. In light of the above, we conclude that, under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes, the Central Government provides a financial contribution to sugar mills in the form of grants within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

Whether the financial contributions confer a "benefit"

7.254. We now examine whether the complainants have demonstrated the existence of a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

7.255. The complainants point out that a grant automatically leaves the recipient better off than it would have been absent the grant.⁵⁶⁵ The complainants submit that the financial contributions under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes are grants because sugar mills are not required to provide anything in return to the Central Government.⁵⁶⁶ In the complainants' view, by receiving these gratuitous contributions, sugar mills are automatically placed in a better position than they would have otherwise been absent the grant.⁵⁶⁷

7.256. India argues that grants do not "*always* and *automatically* result in conferring a benefit on their recipient"⁵⁶⁸ and that the complainants failed to identify any benchmark in a relevant market to demonstrate the existence of a benefit and merely presumed that a benefit exists.⁵⁶⁹ According to India, an assessment of "benefit" must be made in the context of a marketplace.⁵⁷⁰ India points out that, on the one hand, the complainants claim that India's marketplace is heavily distorted, yet, on the other hand, they do not identify an undistorted market for performing a comparison.⁵⁷¹ Furthermore, India submits that there is no benefit to sugar mills because the cost of production of sugar is very high, which makes sugar mills uncompetitive in the export market.⁵⁷²

7.257. Under Article 1.1(b) of the SCM Agreement, a financial contribution by a government is a "subsidy" if "a benefit is thereby conferred". A benefit within the meaning of Article 1.1(b) is an "advantage"⁵⁷³ to the recipient of the financial contribution. The term "benefit", as used in Article 1.1(b), "implies some kind of comparison" to determine whether "the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution".⁵⁷⁴ The marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.⁵⁷⁵

⁵⁶⁴ See paras. 7.258-7.261 below.

⁵⁶⁵ Brazil's opening statement at the second substantive meeting of the Panel, para. 58; Australia's second written submission, para. 110; Guatemala's second written submission, paras. 75-77.

⁵⁶⁶ Australia's second written submission, para. 110; Guatemala's second written submission, para. 77.

⁵⁶⁷ Brazil's opening statement at the second substantive meeting of the Panel, paras. 59-60; Australia's second written submission, para. 110; Guatemala's second written submission, para. 77.

⁵⁶⁸ India's second written submission, para. 93. (emphasis original)

⁵⁶⁹ India's first written submission, para. 112; second written submission, para. 94.

⁵⁷⁰ India's second written submission, para. 94.

⁵⁷¹ India's second written submission, para. 96.

⁵⁷² India's second written submission, para. 97.

⁵⁷³ Appellate Body Reports, *Canada – Aircraft*, paras. 154-156; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.150; and Panel Report, *US – Tax Incentives*, para. 7.159.

⁵⁷⁴ Appellate Body Report, *Canada – Aircraft*, para. 157. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.107; Panel Report, *US – Tax Incentives*, para. 7.159.

⁵⁷⁵ Appellate Body Report, *Canada – Aircraft*, para. 157. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.107; and Panel Report, *US – Tax Incentives*, para. 7.159. Article 14 of the SCM Agreement confirms that the focus of the analysis is on the recipient, and that benefit is assessed by reference to the conditions that would exist in the market in the absence of the financial contribution. (Appellate Body Report, *Canada – Aircraft*, paras. 155 and 158)

7.258. The type of financial contribution relevant to our examination of the three Schemes at issue is a direct transfer of funds in the form of a grant within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.⁵⁷⁶ Grants are transactions in which money or money's worth is given to a recipient, normally without an obligation or expectation that anything will be provided to the grantor in return.⁵⁷⁷ Since grants do not involve a reciprocal obligation on the part of the recipient, they would not be made by a private entity acting pursuant to commercial considerations.⁵⁷⁸ By their nature, grants confer a benefit to the recipient because they place the recipient in a better position than the recipient otherwise would have been in the marketplace.⁵⁷⁹

7.259. India asserts that grants do not "*always* and *automatically* result in conferring a benefit on their recipient".⁵⁸⁰ Rather, according to India, "an assessment of benefit in the context of a marketplace is *necessary*".⁵⁸¹ We agree with India that an assessment of whether a benefit has been conferred implies an examination of whether the financial contribution makes the recipient better off than it would otherwise have been, and that a marketplace provides an appropriate basis for such a comparison.⁵⁸² However, in the case of grants, which essentially are gifts from a government, such an inquiry is a simple one. When given to an entity operating in the marketplace, a grant automatically makes the recipient "better off" than it would otherwise have been because it gives that recipient greater resources than it had before, to allow it to pursue its commercial aims, and the grant does not entail any specific reciprocal obligation on the part of the recipient.

7.260. Referring to the panels' findings in *Canada – Renewable Energy / Canada-Feed-in Tariff Program*, India argues that the complainants have not identified the relevant market for performing a comparison on whether a benefit has been conferred and thus failed to demonstrate the existence of a benefit.⁵⁸³ In this regard, we note that, while for some types of financial contribution an elaborate analysis and definition of the relevant market would be appropriate⁵⁸⁴, this is not the case for all types of financial contribution. In the case of grants, the market, however defined, does not make such gifts.⁵⁸⁵ We therefore disagree with India that the complainants have failed to properly identify a marketplace for purposes of the "benefit" analysis.⁵⁸⁶

7.261. Under the Production Assistance, Buffer Stock, and Marketing and Transportation Schemes, sugar mills receive assistance from the Central Government, which is aimed at enabling them to clear their sugarcane dues to farmers. Although, pursuant to the payment arrangements under the three Schemes, the assistance is credited by the Central Government directly into the accounts of sugarcane farmers on behalf of sugar mills, we consider that the benefit accrues to sugar mills and not to farmers.⁵⁸⁷ Such assistance is gratuitous, and thus constitutes grants. In our view, by

⁵⁷⁶ Article 1.1(a)(1)(i) provides an illustrative list of transactions that would constitute direct transfers of funds ("e.g. grants, loans, and equity infusion"). See Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 615; *Japan – DRAMs (Korea)*, para. 251; Panel Report, *India – Export Related Measures*, para. 7.427.

⁵⁷⁷ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 616; Panel Report, *India – Export Related Measures*, para. 7.436.

⁵⁷⁸ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 617; Panel Reports, *India – Export Related Measures*, para. 7.436; *US – Large Civil Aircraft (2nd complaint)*, para. 7.1229.

⁵⁷⁹ Panel Reports, *US – Upland Cotton*, paras. 7.1116 and 7.1118; *EC and certain member States – Large Civil Aircraft*, para. 7.1501; and *US – Large Civil Aircraft (2nd complaint)*, paras. 7.1228-7.1229 and 7.1362.

⁵⁸⁰ India's second written submission, para. 93. (emphasis original)

⁵⁸¹ India's second written submission, para. 94. (emphasis original)

⁵⁸² See para. 7.256 above.

⁵⁸³ India's second written submission, paras. 95-96 (referring to Panel Reports, *Canada – Renewable Energy / Canada-Feed-in Tariff Program*, paras. 7.272-7.274). India explains that "[t]he 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." (Ibid. para. 96)

⁵⁸⁴ For example, this may be the case for financial contributions in the form of provision or purchase of goods under Article 1.1(a)(1)(iii) of the SCM Agreement, where it is necessary to assess the adequacy of remuneration, as was the case in *Canada – Renewable Energy / Canada-Feed-in Tariff Program*.

⁵⁸⁵ See also Panel Report, *India – Export Related Measures*, para. 7.466.

⁵⁸⁶ We further note India's argument that there is no benefit to sugar mills because the cost of production of sugar is very high, which makes sugar mills uncompetitive in the export market. (India's second written submission, para. 97) India's assertion that its sugar mills would be uncompetitive in the absence of these grants further reinforces our view that the sugar mills incur a benefit from receiving these grants. Assuming India's assertion to be true, we do not see how India could consider that the financial resources being provided without consideration, which in India's view increases the recipients' competitiveness, would not confer a "benefit" within the meaning of either the SCM Agreement or the Agreement on Agriculture.

⁵⁸⁷ See para. 7.237 above.

receiving such grants, sugar mills are automatically placed in a better position than they would have been absent the grants, and thus receive a benefit.

7.262. In light of the above, we conclude that the financial contributions under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes confer a benefit on sugar mills within the meaning of Article 1.1(b) of the SCM Agreement. Since these Schemes confer a financial contribution and a benefit within the meaning of the SCM Agreement, we further conclude that they constitute "subsidies" within the meaning of Article 9.1 of the Agreement on Agriculture.

Whether the subsidies are "direct"

7.263. The complainants submit that the subsidies under the Production Assistance, Buffer Stock, and Marketing and Transportation Schemes are "direct" within the meaning of Article 9.1(a) of the Agreement on Agriculture because they are provided to sugar mills by the Indian Government in a straightforward and immediate manner.⁵⁸⁸ In this regard, Australia and Guatemala explain that, under the Production Assistance, Buffer Stock, and the Marketing and Transportation Schemes, monies are deposited by the Indian Government "directly" into bank accounts opened for the purpose of receiving the subsidies.⁵⁸⁹

7.264. India does not comment on the complainants' arguments regarding this issue.

7.265. As noted above⁵⁹⁰, in our view, the term "direct" in Article 9.1(a) indicates that the subsidy must be provided from the grantor to the recipient in a straightforward and immediate manner.

7.266. Turning to the requirements of the three Schemes, we recall that, to receive a subsidy, sugar mills are required to open a separate no-lien account in a bank and furnish to the bank the list of farmers and their bank account details, as well as information about the extent of sugarcane price dues payable to the farmers for the relevant sugar season. The bank credits the assistance to the farmers' accounts on behalf of sugar mills, and any subsequent balance is credited into the sugar mills' accounts.⁵⁹¹ As explained above⁵⁹², although the assistance is credited directly into the accounts of farmers on behalf of sugar mills, we consider sugar mills to be the recipients of the subsidies. Thus, the modalities of disbursement of the subsidies demonstrate that the subsidies are provided by the Central Government to sugar mills in a straightforward and immediate manner.

7.267. We therefore conclude that the subsidies under the Production Assistance, Buffer Stock, and Marketing and Transportation Schemes are "direct" within the meaning of Article 9.1(a) of the Agreement on Agriculture.⁵⁹³

7.2.4.5.3.4 Whether the subsidies are "contingent on export performance"

7.268. We have found that the provision of assistance to sugar mills under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes constitute direct subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture. We now examine whether these subsidies are "contingent on export performance".

⁵⁸⁸ Australia's first written submission, para. 292; Guatemala's first written submission, para. 285.

⁵⁸⁹ Australia's first written submission, para. 292; Guatemala's first written submission, para. 285. For its part, Brazil asserts that "[b]ecause the payment is made by the Central Government without full consideration, it constitutes a 'direct subsidy', within the meaning of Article 9.1(a) of the Agreement on Agriculture." (Brazil's first written submission, para. 201)

⁵⁹⁰ See para. 7.225 above.

⁵⁹¹ Notification of 2 December 2015, (Exhibit JE-76), para. 2(v)-(vi); Notification of 9 May 2018, (Exhibit JE-75), para. 3(iv)-(v); Notification of 5 October 2018, (Exhibit JE-74), para. 3(iv); Notification of 31 July 2019, (Exhibit JE-77), para. 9(a); Notification of 15 June 2018, (Exhibit JE-78), para. 9(a); Notification of 12 September 2019, (Exhibit JE-114), para. 5(ii).

⁵⁹² See para. 7.237 above.

⁵⁹³ We wish to underline that our findings reflect the characteristics of the subsidies at issue in these proceedings, in particular the fact that, under these subsidies, assistance is provided from the Central Government to sugar mills without an intermediary. By making these findings, we are not taking any position on whether a subsidy granted by a government or its agency through an intermediary would constitute a "direct" subsidy within the meaning of Article 9.1(a) of the Agreement on Agriculture.

7.269. The complainants claim that the subsidies under the three Schemes are "contingent on export performance" under Article 9.1(a) of the Agreement on Agriculture. With respect to the Production Assistance and Buffer Stock Schemes, the complainants assert that the provision of assistance under those Schemes is conditioned upon the sugar mills' compliance with export allocations under MIEQ orders.⁵⁹⁴ Similarly, the complainants argue that the provision of assistance under the Marketing and Transportation Scheme is conditioned upon sugar mills exporting at least 50% of their MAEQ allocation.⁵⁹⁵

7.270. India does not submit any specific arguments in response to the complainants' allegations of export contingency.

7.271. We recall that, due to the textual similarity between the two provisions, the requirement of export contingency has the same meaning under Article 9.1(a) of the Agreement on Agriculture and Article 3.1(a) of the SCM Agreement.⁵⁹⁶ Export contingency in the context of Article 3.1(a) of the SCM Agreement has been interpreted to refer to subsidies that are conditional upon export performance, or are dependent for their existence on export performance.⁵⁹⁷ To demonstrate such a relationship of conditionality or dependence, it has to be shown that the granting of a subsidy is "tied to" the export performance.⁵⁹⁸ We find this interpretation convincing and consider it appropriate to rely on it in applying Article 9.1(a) of the Agreement on Agriculture.

7.272. With respect to the Production Assistance Scheme, we recall that assistance under this Scheme is provided to sugar mills on a seasonal basis "to offset the cost of cane and facilitate timely payment of cane price dues of farmers" for the relevant sugar season.⁵⁹⁹ Pursuant to one of the eligibility criteria under the Scheme, to receive a subsidy in the 2017-18 and 2018-19 sugar seasons, sugar mills "should have fully complied with all the orders/directives of the [DFPD] to the sugar mills" for the relevant sugar season.⁶⁰⁰ In this regard, we recall that the MIEQs are orders issued by the DFPD pursuant to Section 3 of the Essential Commodities Act and Clause 5 of the Sugar (Control) Order.⁶⁰¹ Consequently, to be eligible for a subsidy under the Production Assistance Scheme, sugar mills must have fully complied with their individual export allocations under the MIEQ, i.e. they must have exported a certain amount of sugar during the relevant sugar season.⁶⁰² Eligibility for a subsidy under the Production Assistance Scheme is therefore conditional on export performance within the meaning of Article 9.1(a).

7.273. With regards to the Buffer Stock Scheme, we recall that, under this Scheme, sugar mills receive a subsidy in respect of the quantity of buffer stock maintained.⁶⁰³ We note that an amendment to the Buffer Stock Scheme 2018 of 31 December 2018 provides that, to be eligible for the subsidy, a sugar mill must "fully comply with all the orders/directives" issued by the DFPD for compliance during the 2018-19 season.⁶⁰⁴ As explained above, such orders include the MIEQs. Thus, to be eligible for a subsidy under the Buffer Stock Scheme 2018, sugar mills were required to have

⁵⁹⁴ Brazil's first written submission, paras. 202-203, 207-208, 212, 216-217, 221; Australia's first written submission, paras. 297-304 and 310-342; Guatemala's first written submission, para. 289. Australia submits that India's subsidies under the Buffer Stock Scheme are, in the first instance, *de jure* contingent and, in the alternative, *de facto* contingent on export performance. (Australia's first written submission, paras. 278 and 310-341)

⁵⁹⁵ Brazil's first written submission, paras. 227-228; Australia's first written submission, paras. 348-351; Guatemala's first written submission, para. 289.

⁵⁹⁶ See para. 7.228 above.

⁵⁹⁷ Appellate Body Report, *Canada – Aircraft*, para. 166.

⁵⁹⁸ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 111.

⁵⁹⁹ 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. See also paras. 7.130-7.131 above.

⁶⁰⁰ Notification of 9 May 2018, (Exhibit JE-75), para. 2(c); Notification of 5 October 2018, (Exhibit JE-74), para. 2(c). Similarly, in order to be eligible for a subsidy in the 2015-16 sugar season, sugar mills had to achieve at least 80% of their MIEQ allocation. (Notification of 2 December 2015, (Exhibit JE-76), para. 2.iii)

⁶⁰¹ See para. 7.125 above.

⁶⁰² Pursuant to the proforma application form for the 2017-18 and 2018-19 sugar seasons, a sugar mill had to indicate whether it has complied with all the orders /directives of the DFPD, and to submit relevant supporting documents. (Notification of 9 May 2018, (Exhibit JE-75), Proforma A, para. 3(e); Notification of 5 October 2018, (Exhibit JE-74), Proforma A, para. 3(e)) Likewise, pursuant to the proforma application form for the 2015-16 sugar season, a sugar mill had to indicate the amount of sugar exported. (Notification of 2 December 2015, (Exhibit JE-76), Proforma A, para. 3(e))

⁶⁰³ See para. 7.137 above.

⁶⁰⁴ Notification of 31 December 2018, (Exhibit JE-112), para. 2.

fully complied with their individual export allocations under the MIEQ in the 2018-19 sugar season. Eligibility for a subsidy under the Buffer Stock Scheme 2018 was therefore conditional on export performance within the meaning of Article 9.1(a).

7.274. The Buffer Stock Scheme 2019 does not frame the eligibility criteria in the same way as the Buffer Stock Scheme 2018. Nevertheless, pursuant to the Buffer Stock Scheme 2019, the Central Government takes sugar mills' MIEQ compliance into account in determining the quantity of buffer stock that a mill is allocated to hold. Specifically, if a sugar mill failed to export any quantity of the sugar that it was required to export under the relevant MIEQ order before June 2019, the total amount of its MIEQ allocation would be deducted from its buffer stock.⁶⁰⁵ We recall that the amount of the buffer stock subsidy is determined on the basis of the value of buffer stock that sugar mills have been allocated to hold, at the rate of INR 31 per kilogram of sugar.⁶⁰⁶ Accordingly, the higher the amount of buffer stock a sugar mill is allocated to hold, the higher its value, and, as a result, the higher the amount of the subsidy that the sugar mill would receive. As noted, if a sugar mill fails to export any quantity of sugar in fulfilment of its MIEQ allocation, the amount equivalent to its overall MIEQ allocation would be deducted from the quantity of buffer stock that it would otherwise be allowed to hold. As a result, a sugar mill would be permitted to hold less buffer stock and would therefore receive a lower subsidy. In short, we understand that under the Buffer Stock Scheme 2019, the amount of the subsidy received by sugar mills depends directly on the amount of sugar that they export. In other words, the amount of the subsidy sugar mills receive is "tied to", i.e. "contingent on", export performance, within the meaning of Article 9.1(a).⁶⁰⁷

7.275. Turning to the Marketing and Transportation Scheme, we recall that, under this Scheme, sugar mills receive assistance in the form of a lump sum for payment of sugarcane price dues of farmers for the sugar season 2019-20 and sugarcane price arrears of previous sugar seasons.⁶⁰⁸ One of the eligibility criteria under the Scheme is that "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".⁶⁰⁹ More specifically, to be eligible for the assistance, a sugar mill is required to export at least 50% of its MAEQ.⁶¹⁰ In this regard, we recall that the MAEQ order imposes the maximum admissible export quantity of sugar of 6 million tonnes, which is divided among sugar mills.⁶¹¹ Accordingly, to be eligible for assistance under the Marketing and Transportation Scheme, a sugar mill is required to have fulfilled at least 50% of its export target under the MAEQ order. Eligibility for a subsidy under the Marketing and Transportation Scheme is therefore conditional on export performance within the meaning of Article 9.1(a).

7.276. In light of the above, we conclude that the subsidies under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes are contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture.

⁶⁰⁵ The Buffer Stock Scheme 2019 provides in this regard:

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.

(Notification of 31 July 2019, (Exhibit JE-77), para. 2)

⁶⁰⁶ Notification of 31 July 2019, (Exhibit JE-77), paras. 3(a)-3(d).

⁶⁰⁷ Having found that the Buffer Stock 2019 is, on its face, contingent on export performance, we do not need to address Australia's alternative argument regarding the alleged *de facto* export contingency. (Australia's first written submission, para. 319)

⁶⁰⁸ See paras. 7.140-7.141 above.

⁶⁰⁹ Notification of 12 September 2019, (Exhibit JE-114), para. 2(a).

⁶¹⁰ Notification of 12 September 2019, (Exhibit JE-114), para. 2(a). Sugar mills are required to submit evidence of their export performance as part of their application for assistance under the Marketing and Transportation Scheme. (Ibid. Proforma-A, paras. 5 and 9)

⁶¹¹ Cabinet Committee on Economic Affairs Announcement of Sugar export policy for evacuation of surplus stocks during sugar season 2019-20, (Exhibit JE-113); MAEQ Order of 16 September 2019, (Exhibit JE-115), Annexure. We note that, although the MAEQ order refers to the "*maximum* admissible export quantity", the MAEQ is fixed at 6 million tonnes of sugar, which is higher than the MIEQ of 5 million tonnes set for the 2018-19 sugar season.

7.2.4.5.4 Duty Free Import Authorization (DFIA) Scheme

7.2.4.5.4.1 Introduction

7.277. Australia claims that the DFIA Scheme, which exempts eligible sugar mills from paying customs duties on imports of raw sugar on account of past exports of white sugar, is a subsidy contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture.⁶¹² In response to India's argument under footnote 1 to the SCM Agreement, Australia underlines that the "DFIA attaches not to the raw sugar consumed in producing the white sugar exported in 2018, but rather to raw sugar subsequently, or yet to be, imported".⁶¹³ According to Australia, the DFIA Scheme does not meet the requirement of footnote 1 to the SCM Agreement "that the remission or drawback be on an imported product that is consumed in the production of an exported product" because it allows duty-free imports of raw sugar on account of past exports of white sugar.⁶¹⁴

7.278. India argues that the DFIA Scheme does not constitute a subsidy by virtue of footnote 1 to the SCM Agreement, read together with paragraph (i) of its Annex I.⁶¹⁵ While India agrees that the DFIA Scheme provides remission of import charges on a post-export basis, India argues that such remission is commensurate with inputs already consumed in exported products.⁶¹⁶ India submits that "an exporter is only entitled to claim an exemption on import dut[ies] 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" and that "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".⁶¹⁷

7.279. We begin by addressing India's allegation that the DFIA Scheme does not constitute a subsidy under the Agreement on Agriculture because it meets the requirements of footnote 1 to the SCM Agreement. We will then turn, if necessary, to assess whether the DFIA Scheme as it applies to sugar is inconsistent with Article 9.1(a) of the Agreement on Agriculture.

7.2.4.5.4.2 Whether the DFIA Scheme does not constitute a subsidy pursuant to footnote 1 to the SCM Agreement

7.280. Footnote 1 to Article 1 of the SCM Agreement reads:

In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

7.281. According to footnote 1, the exemption of an exported product from duties and taxes borne by the like product, when destined for domestic consumption in amounts not in excess of those which have accrued, or the remission of such duties, shall not be deemed to be a subsidy. Footnote 1 must be read in accordance with, *inter alia*, Annexes I to III of the SCM Agreement. Annex I contains an illustrative list of export subsidies. In particular, paragraph (i) of Annex I refers to "[t]he remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product".⁶¹⁸ Footnote 58, which is appended to Annex I(i), specifies that "'[r]emission' of taxes includes the refund or rebate of taxes", whereas "'[r]emission or drawback' includes the full or partial exemption or deferral of import charges".

⁶¹² Australia's first written submission, para. 352.

⁶¹³ Australia's second written submission, para. 216.

⁶¹⁴ Australia's second written submission, para. 217. See also Australia's response to Panel question No. 85.

⁶¹⁵ India's first written submission, paras. 124-125 and 149-155; second written submission, para. 109.

⁶¹⁶ India's second written submission, para. 109.

⁶¹⁷ India's second written submission, para. 109 (referring to Foreign Trade Policy 2015-20 (Exhibit AUS-40), para. 4.12; and Foreign Trade Policy, Handbook of Procedures 2015-20 (Exhibit IND-21), para 4.56).

⁶¹⁸ Footnote omitted.

7.282. Pursuant to footnote 1, read together with Annex I(i), for a "remission or drawback" of import charges to benefit from the shelter of footnote 1, the remission or drawback must not be "in excess of [import charges] levied on imported inputs that are consumed in the production of the exported product". Accordingly, to ascertain whether a remission or drawback of duties is not "deemed to be a subsidy" by virtue of footnote 1, read in conjunction with Annex I(i), a panel has to examine whether the measure is (i) a remission or drawback; (ii) of import charges; (iii) on imported inputs that are consumed in the production of the exported product; (iv) not in excess of those levied on those inputs.⁶¹⁹

7.283. Footnote 1 must also be read "in accordance with" Annex II of the SCM Agreement, which sets out "Guidelines on Consumption of Inputs in the Production Process". Annex II provides the basis for examining "whether inputs are consumed in the production of the exported product".⁶²⁰ Footnote 61 to Annex II defines "inputs that are consumed in the production process" as "*inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product*".⁶²¹ Annex II(II)(3) provides further guidance on the interpretation of this phrase, by stipulating that "[i]nvestigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are *physically present in the product exported*".⁶²²

7.284. In sum, footnote 1, read in conjunction with Annex II of the SCM Agreement, indicates that imported inputs that are consumed in the production of the exported product must be "used in the production process" and be "physically present in the product exported".⁶²³ With these considerations in mind, we now turn to assess the DFIA Scheme.

7.285. India considers that the DFIA Scheme does not constitute a subsidy because it meets the conditions of footnote 1, read together with paragraph (i) of Annex I to the SCM Agreement.⁶²⁴ In response, Australia submits that the DFIA Scheme does not meet the requirement of footnote 1 "that the remission or drawback be on an imported product that is consumed in the production of an exported product".⁶²⁵

7.286. As noted, to fall under the scope of footnote 1, a measure has to be (i) a remission or drawback; (ii) of import charges; (iii) on imported inputs that are consumed in the production of the exported product; and (iv) not in excess of those levied on those inputs.⁶²⁶ Australia and India agree that the DFIA Scheme is a remission of import charges.⁶²⁷ However, Australia takes issue with the third item and argues that "[i]t is physically impossible for raw sugar that is or was imported customs duty free between 1 October 2019 and 30 September 2021 to have been consumed in the production of white sugar exported in 2018."⁶²⁸

⁶¹⁹ Panel Report, *India – Export-Related Measures*, para. 7.191.

⁶²⁰ Chapeau of Annex II(II) of the SCM Agreement. Although Part II of Annex II is expressly directed at this examination "as part of a countervailing duty investigation", this does not make Annex II irrelevant outside the context of countervailing duty investigations. In our view, Annex II informs the understanding of footnote 1 beyond the context of countervailing investigations. (See Panel Report, *India – Export Related Measures*, para. 7.182)

⁶²¹ Emphasis added.

⁶²² Emphasis added. Annex II(II)(3) further provides that "an input need not be present in the final product in the same form in which it entered the production process".

⁶²³ Annex II(II)(3) of the SCM Agreement.

⁶²⁴ India's first written submission, paras. 124-125 and 149-155; second written submission, para. 109.

⁶²⁵ Australia's second written submission, para. 217. See also Australia's response to Panel question No. 85.

⁶²⁶ See para. 7.282 above.

⁶²⁷ Australia's response to Panel question No. 85, para. 118; India's first written submission, paras. 97-98, 124, and 150-155; second written submission, paras. 107-109. We recall, in this regard, that the difference between an exemption and a remission is that, in the case of exemptions, the duty or tax liability does not arise, whereas, in the case of remissions, the liability first arises, but is later remitted, including by returning a payment that has been made. (Panel Report, *India – Export Related Measures*, para. 7.169) Based on our own assessment of the DFIA Scheme, we understand that the DFIA is a "remission" rather than an "exemption" because sugar mills may receive the DFIA after importation of raw sugar. (Foreign Trade Policy 2015-2020, (Exhibit AUS-40), paras. 4.27 and 4.29; India's response to Panel question No. 88 (referring to Exhibits IND-24 and IND-25))

⁶²⁸ Australia's second written submission, para. 218. See also Australia's response to Panel question No. 85, paras. 116 and 126-128.

7.287. We recall that the DFIA Scheme allows sugar exporters that exported white sugar between 28 March and 30 September 2018 to claim, on account of such exports, a remission of customs duties on raw sugar imported between 1 October 2019 and 30 September 2021.⁶²⁹

7.288. As explained above, in our view, footnote 1, read in conjunction with Annex II of the SCM Agreement, requires that imported inputs be "used in the production process" and be "physically present in the product exported".⁶³⁰ We agree with Australia that this is not the case under the DFIA Scheme because it provides for duty-free importation of raw sugar (i.e. the input) *after* the exportation of white sugar (i.e. the "product exported"). The raw sugar imported between 1 October 2019 and 30 September 2021 is not used in the production process of, and is not physically present in, the white sugar exported between 28 March and 30 September 2018. Clearly, therefore, the remission under the DFIA Scheme does not apply to "imported inputs that are consumed in the production of the exported product", as footnote 1 requires.

7.289. India argues that "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."⁶³¹ India also points out that "there exists a verification mechanism to ensure that only the specific inputs actually consumed in the export[ed] product are allowed [to be imported] duty free ... under DFIA".⁶³² As noted above, in our view, to fall within the scope of footnote 1, the imported inputs that benefit from the remission must be consumed in the production of the exported product, which is not the case under the DFIA Scheme. As long as this important requirement is not met, it is immaterial, in our view, whether the quantity of inputs imported duty free subsequent to the exportation of the final product corresponds to the quantity of inputs used in the production of that final product. We therefore find India's argument unconvincing.

7.290. Finally, we note India's statement that "the DFIA can be transferred from one entity to another".⁶³³ In our view, in the circumstances of this dispute, the transferability of the DFIA further underscores the disconnect between the imported inputs and the exported final product, since the importer of the inputs and the exporter of the final product may not be the same entity.

7.291. In light of the above, we conclude that India has failed to establish that the DFIA Scheme as it applies to sugar falls under the scope of footnote 1 to the SCM Agreement.

7.292. We have concluded that India has failed to establish that the DFIA Scheme for sugar meets the requirements of footnote 1 of the SCM Agreement. Consequently, we proceed to examine Australia's claim that the DFIA Scheme is inconsistent with Article 9.1(a) of the Agreement on Agriculture.

7.2.4.5.4.3 Whether the DFIA Scheme is inconsistent with Article 9.1(a) of the Agreement on Agriculture

7.293. Australia claims that the DFIA Scheme is a subsidy contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture.⁶³⁴ In this regard, Australia notes that the assistance under the DFIA Scheme is provided to sugar mills by a government or its agency within the meaning of Article 9.1(a).⁶³⁵ According to Australia, the financial contribution under the DFIA Scheme is in the form of revenue forgone because the DFIA Scheme creates an exception to a general rule of taxation.⁶³⁶ Australia further argues that the DFIA Scheme is a "direct subsid[y]" within the meaning of Article 9.1(a) because "[t]he sugar mills that benefit from the scheme have a direct relationship with [the granting authority], without any intermediaries or intervening factors."⁶³⁷ With respect to the export contingency element, Australia notes that, according to an

⁶²⁹ Amendment to the Foreign Trade Policy 2015-2020, (Exhibit AUS-41), paras. 1-2.

⁶³⁰ See para. 7.283 above.

⁶³¹ India's second written submission, para. 109.

⁶³² India's second written submission, para. 109 (referring to Notification 01/2015-2020, Foreign Trade Policy 2015-20 (Exhibit AUS-40), para. 4.12; and Foreign Trade Policy, Handbook of Procedures 2015-20 (Exhibit IND-21), para 4.56).

⁶³³ India's response to Panel question No. 85(a). Australia agrees with India's description of this aspect of the DFIA Scheme. (Australia's response to Panel question No. 86)

⁶³⁴ Australia's first written submission, para. 352.

⁶³⁵ Australia's first written submission, paras. 353 and 362.

⁶³⁶ Australia's first written submission, para. 356.

⁶³⁷ Australia's first written submission, para. 354.

amendment to the DFIA Scheme of 28 March 2018, "entities that exported white sugar between 28 March and 30 September 2018 may be eligible to receive [an] import duty exemption between 1 October 2019 and 30 September 2021".⁶³⁸

7.294. Other than its arguments concerning footnote 1 of the SCM Agreement, India does not present any additional or alternative arguments in response to Australia's allegations under Article 9.1(a) of the Agreement on Agriculture.

7.295. In examining Australia's claim, we follow the legal standard set out in paragraph 7.222 above. Thus, we assess whether the DFIA is (i) provided by a government or its agency; (ii) 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; (iii) in the form of a direct subsidy, including payments in kind; and (iv) contingent on export performance.

7.296. Turning to the first element, we note that, as Australia argues, the DFIA Scheme is part of India's Foreign Trade Policy, which is implemented by the Department of Commerce, Directorate General of Foreign Trade, a governmental authority within India's Ministry of Commerce and Industry.⁶³⁹ Applications for the DFIA have to be made to the Regional Authority of the Directorate General for Foreign Trade.⁶⁴⁰ This shows that the DFIA is provided by "governments or their agencies" within the meaning of Article 9.1(a).

7.297. Second, like the assistance under the Production Assistance, Buffer Stock, and Marketing and Transportation Schemes, the DFIA is granted to sugar mills. Thus, for the reasons set out in paragraphs 7.237-7.240 above, we conclude that the DFIA is provided to "producers of an agricultural product" within the meaning of Article 9.1(a).

7.298. Turning to whether the DFIA scheme represents a "direct subsidy", we recall that a "subsidy" shall be deemed to exist if there is a "financial contribution by a government or any public body" and "a benefit is thereby conferred".⁶⁴¹ Regarding financial contributions in the form of revenue otherwise due that is forgone or not collected, to determine the existence of such a financial contribution, a comparison must be made between the revenue actually raised and the revenue that would have been raised "otherwise".⁶⁴² The relevant tax rules of the Member in question constitute a basis for comparison in determining what would otherwise have been due. In many instances, such comparison would involve a determination of what a tax or duty rate would be "but for" the measure at issue.⁶⁴³ Exempting the recipient from a tax or duty that would have otherwise been due confers a benefit on the recipient because it would make the recipient better off than it would otherwise have been.

7.299. The parties do not contest that, "but for" the DFIA Scheme, import duties would be levied on raw sugar pursuant to Section 2 of India's Customs Tariff Act 1975 and Chapter 17 of India's First Schedule.⁶⁴⁴ Therefore, we consider that the DFIA Scheme entails a financial contribution in the form of revenue otherwise due that is forgone or not collected.⁶⁴⁵ We also consider that "a benefit is thereby conferred"⁶⁴⁶ since the remission of duties that otherwise would have to be paid puts eligible sugar mills in a better-off position than they would be absent the DFIA. In our view, the subsidy under the DFIA scheme is a "direct" one, since the financial contribution is provided from

⁶³⁸ Australia's first written submission, para. 364.

⁶³⁹ Foreign Trade Policy 2015-2020, (Exhibit AUS-40).

⁶⁴⁰ Foreign Trade Policy 2015-2020, (Exhibit AUS-40), para. 4.29(i).

⁶⁴¹ See para. 7.225 above.

⁶⁴² Appellate Body Report, *US – FSC*, para. 90.

⁶⁴³ Panel Report, *US – FSC*, para. 7.45. At the same time, we note that, in certain circumstances, it may be difficult to isolate a "general" rule of taxation and "exceptions" to the rule. Therefore, an examination under Article 1.1(a)(1)(ii) must be sufficiently flexible to adjust to the complexities of a Member's domestic rules of taxation. (See Appellate Body Report, *US – FSC*, paras. 90-91. See also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 813)

⁶⁴⁴ Australia's first written submission, paras. 357-358 (referring to Customs Tariff Act 1975, (Exhibit AUS-38), Section 2 and First Schedule, Chapter 17). As noted, in certain circumstances, it may be difficult to isolate a "general" rule of taxation and "exceptions" to the rule, and an examination under Article 1.1(a)(1)(ii) must be sufficiently flexible to adjust to the complexities of a Member's domestic rules of taxation. (See Appellate Body Report, *US – FSC*, paras. 90-91) In this dispute, no arguments were made by India to contest the general rule pertaining to the levying of customs duties identified by Australia.

⁶⁴⁵ Article 1.1(a)(1)(ii) of the SCM Agreement.

⁶⁴⁶ Article 1.1(b) of the SCM Agreement.

the Central Government, through its specialized agencies, to sugar mills in a straightforward and immediate manner.

7.300. We recall that, under the DFIA Scheme, sugar exporters that exported white sugar between 28 March and 30 September 2018 can claim, on account of such exports, a remission of the basic customs duty on raw sugar imported between 1 October 2019 and 30 September 2021. In other words, sugar mills can only be eligible for the DFIA if they exported white sugar during the indicated period. In our view, therefore, the DFIA is "tied to" past export performance and, therefore, is "contingent" on export performance under Article 9.1(a).

7.301. In light of the above, we conclude that the DFIA Scheme for sugar is inconsistent with Article 9.1(a) of the Agreement on Agriculture.

7.2.4.6 Guatemala's claim under Article 9.1(c) of the Agreement on Agriculture

7.302. Guatemala claims that, in addition to constituting export subsidies under Article 9.1(a), the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes constitute payments on the export of sugar that are financed by virtue of governmental action within the meaning of Article 9.1(c) of the Agreement on Agriculture.⁶⁴⁷ Guatemala submits that Articles 9.1(a) and 9.1(c) do not have mutually exclusive application and hence a measure can constitute an export subsidy under both provisions.⁶⁴⁸ Guatemala presents similar arguments for its claim under Article 9.1(c) as for its claim under Article 9.1(a).⁶⁴⁹

7.303. We have found that India's Production Assistance, Buffer Stock, and Marketing and Transportation Schemes are inconsistent with Article 9.1(a). Consequently, we do not consider it necessary to address Guatemala's claim under Article 9.1(c) of the Agreement on Agriculture regarding the same Schemes.

7.2.4.7 Overall conclusion under the Agreement on Agriculture

7.304. Above, we have found that, under the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes, India grants to sugar mills direct subsidies contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture. Since India did not make export subsidy reduction commitments with respect to sugar in its Schedule⁶⁵⁰, we conclude that India's subsidies contingent on export performance within the meaning of Article 9.1(a) are inconsistent with Articles 3.3 and 8 of the Agreement on Agriculture.⁶⁵¹

7.2.5 Claims under the SCM Agreement

7.2.5.1 Introduction

7.305. In addition to their claims under the Agreement on Agriculture, Australia and Guatemala also claim that India's subsidy schemes constitute subsidies *de jure* contingent upon export performance under Article 3.1(a) of the SCM Agreement.⁶⁵² Their claims under Article 3.1(a) are largely based on the same arguments and evidence as the claims under Articles 9.1(a) and (c) of the Agreement on Agriculture.⁶⁵³ With respect to India's arguments regarding Article 27 of the SCM Agreement, Australia and Guatemala assert that the text of Article 27.2(b) is unambiguous, and that the eight-year export subsidy phase-out period referred to in that provision ended in

⁶⁴⁷ Guatemala's first written submission, para. 291.

⁶⁴⁸ Guatemala's first written submission, para. 275.

⁶⁴⁹ Guatemala's first written submission, paras. 294-297.

⁶⁵⁰ See paras. 7.174-7.176 above.

⁶⁵¹ As a result, we do not address Australia's alternative claim under Article 10 of the Agreement on Agriculture. (See paras. 7.116 and 7.158 above)

⁶⁵² Australia's first written submission, paras. 368-369 and 391; Guatemala's first written submission, para. 300.

⁶⁵³ Australia's first written submission, paras. 391-433; Guatemala's first written submission, paras. 310-321.

2003.⁶⁵⁴ In this regard, Australia and Guatemala agree with the interpretation of Article 27.2(b) developed by the panel in *India – Export Related Measures*.⁶⁵⁵

7.306. India argues that Article 3.1(a) does not apply to India by virtue of Article 27 of the SCM Agreement, which provides for special and differential treatment for developing countries.⁶⁵⁶ India does not dispute that its Gross National Product (GNP) per capita reached USD 1,000 in three consecutive years and that India graduated from the list of Members identified in Annex VII(b) of the SCM Agreement in 2017.⁶⁵⁷ However, in India's view, "a period of eight years from the date of entry into force of the WTO Agreement" under Article 27.2(b) must start from the date of a developing country's graduation from Annex VII(b), rather than from the date of entry into force of the WTO Agreement.⁶⁵⁸ India explains that Members referred to in Annex VII(b) of the SCM Agreement "must be subject to the *same treatment* that is applied to other developing country Members in Article 27.2(b)", in other words "they are to be provided an eight-year phase out period with respect to export subsidies".⁶⁵⁹ In India's view, an interpretation to the contrary "would necessarily render parts of the SCM Agreement redundant, as against developing countries".⁶⁶⁰ Finally, India considers that the interpretation of Article 27 developed by the panel in *India – Export Related Measures* "is not binding and has no legal effect in the present disputes" because the appeal in that dispute is currently pending before the Appellate Body.⁶⁶¹

7.307. As third parties, Canada, Costa Rica, and the United States disagree with India's interpretation of Article 27.2(b). In their view, the "period of eight years from the date of entry into force of the WTO Agreement" expired on 1 January 2003, and therefore Article 27.2(b) does not apply to India.⁶⁶² The European Union notes that the same issue was comprehensively addressed by the panel in *India – Export Related Measures*. Although the panel report in that dispute is subject to appeal, the European Union considers that it provides useful guidance for the present dispute.⁶⁶³

7.308. We start by addressing India's defence under Article 27.2(b) of the SCM Agreement. We then turn, if necessary, to assess whether India's subsidy schemes are inconsistent with Article 3.1(a) of the SCM Agreement.

7.2.5.2 Whether Article 27.2(b) applies to India

7.309. Article 27 of the SCM Agreement is titled "Special and Differential Treatment of Developing Country Members". Article 27.2 provides:

The prohibition of paragraph 1(a) of Article 3 shall not apply to:

⁶⁵⁴ Australia's second written submission, paras. 181-182; Guatemala's second written submission, paras. 118-119. Canada, Costa Rica, the European Union, Japan, and the United States, third parties to the disputes, share Australia's and Guatemala's position. (Canada's third-party submission, paras. 30-38; Costa Rica's third-party submission, paras. 28-30; European Union's third-party submission, paras. 78-80; Japan's third-party statement at the first substantive meeting, paras. 10-12; United States' third-party submission, paras. 59-62)

⁶⁵⁵ Australia's second written submission, para. 184; Guatemala's second written submission, paras. 121 and 129.

⁶⁵⁶ India's first written submission, paras. 127 and 129.

⁶⁵⁷ India's first written submission, para. 132.

⁶⁵⁸ India's first written submission, para. 139; opening statement at the first substantive meeting of the Panel, para. 19. India submits that its interpretation is consistent with the principle of effectiveness in treaty interpretation and is supported by the context provided by Articles 27.4 and 27.5 of the SCM Agreement. India contends that its interpretation is further supported by the negotiating history of the SCM Agreement, in particular, the Draft Texts by the Chairman of the Negotiating Group of the SCM Agreement. (India's first written submission, paras. 136-139, 141, and 143)

⁶⁵⁹ India's first written submission, para. 138. (emphasis original)

⁶⁶⁰ India's first written submission, para. 137.

⁶⁶¹ India's first written submission, para. 144; second written submission, para. 66.

⁶⁶² Canada's third-party submission, paras. 30-33 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 139; Panel Report, *India – Export Related Measures*, para. 7.74); Costa Rica's third-party submission, paras. 28-30 (referring to Panel Report, *India – Export Related Measures*, para. 7.74); United States' third-party submission, para. 59. See also United States' third-party submission, paras. 61 and 64-68 (referring to Panel Report, *India – Export Related Measures*, paras. 7.50 and 7.70-7.73).

⁶⁶³ European Union's third-party submission, paras. 79-80 (referring to Panel Report, *India – Export Related Measures*, paras. 7.28-7.74).

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

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

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

...

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached \$1,000 per annum: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.⁶⁶⁴

7.311. Article 27.2(a) of the SCM Agreement provides that the prohibition of subsidies contingent upon export performance under Article 3.1(a) does not apply to developing country Members referred to in Annex VII, which includes India. In turn, Annex VII(b) provides that, when the GNP per capita of a developing country Member listed in Annex VII has reached USD 1,000 per year, such Member becomes subject to the treatment reserved for "other developing country Members" under Article 27.2(b). Under Article 27.2(b), Article 3.1(a) shall not apply to "other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement".

7.312. The parties agree that India has reached a GNP per capita of USD 1,000 per year and that India graduated from Annex VII(b) of the SCM Agreement as of 2017.⁶⁶⁵ However, the parties disagree whether the "period of eight years" referred to in Article 27.2(b) of the SCM Agreement begins from the date of India's graduation from Annex VII(b), as India argues, or from the date of entry into force of the WTO Agreement, as Australia and Guatemala argue.

7.313. We note, first, that India's arguments are not based on the ordinary meaning of Article 27.2(b). Rather, India's interpretation is rooted in India's view of the context and negotiating history of this provision.⁶⁶⁶ The text of Article 27.2(b) unequivocally provides for a transition "period of eight years from the date of entry into force of the WTO Agreement". The WTO Agreement entered into force on 1 January 1995. Therefore, it is clear from the text of Article 27.2(b) that "a period of eight years from the date of entry into force of the WTO Agreement" within the meaning of Article 27.2(b) is the period from 1 January 1995 to 1 January 2003.⁶⁶⁷

7.314. We are not persuaded by India's argument that the language "shall be subject to" in Annex VII(b) mandates that, when a Member graduates from Annex VII, it must receive "the same *treatment* which other developing country Members have received, i.e. an 'eight year' phase out period", which would only exist if the period commenced the date of its graduation from

⁶⁶⁴ Footnote omitted.

⁶⁶⁵ We note that, pursuant to the 2001 Decision of the Ministerial Conference on "Implementation-Related Issues and Concerns", the threshold of GNP per capita of USD 1,000 per year is met when Annex VII(b) Members reach USD 1,000 in constant 1990 dollars for three consecutive years. (WTO, Ministerial Conference, Decision of 14 November 2001, WT/MIN(01)/17, para. 10.1) The WTO Secretariat annually publishes the gross national product (GNP) per capita of the Annex VII(b) developing country Members using the three most recent years for which data are available. According to the WTO Secretariat, India's GNP per capita exceeded USD 1,000 per year for the periods 2013-2015 and 2014-2016. (Committee on Subsidies and Countervailing Measures, Annex VII(b) of the Agreement on Subsidies and Countervailing Measures, G/SCM/110/Add.14 (11 July 2017); Committee on Subsidies and Countervailing Measures, Annex VII(b) of the Agreement on Subsidies and Countervailing Measures, G/SCM/110/Add.15 (20 April 2018))

⁶⁶⁶ India's first written submission, paras. 141-142.

⁶⁶⁷ Appellate Body Report, *Brazil – Aircraft*, para. 139.

Annex VII.⁶⁶⁸ Annex VII(b) provides that Article 27.2(b) becomes applicable to certain developing country Members "when [their] GNP per capita has reached \$1,000 per annum". The substance of the cross-reference to Article 27.2(b) is determined by the content of that provision. This means that, at the time of their graduation, Annex VII(b) Members become subject to the same provisions that apply to other developing country Members under Article 27.2(b), i.e. the eight-year transition period that started on 1 January 1995. We therefore consider that the text of Annex VII(b) does not support India's view that Article 27.2(b) applies to Annex VII(b) Members with a modified starting date for the eight-year transition period.

7.315. It may be that, if a developing country Member graduates from Annex VII(b) after 1 January 2003, the cross-reference to Article 27.2(b) would have no practical effect because the eight-year transition period would have expired before the Member's graduation from the Annex. However, we do not agree with India that this renders parts of the SCM Agreement "inutile" or "amount[s] to an invalidation of the mandatory language in Annex VII(b)".⁶⁶⁹ In our view, the possibility that Members graduating from Annex VII(b) no longer benefit from the transition period under Article 27.2(b) is inherent in the reference in Annex VII(b) to a time-limited provision. Furthermore, Annex VII(b) Members that graduated before 1 January 2003 enjoyed a transition period pursuant to Article 27.2(b).

7.316. 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".⁶⁷⁰ In India's view, Article 27.4 "does not mention a specific date, but rather appears to account for the possibility of different periods applying to [Members] graduating from Annex VII at different times".⁶⁷¹ India further argues that "a strict interpretation" of Article 27.2 would mean that, under Article 27.5, an eight-year phase-out period would be available for products that reached export competitiveness, while other export subsidies would have to be eliminated.⁶⁷²

7.317. Article 27.4 of the SCM Agreement stipulates that "[a]ny developing country Member referred to in paragraph 2(b) shall phase out its export subsidies *within the eight-year period*, preferably in a progressive manner."⁶⁷³ The first part of Article 27.4 is expressly linked to Article 27.2(b) through the wording "[a]ny developing country Member referred to in paragraph 2(b)". Article 27.4 then refers to phasing out export subsidies "*within the eight-year period*". The use of the definite article "the" indicates that Article 27.4 refers to a specific or already identified eight-year period. This period is defined in Article 27.2(b), to which Article 27.4 explicitly refers. We therefore disagree with India that Article 27.4 envisages the possibility of different periods applying to Members graduating from Annex VII at different times.

7.318. In turn, Article 27.5 of the SCM Agreement states:

A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

7.319. We disagree with India's view that Article 27.5 grants an extended exclusion from the disciplines of Article 3.1(a). Article 27.5 requires Members that otherwise benefit from special and differential treatment to eliminate their export subsidies on products in which they have reached export competitiveness, while maintaining their right to special and differential treatment due to their development status. In doing so, Article 27.5 treats Annex VII Members more favourably compared to other developing country Members by giving the former eight years to phase out these subsidies instead of the two-year period given to the latter. Clearly, therefore, the reference in Article 27.5 to Annex VII should be interpreted to mean that Annex VII Members benefit from an eight-year phase-out period to eliminate export subsidies for products in which they have reached export competitiveness, as long as they continue to satisfy the requirements of Annex VII. A Member

⁶⁶⁸ India's first written submission, para. 139. (emphasis original)

⁶⁶⁹ India's first written submission, paras. 139-140.

⁶⁷⁰ India's first written submission, para. 141.

⁶⁷¹ India's first written submission, para. 141.

⁶⁷² India's first written submission, para. 141.

⁶⁷³ Emphasis added.

graduating from Annex VII becomes subject to Article 27.2(b), in terms of the prohibition on export subsidies generally, and to the first sentence of Article 27.5, in terms of the amount of time it has to eliminate export subsidies for products in which it has reached export competitiveness. This means that a Member graduating from Annex VII will be subject to Article 27.2, and will have either two years or the time-period between its graduation and 1 January 2003, whichever is shorter, to eliminate export subsidies for products in which it has reached export competitiveness. Therefore, we do not consider that Article 27.5 grants an extended phase-out period compared to the one under Article 27.2(b).

7.320. We note India's argument that not accepting its reading of Article 27.2(b), "when viewed in light of the object and purpose of the SCM Agreement, would result in manifestly unreasonable results where certain developing Members would be deprived of equitable treatment provided to other developing country Members with respect to phasing out of export subsidies".⁶⁷⁴ We note that the object and purpose of the SCM Agreement is to strengthen and improve GATT disciplines on the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions.⁶⁷⁵ As part of this balance, the SCM Agreement grants special and differential treatment to developing country Members. In particular, Article 27, found in Part VIII of the SCM Agreement, titled "Developing Country Members", makes operational the principle of special and differential treatment.⁶⁷⁶ With this in mind, we fail to see how our interpretation of Article 27.2(b) would run contrary to the object and purpose of the SCM Agreement. Rather, in our view, this interpretation reflects the balance contained in the SCM Agreement between prohibiting certain types of subsidies, on the one hand, and providing special and differential treatment, in accordance with the relevant provisions of the SCM Agreement, on the other hand.

7.321. Based on the above, we conclude that the terms of Article 27.2(b) of the SCM Agreement, read in their context, and in light of the object and purpose of the SCM Agreement, indicate that the eight-year transition period under Article 27.2(b) runs from 1 January 1995, i.e. the date of entry into force of the WTO Agreement.⁶⁷⁷ In light of the clear meaning of Article 27.2(b), we do not consider it necessary to further examine India's arguments regarding supplementary means of interpretation, such as the negotiating history of Article 27.⁶⁷⁸

7.322. It is undisputed that India has graduated from Annex VII(b) of the SCM Agreement. Our interpretation of Article 27.2(b) leads us to conclude that the transition period set forth in Article 27.2(b) expired on 1 January 2003, including for Members graduating from Annex VII(b). We therefore find that Article 27 no longer excludes India from the application of Article 3.1(a) of the SCM Agreement.

7.323. We now examine Australia's and Guatemala's claims under Article 3.1(a).

7.2.5.3 Whether India's subsidy schemes are inconsistent with Article 3.1(a) of the SCM Agreement

7.324. As noted, Australia and Guatemala claim that India's Production Assistance, Buffer Stock, and Marketing and Transportation Schemes constitute subsidies *de jure* contingent upon export

⁶⁷⁴ India's first written submission, para. 142.

⁶⁷⁵ Appellate Body Reports, *US – Carbon Steel*, paras. 73–74 and *US – Softwood Lumber IV*, para. 64.

⁶⁷⁶ Panel Report, *Canada – Aircraft (Article 21.5 – Brazil)*, fn 120 to para. 5.135.

⁶⁷⁷ We note that India urged us not to rely on the interpretation of Article 27 developed by the panel in *India – Export Related Measures* because the appeal in that dispute is currently pending before the Appellate Body. (India's first written submission, para. 144) Having examined the text of Article 27.2, in its context, and in light of the object and purpose of the SCM Agreement, we have arrived at an understanding of that provision which is consistent with the interpretation of the panel in *India – Export Related Measures*. (See Panel Report, *India – Export Related Measures*, para. 7.69) Furthermore, contrary to what India suggests, the fact that the panel report in that dispute is currently under appeal does not necessarily preclude future panels from relying on that panel's interpretation of Article 27.2, if they find such interpretation persuasive.

⁶⁷⁸ Article 32 of the Vienna Convention on the Law of Treaties provides that "[r]ecourse may be had to supplementary means of interpretation ... in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

performance under Article 3.1(a) of the SCM Agreement.⁶⁷⁹ In addition, Australia raises a claim under Article 3.1(a) with respect to the DFIA Scheme. In substantiating their claims, Australia and Guatemala refer to the arguments and evidence they submitted in support of their claims under Articles 9.1(a) and (c) of the Agreement on Agriculture.⁶⁸⁰

7.325. We have found above that, through the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes, India grants to sugar mills direct subsidies contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture.⁶⁸¹ In reaching these findings, we concluded, *inter alia*, that the aforementioned Schemes are (i) direct subsidies, including payments in kind; (ii) provided by a government or its agency; and (iii) contingent on export performance. In examining whether the four Schemes are direct subsidies, we assessed, in particular, the existence of "a financial contribution" and "benefit" within the meaning of Article 1.1 of the SCM Agreement. Furthermore, in ascertaining whether the subsidies under these four Schemes are contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture, we have concluded that the legal standard of export contingency under Article 9.1(a) does not differ from that under Article 3.1(a) of the SCM Agreement.

7.326. We recall that, to demonstrate the existence of an export subsidy within the meaning of Article 3.1(a) of the SCM Agreement, a Member must establish: (i) the existence of a subsidy within the meaning of Article 1 of the SCM; and (ii) contingency of that subsidy upon export performance.⁶⁸² We have concluded that the complainants have established the existence of these two elements in the context of their claims under Article 9.1(a) of the Agreement on Agriculture. We therefore see no need to conduct an additional assessment of whether the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes are also inconsistent with Article 3.1(a) of the SCM Agreement.⁶⁸³

7.327. Therefore, for the reasons set out in section 7.2.4.5 above, we find that the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes constitute subsidies contingent upon export performance inconsistent with Article 3.1(a) of the SCM Agreement. By maintaining such subsidies, India has also acted inconsistently with Article 3.2 of the SCM Agreement.

7.2.5.4 Conclusion under the SCM Agreement

7.328. In light of the above, we find that, under the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes, India has granted "subsidies contingent, in law ... upon export performance" inconsistent with Article 3.1(a) of the SCM Agreement. By maintaining such subsidies, India has also violated Article 3.2 of the SCM Agreement.

7.2.6 Recommendation under Article 4.7 of the SCM Agreement⁶⁸⁴

7.329. We have found that, under the Production Assistance Scheme, the Buffer Stock Scheme, the Marketing and Transportation Scheme, and the DFIA Scheme, India provides subsidies contingent upon export performance, inconsistently with Articles 3.1(a) and 3.2 of the SCM Agreement. Therefore, pursuant to Article 4.7 of the SCM Agreement, we recommend that India withdraw such subsidies without delay.

7.330. Article 4.7 further requires us to "specify in [our] recommendation the time-period within which the measure must be withdrawn". We note, in this regard, that some panels called upon to determine the time-period for the withdrawal of prohibited subsidies under Article 4.7 found a period

⁶⁷⁹ Australia's first written submission, paras. 368-369 and 391; Guatemala's first written submission, para. 300.

⁶⁸⁰ Australia's first written submission, paras. 391-433; Guatemala's first written submission, paras. 310-321.

⁶⁸¹ See para. 7.304 above.

⁶⁸² Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.16

⁶⁸³ See Panel Report, *US – Upland Cotton*, para. 7.754.

⁶⁸⁴ This section concerns the Panel's findings in the disputes DS580 and DS581.

of 90 days to be appropriate⁶⁸⁵ whereas others opted for longer periods, considering the nature of the measures before them.⁶⁸⁶

7.331. It has been pointed out in past disputes that, in determining the time-period for withdrawal "without delay" under Article 4.7, a panel should typically take into account the nature of the measure(s) to be revoked or modified and the domestic procedures available for such revocation or modification.⁶⁸⁷

7.332. In the present disputes, India's subsidies under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes are granted by virtue of notifications issued by the DFPD for specific sugar seasons. In turn, the MIEQ and the MAEQ orders are issued by the DFPD pursuant to the authority granted to it under the Sugarcane Act and the Sugar (Control) Order.⁶⁸⁸ As for the DFIA Scheme, it is set out in India's Foreign Trade Policy (FTP) 2015-2020. The FTP is adopted by "the Central Government" in the "exercise of powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992".⁶⁸⁹ Thus, it appears that none of these four Schemes require legislative action for their withdrawal. In principle, therefore, we do not consider that a long period of time is needed for India to comply with our findings regarding these subsidies.

7.333. However, we also note that, throughout these proceedings, India has referred to the impact of the COVID-19 pandemic on the functioning of its various governmental institutions.⁶⁹⁰ In our view, the impact of the COVID-19 pandemic has to be taken into account in determining the time frame for the withdrawal of the export subsidies at issue. On balance, in these disputes, we consider it appropriate to grant India 120 days from the date of adoption of the Reports in DS580 and DS581 for the withdrawal of these subsidies.

7.334. Therefore, to the extent India continues to grant subsidies under the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes, we recommend that India withdraw them within 120 days from the date of adoption of the Reports in DS580 and DS581.

7.3 Notifications⁶⁹¹

7.335. Australia argues that India has violated its notification obligations under the Agreement on Agriculture and the SCM Agreement. With regard to the Agreement on Agriculture, Australia alleges three violations. First, it contends that India has failed to notify to the Committee on Agriculture its

⁶⁸⁵ E.g. Panel Reports, *Korea – Commercial Vessels*, para. 8.700; *Canada – Aircraft Credits and Guarantees*, para. 8.4; *Canada – Autos*, para. 11.7; *Australia – Automotive Leather II*, para. 10.7; *Brazil – Aircraft*, para. 8.5; and *US – Tax Incentives*, para. 8.6.

⁶⁸⁶ For example, in *US – Upland Cotton*, the panel recommended withdrawal of the measures either within six months from adoption of the panel report, or by 1 July 2005 (which was a little less than ten months from the date of circulation of the panel report), whichever was earlier. (Panel Report, *US – Upland Cotton*, paras. 8.3(b) and 8.3(c)) In *US – FSC*, the panel observed that withdrawal of the prohibited subsidy required legislative action, and that the measures were part of the respondent's tax legislation, which was revised every year with effect from the beginning of each fiscal year. On that basis, the panel considered that withdrawal would be "without delay" if it took place no later than the start of the fiscal year that would follow the completion of the appeal process. This was a year from the expected circulation of the panel report, and about half a year from the time at which the panel expected adoption of the report in case of an appeal. (Panel Report, *US – FSC*, paras. 8.5-8.8) In *India – Export Related Measures*, the panel took a measure-by-measure approach and considered what action would be required to withdraw each of the subsidies it found to be inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement. For measures that appeared to require amendments to legislative acts of India's Parliament, the panel specified that withdrawal "without delay" would be withdrawal within 180 days from adoption of the panel report. (Panel Report, *India – Export Related Measures*, paras. 9.16 and 9.19)

⁶⁸⁷ These domestic procedures may include any extraordinary procedures that may be available within the legal system of a WTO Member. (Appellate Body Report, *Brazil – Taxation*, para. 5.446)

⁶⁸⁸ See section 7.2.2 above.

⁶⁸⁹ Foreign Trade Policy 2015-2020, (Exhibit AUS-40), p. 6.

⁶⁹⁰ In particular, India noted that, to mitigate the effects of COVID-19, it imposed nation-wide lockdowns and limited the number of government officials attending offices. (See e.g. India's comments on the Panel's alternative proposal, 17 April 2020, p. 1; comments regarding the first substantive meeting and additional working procedures, 28 October 2020, para. 11. See also India's opening statement at the first substantive meeting of the Panel, para. 2)

⁶⁹¹ This section concerns the dispute DS580.

annual domestic support to sugarcane producers subsequent to the 1995-96 marketing year⁶⁹², in violation of Article 18.2 of the Agreement on Agriculture.⁶⁹³ Second, Australia argues that India has acted inconsistently with Article 18.3 of the Agreement on Agriculture by failing to notify to the Committee on Agriculture any new domestic support measure, or modification of an existing measure, that India considers to be consistent with its obligations by virtue of being exempted from its reduction commitments.⁶⁹⁴ Third, Australia maintains that India's last notification to the Committee on Agriculture of its export subsidies for sugar was in 2012, which covered the 2004-05 to 2009-10 marketing years, and that since then India has not made any new notification, thus violating Article 18.2 of the Agreement on Agriculture.⁶⁹⁵ With regard to the SCM Agreement, Australia asserts that India has violated its notification obligations under Article 25 of that Agreement by failing to notify its export subsidies for sugar.⁶⁹⁶ More specifically, Australia maintains that "India has failed to notify its prohibited export subsidies, and is thus in breach of its notification obligations under Articles 25.1 and 25.2 of the SCM Agreement".⁶⁹⁷ Alternatively to its claims under the Agreement on Agriculture and the SCM Agreement, Australia submits that India has failed to comply with the notification obligation in Article XVI:1 of the GATT 1994.⁶⁹⁸

7.336. With respect to the claims under the Agreement on Agriculture, India does not dispute that it last notified its domestic support to sugarcane producers in its 1995-96 notification to the Committee on Agriculture and that its last notification concerning export subsidies for sugar covered the 2004-05 to 2009-10 marketing years. However, India argues that Article 18 of the Agreement on Agriculture does not impose mandatory notification obligations on Members. Rather, India asserts that this provision only vests the Committee on Agriculture with discretion to determine the conduct of the review process, based on notifications. In India's view, the Committee on Agriculture uses hortatory language in framing the notification requirements, which does not amount to a mandatory obligation.⁶⁹⁹ In addition, India submits that the measures at issue are not of the kind that require notification pursuant to the Agreement on Agriculture or the SCM Agreement. Specifically, India maintains that the complainants have failed to demonstrate that the measures at issue which purportedly have to be notified as domestic support measures meet the definition of domestic support under the Agreement on Agriculture.⁷⁰⁰ Similarly, with respect to the export subsidies that India is allegedly required to notify under both the Agreement on Agriculture and the SCM Agreement, India maintains that the complainants have failed to demonstrate that such measures meet the definition of a "subsidy" within the meaning of those two Agreements. Thus, India asserts, Australia has failed to establish that India was under a legal obligation to submit notifications pursuant to Article 18 of the Agreement on Agriculture, Article 25 of the SCM Agreement, and Article XVI of the GATT 1994.⁷⁰¹

⁶⁹² We note that in its notifications to the Committee on Agriculture (see e.g. G/AG/N/IND/1), India refers to "marketing" years, as opposed to "financial" years. According to the Supporting Tables referenced in India's Schedule, the financial year "*corresponds basically to the marketing year*". (G/AG/AGST/IND, p. 4, para. 6) (emphasis added) For ease of reference, we also use the term "marketing" year(s) in this section.

⁶⁹³ Australia's first written submission, para. 452.

⁶⁹⁴ In this respect, Australia asserts that India included certain buffer stock operations for sugar as a food security measure in its notification for the 1996-97 and 1997-98 marketing years, which India characterized as exempt from reduction commitments under Annex 2 of the Agreement on Agriculture. In Australia's view, India has failed to include such support in its subsequent notifications, inconsistently with Article 18.3 of the Agreement on Agriculture. (Australia's first written submission, para. 453 (referring to G/AG/N/IND/2, DS:1, p. 3))

⁶⁹⁵ Australia's first written submission, para. 454 (referring to G/AG/N/IND/9, circulated by the Committee on Agriculture on 30 July 2012).

⁶⁹⁶ Australia's first written submission, paras. 456-458. Australia asserts that, pursuant to Article 2.3 of the SCM Agreement, subsidies prohibited by Article 3 of the SCM Agreement are deemed to be "specific" within the meaning of Article 2 of the SCM Agreement. In Australia's view, since India grants such prohibited subsidies, it is obliged to notify them under Article 25 of the SCM Agreement. (Ibid. paras. 456-457)

⁶⁹⁷ Australia's response to Panel question No. 44(a), para. 139. Australia added that "[b]y not submitting notifications, India has also, in effect, violated the requirements concerning the content of notifications set out in Article 25.3 and 25.4." (Ibid.)

⁶⁹⁸ Australia's first written submission, para. 459.

⁶⁹⁹ India's first written submission, paras. 158-159. India relies on the language used in document G/AG/2, adopted by the Committee on Agriculture at its meeting on 8 June 1995. (Committee on Agriculture, Notification Requirements and Formats, G/AG/2 ("G/AG/2"))

⁷⁰⁰ India asserts that the Committee on Agriculture "recommends [*sic.*] Members that 'where no support exists, a statement to this effect should be made'." (India's first written submission, para. 159 (referring to G/AG/2, p. 11, (ii))) However, India adds, "this recommendation again, uses hortatory language making clear that it is suggestive in nature and not a binding obligation." (Ibid.)

⁷⁰¹ India's first written submission, para. 157.

7.337. We proceed with our analysis by addressing, in turn, Australia's claims under: (i) Article 18.2 of the Agreement on Agriculture; (ii) Article 18.3 of the Agreement on Agriculture; and (iii) Article 25 of the SCM Agreement. Thereafter, we proceed to address Australia's alternative claims under Article XVI:1 of the GATT 1994, as appropriate.

7.338. Regarding Australia's claim under Article 18.2 of the Agreement on Agriculture, we note that the parties contest whether the Agreement on Agriculture, including Article 18.2, imposes any notification obligation on Members.⁷⁰² Hence, we must first examine whether Article 18.2 imposes a notification obligation before we examine whether India has violated any such obligation. The parties' arguments in this regard pertain to Article 18 of the Agreement on Agriculture, read in light of document G/AG/2 adopted by the Committee on Agriculture regarding notifications. We examine Article 18 and G/AG/2 in order to determine whether they contain an obligation to notify the relevant measures.

7.339. Article 18 of the Agreement on Agriculture provides, in relevant parts:

1. Progress in the implementation of commitments negotiated under the Uruguay Round reform programme shall be reviewed by the Committee on Agriculture.
2. 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, as well as on the basis of such documentation as the Secretariat may be requested to prepare in order to facilitate the review process.
3. In 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. This notification shall contain details of the new or modified measure and its conformity with the agreed criteria as set out either in Article 6 or in Annex 2.

7.340. We observe that Article 17 of the Agreement on Agriculture establishes the Committee on Agriculture, and paragraph 1 of its Article 18 mandates that Committee to oversee Members' implementation of their commitments undertaken in the context of the Uruguay Round reform programme. While the text of paragraph 2 of Article 18 might not be explicit regarding a notification obligation, it conveys a clear expectation that such notifications will be made, and we do not agree with India's view that this provision entails no obligation to notify. In this regard, we find it appropriate to interpret this paragraph in light of its immediate context found in the other paragraphs of the same Article. Paragraph 1 points out that progress in the implementation of commitments "shall be reviewed" by the Committee. Paragraph 2 provides that the review process "shall be undertaken" on the basis of notifications submitted by Members. This demonstrates that the duty of the Committee on Agriculture to conduct the review process is essentially based on the notifications to be submitted by Members. Thus, paragraphs 1 and 2 of Article 18, read together, indicate that Members are expected to notify the implementation of their commitments.

7.341. This interpretation finds strong support in paragraph 3. This paragraph states that "[i]n addition to the notifications to be submitted under paragraph 2", which again reinforces the expectation that Members will make notifications, "any new domestic support measure, or modification of an existing measure, for which exemption from reduction is claimed shall be notified promptly". Clearly, the term "shall" in paragraph 3 indicates that Members must also notify any new or modified measures for which an exemption from reduction commitment is claimed. We see no reason why the drafters would oblige Members to notify new measures and modifications to existing measures for which exemptions are claimed, but not require the notification of non-exempt measures. We are therefore not persuaded by India's interpretation of these provisions.

7.342. Furthermore, we consider India's interpretation difficult to reconcile with the main purpose of Article 18, i.e. to enable the Committee on Agriculture to review Members' implementation of

⁷⁰² In this regard, we also note Canada's third-party arguments relating to Australia's claims under the Agreement on Agriculture, stating, *inter alia*, that "Article 18 of the [Agreement on Agriculture] imposes a mandatory obligation on WTO Members to notify their measures; and [] Members must in good faith notify all domestic support in favour of agricultural producers, including market price support, under Article 18 of the [Agreement on Agriculture]."(Canada's third-party submission, para. 42)

their commitments and thereby to ensure transparency. If we were to accept India's interpretation, it would mean that the provision obliging the Committee to conduct a notification-based review would, at the same time, restrict the Committee's ability to discharge that responsibility, by not requiring Members to submit such notifications. In sum, we find that Article 18.2 of the Agreement on Agriculture includes an obligation for Members to notify all their domestic support measures and agricultural export subsidies to the Committee on Agriculture.⁷⁰³

7.343. We now turn to the parties' arguments regarding document G/AG/2.⁷⁰⁴ Australia asserts that in addition to the obligations under Article 18 of the Agreement on Agriculture, document G/AG/2 sets out the notifications' requirements and formats.⁷⁰⁵ Australia adds that the said document is not a treaty-level instrument, and "[i]t is immaterial, and unsurprising, that the document uses hortatory language".⁷⁰⁶ In India's view, since there is no notification obligation under Article 18, the hortatory language of document G/AG/2 itself does not amount to such an obligation.⁷⁰⁷

7.344. We recall that Australia brings its claims under Article 18 of the Agreement on Agriculture, not under document G/AG/2.⁷⁰⁸ We have interpreted Article 18 as containing an obligation to notify, *inter alia*, domestic support measures and agricultural export subsidies. We observe that document G/AG/2 contains hortatory language, stating that notifications "should be made"⁷⁰⁹ within specified timeframes and frequencies with respect to the relevant implementation periods. We also observe that it clarifies the notification "requirements and formats" in each policy area.⁷¹⁰ For instance, it sets out the "matters" that should be notified, and the "intervals" at which notifications should be submitted, in accordance with paragraph 2 of Article 18. It also confirms that notifications cover, *inter alia*, the domestic support measures and export subsidies provided by Members.⁷¹¹

7.345. Reading Article 18 of the Agreement on Agriculture together with document G/AG/2 confirms that Article 18.2 imposes an obligation on Members, including India, to notify their domestic support and export subsidies. Document G/AG/2 clarifies the manner in which Members are expected to comply with their notification obligations under Article 18.2. We do not see anything in document G/AG/2 that contradicts our interpretation of Article 18.2 as containing an obligation to submit notifications to the Committee on Agriculture.

7.346. Turning to the issue of whether India has acted inconsistently with Article 18.2, we recall that we have found that India maintains domestic support to sugarcane producers and export subsidies for sugar.⁷¹² There is no dispute among the parties as to when India last submitted its notifications to the Committee on Agriculture. Based on our assessment of the evidence on record⁷¹³, we observe that, with respect to its domestic support measures, India's last notification of domestic support to sugarcane producers concerned the 1995-96 marketing year. We recall our finding that

⁷⁰³ We note that, in the Uruguay Round, Members undertook certain commitments in the areas of, *inter alia*, agricultural domestic support and export subsidies. (See e.g. Agreement on Agriculture, preamble, Articles 6-10) Thus, to review the progress in the implementation of such commitments, notifications relating to both areas must be submitted to the Committee on Agriculture.

⁷⁰⁴ Document G/AG/2 was adopted by the Committee on Agriculture at its meeting on 8 June 1995, and is accompanied by an Addendum, G/AG/2/Add.1, adopted on 16 October 1995.

⁷⁰⁵ Australia's first written submission, para. 439.

⁷⁰⁶ Australia's response to Panel question No. 44(b), para. 140.

⁷⁰⁷ India's first written submission, paras. 158-159.

⁷⁰⁸ Australia's first written submission, para. 468; response to Panel question No. 44(b), para. 140.

⁷⁰⁹ See e.g. G/AG/2, pp. 11 and 24.

⁷¹⁰ G/AG/2, p. 1.

⁷¹¹ G/AG/2, pp. 11 and 24. We also observe that, regarding domestic support, there are two distinct types of notifications, i.e. those relating to calculation and annual reporting of the Current Total AMS, which are to be submitted annually, and those relating to the *ad-hoc* notification of new or modified domestic support measures for which exemption from reduction is claimed under Article 6 or Annex 2. (G/AG/2, p. 11) Regarding export subsidies, subject to certain conditions, the deadline to submit notifications for Members with no export subsidy reduction commitments in Part IV of their Schedules, such as India, is no later than 30 days following the end of the year in question. (G/AG/2, p. 24)

⁷¹² We have established that: (i) India maintains market price support through the FRP and SAPs, as well as at least one non-exempt direct payment, within the meaning of the Agreement on Agriculture (see paras. 7.66 and 7.90 above); (ii) India grants direct subsidies contingent on export performance within the meaning of the Agreement on Agriculture (see para. 7.304 above); and (iii) India grants export subsidies that are inconsistent with its obligations under the SCM Agreement (see para. 7.328 above).

⁷¹³ In seeking to substantiate its assertions relating to India's alleged violation, Australia refers to a number of India's notifications, submitted to the Committee on Agriculture. (See e.g. Australia's first written submission, fn 434 to para. 451, fn 435 to para. 452, fn 437 to para. 454)

India maintained domestic support to sugarcane producers for the 2014-15 to 2018-19 sugar seasons (which we understand correspond to the 2015-16 to 2019-20 marketing years). With respect to its export subsidies, we note that India last notified its export subsidies for sugar in its notification to the Committee on Agriculture, circulated on 30 July 2012, which covered the 2004-05 to 2009-10 marketing years.⁷¹⁴ In this connection, we also recall our findings that India maintained export subsidies for sugar during certain marketing years following the periods subject to its last notification.⁷¹⁵

7.347. We therefore conclude that India has failed to notify its domestic support to sugarcane producers after the 1995-96 marketing year, inconsistently with Article 18.2 of the Agreement on Agriculture. We also conclude that India has failed to submit notifications of its export subsidies for sugar after the 2009-10 marketing year, inconsistently with Article 18.2 of the Agreement.

7.348. We now turn to examine Australia's allegation that India has also violated the obligation laid down in Article 18.3 of the Agreement on Agriculture. In this regard, Australia contends that India notified certain buffer stock operations for sugar, characterized by India as exempt by virtue of Annex 2 of the Agreement on Agriculture, in its notification for the 1996-97 and 1997-98 marketing years.⁷¹⁶ In Australia's view, by failing to include such support in its subsequent notifications, India has violated Article 18.3 of the Agreement on Agriculture. We note, however, that Australia has not submitted evidence demonstrating that such support was maintained by India after the 1996-97 and 1997-98 marketing years. We therefore reject Australia's claim that India has acted inconsistently with Article 18.3.

7.349. We now proceed to address Australia's claims under the SCM Agreement. We begin by noting that Article 24 of the SCM Agreement establishes the Committee on Subsidies and Countervailing Measures ("SCM Committee"), which receives Members' subsidy notifications. The relevant parts of Article 25 read:

1. Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.
2. Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

7.350. We observe that paragraph 1 specifies the intervals and dates of subsidy notifications whereas paragraph 2 clarifies that any subsidy that is specific has to be notified. We also observe that the notification obligation set out under Article 25 of the SCM Agreement serves a transparency objective, and that, pursuant to Article 25.7, "notification of a measure does not prejudice either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself."⁷¹⁷

7.351. We note that, in contrast to its position regarding Article 18 of the Agreement on Agriculture, India does not dispute the mandatory nature of the notification obligation under Article 25 of the SCM Agreement.⁷¹⁸ Rather, as noted above, India's sole argument is that the complainants have failed to establish that India provides export subsidies within the meaning of the Agreement on Agriculture and the SCM Agreement, and therefore Australia has failed to demonstrate that a notification obligation exists.

7.352. Turning now to the facts concerning this claim, we note Australia's argument that India has failed to notify its export subsidies for sugar since 2009-10.⁷¹⁹ We observe, however, that the

⁷¹⁴ G/AG/N/IND/9.

⁷¹⁵ See paras. 7.304 and 7.328 above.

⁷¹⁶ See fn 694 to para. 7.335 above.

⁷¹⁷ The Appellate Body also highlighted this aspect in *Brazil – Aircraft*, by stating that "Article 25 aims to promote transparency by requiring Members to notify their subsidies, without prejudging the legal status of those subsidies". (Appellate Body Report, *Brazil – Aircraft*, para. 149)

⁷¹⁸ India's first written submission, para. 157.

⁷¹⁹ Australia's first written submission, para. 458.

notifications circulated to date by the SCM Committee show that India has never notified a subsidy for sugar under the SCM Agreement. We also note that India has not argued otherwise.

7.353. Above, we have found that, under the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes, India grants subsidies contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement.⁷²⁰ Moreover, we recall that, under the said Schemes, India grants subsidies only to one part of its agricultural sector - the producers of sugar.⁷²¹ In this regard, we also note that, according to Article 2.3 of the SCM Agreement, subsidies falling under Article 3 are deemed to be specific. It follows that, by not notifying these export subsidies to the SCM Committee, India has acted inconsistently with its obligations under Articles 25.1 and 25.2 of the SCM Agreement.

7.354. In light of the above, we conclude that India has violated its obligation under Article 18.2 of the Agreement on Agriculture by failing to notify to the Committee on Agriculture its domestic support to sugarcane producers subsequent to the 1995-96 marketing year, as well as its export subsidies for sugar subsequent to the 2009-10 marketing year. We also find that by failing to notify to the SCM Committee its export subsidies for sugar under the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes, India has violated its obligations under Articles 25.1 and 25.2 of the SCM Agreement.⁷²²

8 CONCLUSIONS AND RECOMMENDATIONS

8.1 Complaint by Brazil (DS579)

8.1. With respect to Brazil's claims regarding India's domestic support to sugarcane producers, we find that, for five consecutive sugar seasons, from 2014-15 to 2018-19, India provided non-exempt product-specific domestic support to sugarcane producers in excess of the permitted level of 10% of the total value of sugarcane production. Therefore, we find that India is acting inconsistently with its obligations under Article 7.2(b) of the Agreement on Agriculture.

8.2. With respect to Brazil's claims regarding India's export subsidies pertaining to sugar or sugarcane, we find that India's subsidies under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes are contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture. Since India did not make export subsidy reduction commitments with respect to sugar in its Schedule, we find that India's subsidies contingent on export performance within the meaning of Article 9.1(a) are inconsistent with Articles 3.3 and 8 of the Agreement on Agriculture.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Agreement on Agriculture, they have nullified or impaired benefits accruing to Brazil under that Agreement.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that India bring its WTO-inconsistent measures into conformity with its obligations under the Agreement on Agriculture.

8.2 Complaint by Australia (DS580)

8.5. With respect to Australia's claims regarding India's domestic support to sugarcane producers we find that, for five consecutive sugar seasons, from 2014-15 to 2018-19, India provided non-exempt product-specific domestic support to sugarcane producers in excess of the permitted

⁷²⁰ See paras. 7.327-7.328 above.

⁷²¹ For a detailed factual description of these four schemes, see section 7.2.2 above.

⁷²² In view of our finding that, by failing to notify its export subsidies for sugar, India has violated Articles 25.1 and 25.2 of the SCM Agreement, we do not consider it necessary to address Australia's assertion that India has also, in effect, violated Articles 25.3 and 25.4 of that Agreement. (See fn 697 to para. 7.335 above) Moreover, in light of our findings under the Agreement on Agriculture and the SCM Agreement, we do not consider it necessary to address Australia's alternative claims under Article XVI:1 of the GATT 1994.

level of 10% of the total value of sugarcane production. Therefore, we find that India is acting inconsistently with its obligations under Article 7.2(b) of the Agreement on Agriculture.

8.6. With respect to Australia's claims regarding India's export subsidies pertaining to sugar or sugarcane, we conclude that:

- a. India's subsidies under the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes are contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture. Since India did not make export subsidy reduction commitments with respect to sugar in its Schedule, India's subsidies contingent on export performance within the meaning of Article 9.1(a) are inconsistent with Articles 3.3 and 8 of the Agreement on Agriculture;
- b. Under the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes, India provides subsidies contingent upon export performance, inconsistently with Articles 3.1(a) and 3.2 of the SCM Agreement.

8.7. With respect to Australia's claims regarding India's notification obligations, we conclude that:

- a. By failing to notify to the Committee on Agriculture its domestic support to sugarcane producers subsequent to the 1995-96 marketing year, as well as its export subsidies for sugar subsequent to the 2009-10 marketing year, India has acted inconsistently with its obligation under Article 18.2 of the Agreement on Agriculture;
- b. Australia has failed to demonstrate that India maintained certain buffer stock operations for sugar after the 1996-97 and 1997-98 marketing years, which India was allegedly required to notify under Article 18.3 of the Agreement on Agriculture after those marketing years. We therefore reject Australia's claim that India has acted inconsistently with Article 18.3 of the Agreement on Agriculture;
- c. By failing to notify to the SCM Committee its export subsidies for sugar under the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes, India has acted inconsistently with its obligations under Articles 25.1 and 25.2 of the SCM Agreement.

8.8. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Agreement on Agriculture and the SCM Agreement, they have nullified or impaired benefits accruing to Australia under those Agreements.

8.9. Pursuant to Article 19.1 of the DSU, we recommend that India bring its WTO-inconsistent measures into conformity with its obligations under the Agreement on Agriculture and the SCM Agreement.

8.10. Furthermore, with respect to India's prohibited subsidies under Article 3.1(a) of the SCM Agreement, we recall Australia's request that the Panel recommend, in accordance with Article 4.7 of the SCM Agreement, that India withdraw those subsidies without delay within a time-period specified by the Panel.

8.11. In light of our conclusions above, and consistent with Article 4.7 of the SCM Agreement, we recommend that India withdraw its prohibited subsidies under the Production Assistance, the Buffer Stock, the Marketing and Transportation, and the DFIA Schemes within 120 days from the adoption of our Report.

8.3 Complaint by Guatemala (DS581)

8.12. With respect to Guatemala's claims regarding India's domestic support to sugarcane producers we find that, for five consecutive sugar seasons, from 2014-15 to 2018-19, India provided non-exempt product-specific domestic support to sugarcane producers in excess of the permitted

level of 10% of the total value of sugarcane production. Therefore, we find that India is acting inconsistently with its obligations under Article 7.2(b) of the Agreement on Agriculture.

8.13. With respect to Guatemala's claims regarding India's export subsidies pertaining to sugar or sugarcane, we conclude that:

- a. India's subsidies under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes are contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture. Since India did not make export subsidy reduction commitments with respect to sugar in its Schedule, India's subsidies contingent on export performance within the meaning of Article 9.1(a) are inconsistent with Articles 3.3 and 8 of the Agreement on Agriculture;
- b. Having found that India's Production Assistance, Buffer Stock, and Marketing and Transportation Schemes are inconsistent with Article 9.1(a) of the Agreement on Agriculture, we do not consider it necessary to address Guatemala's claim under Article 9.1(c) of the Agreement on Agriculture regarding the same Schemes;
- c. Under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes, India provides subsidies contingent upon export performance, inconsistently with Articles 3.1(a) and 3.2 of the SCM Agreement.

8.14. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Agreement on Agriculture and the SCM Agreement, they have nullified or impaired benefits accruing to Guatemala under those Agreements.

8.15. Pursuant to Article 19.1 of the DSU, we recommend that India bring its WTO-inconsistent measures into conformity with its obligations under the Agreement on Agriculture and the SCM Agreement.

8.16. Furthermore, with respect to India's prohibited subsidies under Article 3.1(a) of the SCM Agreement, we recall Guatemala's request that the Panel recommend, in accordance with Article 4.7 of the SCM Agreement, that India withdraw those subsidies without delay within a time-period specified by the Panel.

8.17. In light of our conclusions above, and consistent with Article 4.7 of the SCM Agreement, we recommend that India withdraw its prohibited subsidies under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes within 120 days from the adoption of our Report.



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.

LIST OF ANNEXES**ANNEX A****WORKING PROCEDURES OF THE PANEL**

Contents		Page
Annex A-1	Working Procedures of the Panel	5
Annex A-2	Additional Working Procedures for the Panel's First Substantive Meeting to be Held by Remote Means	13
Annex A-3	Additional Working Procedures for the Panel's Second Substantive Meeting to be Held by Remote Means	15

ANNEX B**ARGUMENTS OF THE PARTIES**

Contents		Page
Annex B-1	Integrated executive summary of the arguments of Brazil	18
Annex B-2	Integrated executive summary of the arguments of Australia	37
Annex B-3	Integrated executive summary of the arguments of Guatemala	59
Annex B-4	Integrated executive summary of the arguments of India	83

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Canada	104
Annex C-2	Integrated executive summary of the arguments of China	108
Annex C-3	Integrated executive summary of the arguments of Costa Rica	110
Annex C-4	Integrated executive summary of the arguments of El Salvador	113
Annex C-5	Integrated executive summary of the arguments of the European Union	116
Annex C-6	Integrated executive summary of the arguments of Japan	119
Annex C-7	Integrated executive summary of the arguments of the United States	122

ANNEX D**COMMUNICATIONS BY THE PANEL REGARDING THE FIRST SUBSTANTIVE MEETING**

Contents		Page
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	128
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	130
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	133
Annex D-4	Panel's communication to the parties and third parties regarding the postponement of the first substantive meeting, dated 18 November 2020	135

ANNEX E

PRELIMINARY RULING

	Contents	Page
Annex E-1	Preliminary Ruling by the Panel concerning India's allegedly expired measures dated 9 November 2020	138
Annex E-2	Preliminary Ruling by the Panel concerning India's Marketing and Transportation Scheme	149

ANNEX A**WORKING PROCEDURES OF THE PANEL**

Contents		Page
Annex A-1	Working Procedures of the Panel	5
Annex A-2	Additional Working Procedures for the Panel's First Substantive Meeting to be Held by Remote Means	13
Annex A-3	Additional Working Procedures for the Panel's Second Substantive Meeting to be Held by Remote Means	15

ANNEX A-1

WORKING PROCEDURES OF THE PANEL¹

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

	Contents	Page
Annex B-1	Integrated executive summary of the arguments of Brazil	18
Annex B-2	Integrated executive summary of the arguments of Australia	37
Annex B-3	Integrated executive summary of the arguments of Guatemala	59
Annex B-4	Integrated executive summary of the arguments of India	83

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 through 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

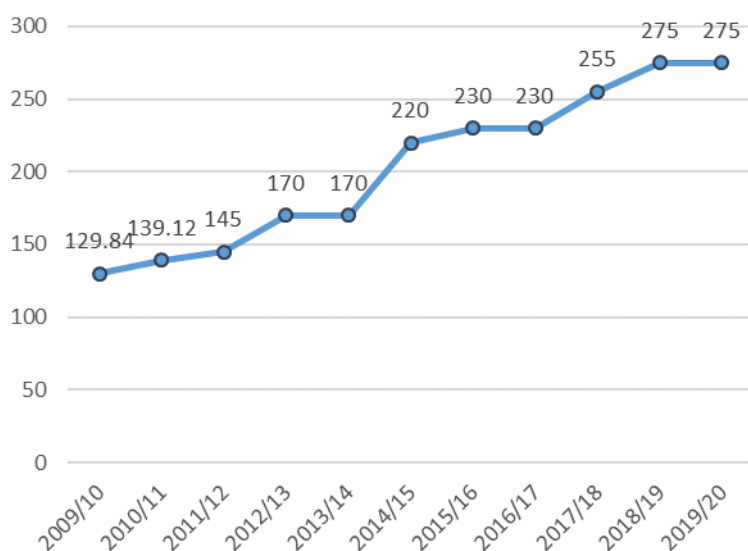
9. Section 3 of the Essential Commodities Act 1955 empowers India's Central Government to control the production, supply and distribution of essential commodities, including sugarcane. In exercise of that power, it has adopted the Sugarcane (Control) Order 1966.

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.

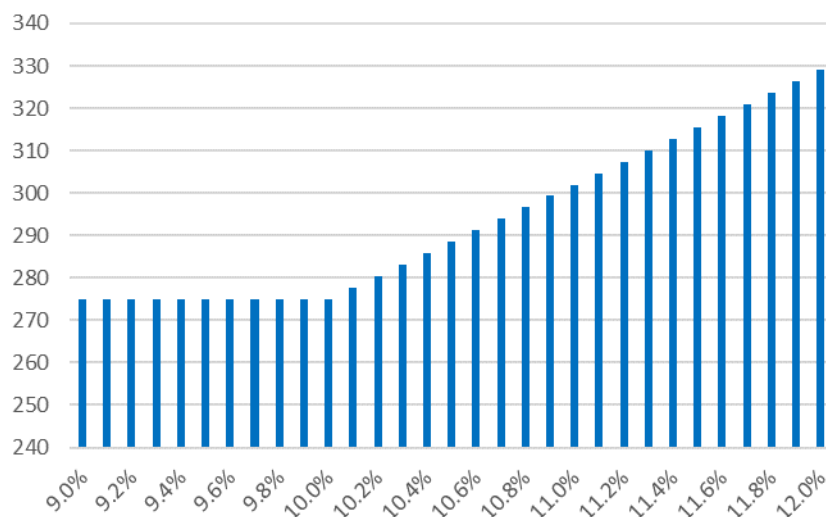
12. Figure 1, below, displays the basic FRP rates announced by the DFPD for each sugar season since the 2009/10 sugar season.

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 Uttarakhand 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 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:

$$\text{MPS} = (\text{AAP} - \text{FERP}) * \text{QEP}$$

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 uncontested 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 season³ 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 contest¹⁰ – 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

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 – terms²⁸ 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.

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 ignore⁵¹ or to downplay⁵² 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.

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 its 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 interpretation¹⁴³ 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

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

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.

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 questions¹⁵, answered vaguely¹⁶, or answered late¹⁷.

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 exhibits²², and detailed calculations²³ 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 India²⁵, 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 quintal³³ 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 Nadu³⁶, 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:

$$\begin{array}{lcl} \text{MPS in} & = & \left(\begin{array}{cc} \text{AAP} & - & \text{FERP} \\ \text{absolute} & & \\ \text{terms} & & \end{array} \right) * \text{QEP} \\ & & \begin{array}{ccc} \text{first element} & \text{second element} & \text{third element} \end{array} \end{array}$$

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.

$$\begin{array}{lcl} \text{Domestic support in} & = & \text{Domestic support} \div \left(\begin{array}{cc} \text{Total} & * & \text{Producer} \\ \text{relation to total value} & & \text{price} \\ \text{of production} & & \end{array} \right) \\ & & \begin{array}{c} \text{total value of production} \\ \text{fourth element} \end{array} \end{array}$$

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

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 Table⁴⁷, 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 ("Sugarcane" 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 production⁵³. 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 AMS⁵⁶ – 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 AAP⁵⁸, 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. Canada⁷³, the European Union⁷⁴, Japan⁷⁵ and the United States⁷⁶ 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 FRP 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 Member's 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.

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 2015/2016⁹⁹ 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/quintal¹⁰⁸; for season 2017/2018, it increased to INR 5.50/quintal, and for season 2018/2019¹⁰⁹, 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

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-kind¹⁴² 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.

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 quantitatively 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 quantitatively 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 Railways¹⁶¹, 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 Canada¹⁶⁸, the European Union¹⁶⁹, Japan¹⁷⁰, 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 subsidies 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 articulation⁵ 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 treaty 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.

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.

⁹ Panel Report, *EC – Approval and Marketing of Biotech Products (US)*, para. 7.2966.

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Canada	104
Annex C-2	Integrated executive summary of the arguments of China	108
Annex C-3	Integrated executive summary of the arguments of Costa Rica	110
Annex C-4	Integrated executive summary of the arguments of El Salvador	113
Annex C-5	Integrated executive summary of the arguments of the European Union	116
Annex C-6	Integrated executive summary of the arguments of Japan	119
Annex C-7	Integrated executive summary of the arguments of the United States	122

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.

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

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 transparency¹¹ 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 an 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 than 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 were falling outside the Panel's terms of reference.

3. The European Union shares 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 foregone 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 qualify 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**

	Contents	Page
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	128
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	130
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	133
Annex D-4	Panel's communication to the parties and third parties regarding the postponement of the first substantive meeting, dated 18 November 2020	135

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

Contents		Page
Annex E-1	Preliminary Ruling by the Panel concerning India's allegedly expired measures dated 9 November 2020	138
Annex E-2	Preliminary Ruling by the Panel concerning India's Marketing and Transportation Scheme	149

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 Panel¹ 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.

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 request¹⁵, 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

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 reference²⁸:

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 FRP⁴⁴; 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 2016-17⁴⁹; (ii) SAP with respect to the state of Bihar⁵⁰; (iii) SAP with respect to the state of Haryana for the sugar seasons 2014-15, 2015-16, and 2017-18⁵¹; (iv) SAP with respect to the state of Punjab for the sugar seasons 2014-15, 2015-16, and 2017-18⁵²; (v) SAP with respect to the state of Tamil Nadu for the sugar seasons 2014-15, 2015-16, and 2017-18⁵³; 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,

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 FRP⁶⁸; 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 2016-17⁷²; (ii) SAP with respect to the state of Bihar⁷³; (iii) SAP with respect to the state of Haryana for the sugar seasons 2014-15, 2015-16, and 2017-18⁷⁴; (iv) SAP with respect to the state of Punjab for the sugar seasons 2014-15, 2015-16, and 2017-18⁷⁵; (v) SAP with respect to the state of Tamil Nadu for the sugar seasons 2014-15, 2015-16, and 2017-18⁷⁶; 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 FRP⁹¹; 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

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 2016-17⁹⁴; (ii) SAP with respect to the state of Bihar⁹⁵; (iii) SAP with respect to the state of Haryana for the sugar seasons 2014-15, 2015-16, and 2017-18⁹⁶; (iv) SAP with respect to the state of Punjab for the sugar seasons 2014-15, 2015-16, and 2017-18⁹⁷; (v) SAP with respect to the state of Tamil Nadu for the sugar seasons 2014-15, 2015-16, and 2017-18⁹⁸; 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

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 Scheme²⁰; (ii) the Marketing and Transportation Scheme is of the same essence as the export subsidies identified in the complainants' panel requests²¹; 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.

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.

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.

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

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 effect⁶⁵; the range of products subject to duties⁶⁶; the operation of the measure and the amendment⁶⁷; their legal implications⁶⁸; their regulatory purpose⁶⁹; the proximity of design, structure, and impact⁷⁰; the existence of an explicit reference to the original measure in the amendment⁷¹; the title of the amendment⁷²; the authority that issued the measure and the amendment⁷³; the legal basis cited⁷⁴; 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 1955⁷⁷ and Clause 5 of the Sugar (Control) Order 1966.⁷⁸

1.47 Second, the purpose of the assistance provided under the Marketing and Transportation Scheme⁷⁹ is the same as that of the Production Assistance Scheme⁸⁰ and the Buffer Stock Scheme⁸¹, 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 costs⁸³, 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 2015-16¹⁰⁵, 2017-18,¹⁰⁶ and 2018-19 sugar seasons¹⁰⁷, and the Buffer Stock Scheme for the 2018-19¹⁰⁸ 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 prejudices 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.

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.



INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

REPORTS OF THE PANELS

Appendix

This *supplement* contains the Appendix to the Reports of the Panels to be found in documents WT/DS579/R, WT/DS580/R, and WT/DS581/R.

APPENDIX**CALCULATION OF INDIA'S MARKET PRICE SUPPORT TO SUGARCANE PRODUCERS FOR
THE 2014-15 TO 2018-19 SUGAR SEASONS****Contents**

1 INTRODUCTION	3
2 RELEVANT LEGAL INSTRUMENTS.....	4
2.1 Fair and Remunerative Price.....	4
2.2 State-Advised Prices	6
2.2.1 Bihar	7
2.2.2 Haryana	7
2.2.3 Punjab	8
2.2.4 Tamil Nadu	9
2.2.5 Uttar Pradesh	10
2.2.6 Uttarakhand.....	11
3 APPLIED ADMINISTERED PRICE.....	11
3.1 General.....	11
3.2 Recovery rates.....	13
3.3 AAP based on the FRP	14
3.4 AAP based on the SAPs	18
3.5 Summary	19
4 FIXED EXTERNAL REFERENCE PRICE	19
5 QUANTITY OF ELIGIBLE PRODUCTION	22
6 CALCULATION OF MARKET PRICE SUPPORT	23

1 INTRODUCTION

1.1. In the circumstances of these disputes, we consider it appropriate to assess India's compliance with Article 7.2(b) of the Agreement on Agriculture by determining whether India's product-specific AMS to sugarcane producers for each sugar season from 2014-15 to 2018-19 was in excess of the amount that India is permitted to provide pursuant to the Agreement.¹ We recall that, according to the complainants, India's product-specific AMS to sugarcane producers consists of: (i) market price support; and (ii) non-exempt direct payments or other non-exempt policies.² This Appendix addresses India's alleged market price support to sugarcane producers.

1.2. Paragraph 8 of Annex 3 of the Agreement on Agriculture describes the methodology for calculating the level of market price support provided by a Member. Under paragraph 8, "market price support shall be calculated using the gap between a fixed external reference price [FERP] and the applied administered price [AAP] multiplied by the quantity of production eligible [QEP] to receive the applied administered price". This can be expressed mathematically as:

$$\text{Market price support} = (\text{FERP} - \text{AAP}) * (\text{QEP})$$

1.3. In support of their claim under Article 7.2(b) of the Agreement on Agriculture, the complainants apply the methodology set out in paragraph 8 of Annex 3 to determine India's market price support to sugarcane producers during each sugar season from 2014-15 to 2018-19. With respect to each component of the calculation, the complainants present considerable evidence and argumentation. Regarding the FERP, the complainants note that, pursuant to paragraph 9 of Annex 3, the FERP may be adjusted for quality differences.³ On that basis, the complainants calculate an adjusted FERP for different States and seasons, using the methodology set out in India's Supporting Tables identified in its Schedule.⁴ As to the AAP, the complainants assert that India's Central Government, as well as certain State Governments, set mandatory minimum prices for sugarcane that constitute AAPs within the meaning of the Agreement on Agriculture.⁵ In order to calculate both the adjusted FERP and the amount of the AAP, the complainants provide evidence of the "recovery rate" (i.e. the "amount of sugar that can be extracted from sugarcane"⁶) in different States.⁷ Regarding the QEP, the complainants provide evidence of the total sugarcane production in different States in India.⁸ Using these data, the complainants apply the paragraph 8 methodology to calculate the total market price support that India provided to sugarcane producers for each season from 2014-15 to 2018-19.⁹

1.4. India argues that the mandatory minimum prices identified by the complainants do not constitute market price support, within the meaning of the Agreement on Agriculture, because they

¹ See para. 7.11 of the Panel Report. We recall that, for the reasons explained in fn 75 to para. 7.9 of the Panel Report, it is unnecessary for us to address the complainants' claims under Articles 3.2 and 6.3 of the Agreement on Agriculture.

² See para. 7.19 of the Panel Report.

³ Brazil's first written submission, para. 146; Australia's first written submission, para. 161; Guatemala's first written submission, para. 146.

⁴ Brazil's first written submission, para. 148; Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)), "FERP" spreadsheet; Australia's first written submission, paras. 161-162; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "FERP" spreadsheet; Guatemala's first written submission, para. 147; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "FERP details" spreadsheet.

⁵ Brazil's first written submission, paras. 24-48, 135-139 and 156; Australia's first written submission, paras. 23-61 and 153-156; Guatemala's first written submission, paras. 37-72 and 140-144.

⁶ Guatemala's first written submission, para. 40. See also Brazil's first written submission, para. 32; Australia's first written submission, para. 28.

⁷ Brazil's first written submission, Table C-1; Australia's first written submission, Table 16; Guatemala's first written submission, Table 2.

⁸ Brazil's first written submission, Table C-8; Australia's first written submission, Table 17; Guatemala's first written submission, Table 8.

⁹ See Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)); Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)); Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)).

do not entail government purchase or procurement of the sugarcane.¹⁰ India does not, however, contest the accuracy of the evidence or calculations provided by the complainants.¹¹

1.5. In paragraphs 7.37 to 7.61 of the Panel Report, we have addressed the parties' disagreement over whether market price support, within the meaning of the Agreement on Agriculture, can only exist where there is government purchase or procurement of the relevant agricultural product. We have concluded that there is no such requirement, and that the existence of market price support depends on the existence and amount of the FERP, AAP, and QEP.¹² In this Appendix, we address the existence and amount of the FERP, AAP, and QEP, and apply the paragraph 8 methodology to determine the amount of market price support for sugarcane producers, if any, that India maintained during each sugar season from 2014-15 to 2018-19.

1.6. We proceed by first describing the relevant legal instruments through which India allegedly provides market price support. We then examine the existence and amount of the AAP, the FERP, and the QEP. Finally, we apply the calculation methodology set out in paragraph 8 in order to determine the amount of market price support, if any, that India provided to sugarcane producers during each sugar season from 2014-15 to 2018-19.

2 RELEVANT LEGAL INSTRUMENTS

2.1. The complainants assert that India maintains mandatory minimum prices payable by purchasers of sugarcane. The complainants identify two sets of such mandatory minimum prices: (i) the "Fair and Remunerative Price" (FRP), allegedly set by the Central Indian Government¹³; and (ii) certain State-Advised Prices (SAPs) set by six individual State Governments within India.¹⁴ According to the complainants, in States where an SAP is applied, the sugar producers are required to pay the SAP instead of the FRP when the former is higher than the latter.¹⁵

2.2. India does not contest, as a factual matter, the complainants' description of the FRP and SAPs.

2.3. Having reviewed the evidence and assertions of the parties, we find that India maintains mandatory minimum prices for sugarcane, payable by sugar producers (i.e. sugar mills and factories that process sugarcane into sugar), in the form of: (i) the FRP, set on an annual basis by the Central Indian Government; and (ii) various SAPs, set on an annual basis by certain State Governments in India. We also understand that, in States where an SAP is applied, sugar producers are required to pay whichever is the higher price as between the FRP and SAPs.¹⁶ For the sake of clarity, we consider it useful to identify, below, the content and operation of the FRP and SAPs.

2.1 Fair and Remunerative Price

2.4. The FRP is established by, and maintained through, the following legal instruments: the Essential Commodities Act of 1955¹⁷ ("Essential Commodities Act"); the Sugarcane (Control) Order

¹⁰ See paras. 7.20, 7.30, and 7.38 of the Panel Report.

¹¹ According to India, its silence with respect to certain aspects of the complainants' arguments should not be construed as assent. (India's responses to questions from the Panel at the first meeting of the Panel)

¹² See para. 7.59 of the Panel Report.

¹³ Brazil's first written submission, paras. 25-34 and 134-155; Australia's first written submission, paras. 23-39 and 166-173; Guatemala's first written submission, paras. 37-50 and 137-165.

¹⁴ Brazil's first written submission, paras. 35-48 and 156-160; Australia's first written submission, paras. 41-61 and 174-180; Guatemala's first written submission, paras. 51-72 and 137-165.

¹⁵ Brazil's first written submission, para. 35; Australia's first written submission, para. 41; Guatemala's first written submission, para. 140.

¹⁶ As clarified by the Supreme Court of India, sugarcane prices fixed by State governments are "statutory prices" and must be complied with by the sugar mills. (Judgment of the Supreme Court of India, *U.P. Co-operative Cane Unions Federations v. West U.P. Sugar Mills Association & Ors. Etc.*, 5 May 2004, (Exhibit JE-49), para. 39) Furthermore, India confirms that "prices that may be set by State orders or enactments do not operate cumulatively with the FRP. If the SAP is higher than the FRP, sugar mills procure sugarcane at the SAP and not at the sum of the FRP and SAP." (India's response to Panel question No. 67)

¹⁷ Essential Commodities Act, (Exhibit JE-43).

of 1966¹⁸ ("Sugarcane Control Order"); and various notifications published in the Official Gazette by the Department of Food and Public Distribution.¹⁹

2.5. The Essential Commodities Act empowers the Central Government to issue orders "for the control of the production, supply and distribution of, and trade and commerce, in certain commodities".²⁰ Section 3, titled "Powers to control production, supply, distribution, etc., of essential commodities", grants the power to the Central Government to regulate, *inter alia*, the production and sale of sugar and sugarcane.²¹

2.6. The Sugarcane Control Order cites Section 3 of the Essential Commodities Act as its legislative basis.²² Clause 2 of the Sugarcane Control Order, titled "Definitions", defines the "fair and remunerative price of sugarcane" as "the price fixed by the Central Government under clause 3, from time to time, for sugarcane".²³ Clause 3 is titled "Fair and remunerative price of sugarcane payable by producer[s] of sugar".²⁴ Clause 3(1) explains that the Central Government "may, after consultation with such authorities, bodies or associations as it may deem fit, by notification in the Official Gazette, from time to time, fix the fair and remunerative price of sugarcane to be paid by producers of sugar or their agents for the sugarcane purchased by them".²⁵ Clause 3(2) indicates that "[n]o person shall sell or agree to sell sugarcane to a producer of sugar or his agent, and no such producer or agent shall purchase or agree to purchase sugarcane, at a price lower than that fixed under sub-clause (1)".²⁶

2.7. As indicated, pursuant to Clause 3(1) of the Sugarcane Control Order, the precise amount of the FRP is set out in the relevant notification published in the Official Gazette, and such notifications may be made "from time to time". From our review of the evidence, we understand that these notifications are published annually and set the FRP for specific sugar seasons.²⁷

2.8. We also note that notifications appear to follow a particular pattern in setting the price for a given sugar season. Based on the evidence before us, we understand that the FRP for each sugar season generally consists of: (i) a base or minimum price that is payable regardless of how low the recovery rate of the sugarcane may be, and (ii) a premium rate that is added to the base price, on an incremental basis, depending on the margin by which the sugarcane recovery rate exceeds a certain threshold (or "basic") recovery rate.²⁸ We understand that the recovery rate of sugarcane is

¹⁸ Sugarcane (Control) Order, (Exhibit JE-45).

¹⁹ See e.g. Notification of 1 October 2015, (Exhibit AUS-19); Notification of 30 September 2016, (Exhibit AUS-20); and Notification of 27 September 2017, (Exhibit AUS-22).

²⁰ Essential Commodities Act, (Exhibit JE-43), preamble, p. 2.

²¹ Essential Commodities Act, (Exhibit JE-43), Section 3, pp. 3-7.

²² Sugarcane (Control) Order, (Exhibit JE-45), preamble, p. 55.

²³ Sugarcane (Control) Order, (Exhibit JE-45), Clause 2(cc), p. 56.

²⁴ Sugarcane (Control) Order, (Exhibit JE-45), Clause 3, p. 57. (footnote omitted)

²⁵ Sugarcane (Control) Order, (Exhibit JE-45), Clause 3(1), p. 57. Clause 3(1) also elaborates on the factors to be taken into account by the Central Government when fixing the FRP, namely: (a) the cost of production of sugarcane; (b) the return to the grower from alternative crops and the general trend of prices of agricultural commodities; (c) the availability of sugar to the consumer at a fair price; (d) the price at which sugar produced from sugarcane is sold by producers of sugar; (e) the recovery of sugar from sugarcane; (f) the realization made from sale of by-products such as molasses, bagasse and press mud or their imputed value; and (g) reasonable margins for the growers of sugarcane on account of risk and profits.

²⁶ Sugarcane (Control Order), (Exhibit JE-45), Clause 3(2), p. 58. The Sugarcane Control Order defines "producer of sugar" as "a person carrying on the business of manufacturing sugar by vacuum pan process and at its own option, ethanol either directly from sugarcane juice or from molasses, including B-Heavy molasses, or both". (Ibid. Clause 2(i), p. 57)

²⁷ We come to this conclusion based on our review of the evidence identified in fns 31-35 to para. 2.9 below.

²⁸ To use an example, we understand that for the 2012-13 sugar season the relevant Notification sets out the mandatory minimum price as follows: a base price of INR 170 per 100 kilograms, with an additional premium of INR 1.79 per 100 kilograms for every 0.1% increase in the recovery rate above a basic (threshold) recovery rate of 9.5%. (Order of 22 October 2013, (Exhibit AUS-17), p. 22) Sugarcane farmers therefore received a minimum price of INR 170 per 100 kilograms of sugarcane, regardless of the actual rate of recovery. In addition, if the recovery rate of a particular farmer's product exceeded 9.5%, then the sugar producer was obliged to pay to the sugarcane farmer an additional INR 1.79 per 100 kilograms for every 0.1% increase above the basic recovery rate. Thus, if a farmer's sugarcane had a recovery rate of 10%, the farmer would be paid INR [170 + (5*1.79) = 178.95] per 100 kilograms of sugarcane.

"the proportion of sugar produced by weight of cane processed, usually expressed as a percentage".²⁹

2.9. Based on our review of the evidence, we note that, for each sugar season from 2014-15 to 2018-19, the FRP was:

- a. For the 2014-15 sugar season: INR 220 per 100 kilograms³⁰, at a basic recovery rate of 9.5%, with an additional premium of INR 2.32 per 100 kilograms for every 0.1% increase in recovery rate³¹;
- b. For the 2015-16 sugar season: INR 230 per 100 kilograms, at a basic recovery rate of 9.5%, with an additional premium of INR 2.42 per 100 kilograms for every 0.1% increase in recovery rate³²;
- c. For the 2016-17 sugar season: INR 230 per 100 kilograms, with a basic recovery rate of 9.5% and an additional premium of INR 2.42 per 100 kilograms for every 0.1% increase in recovery rate³³;
- d. For the 2017-18 sugar season: INR 255 per 100 kilograms, with a basic recovery rate of 9.5% and an additional premium of INR 2.68 per 100 kilograms for every 0.1% increase in recovery rate³⁴; and
- e. For the 2018-19 sugar season, the FRP was structured slightly differently: a base price of INR 275 per 100 kilograms was set at a threshold recovery rate of 10%, with a premium of INR 2.75 for each 0.1% increase in recovery rate above 10%; for sugarcane with a recovery rate between 9.5% and 10%, the price was reduced by INR 2.75 for every 0.1% decrease in recovery rate below 10%, down to a minimum lower threshold level of 9.5%; finally, for sugarcane with a recovery rate equal to or lower than 9.5%, a base price of INR 261.25 per 100 kilograms was set.³⁵

2.2 State-Advised Prices

2.10. The complainants identify SAPs in six States in India: Bihar, Haryana, Punjab, Tamil Nadu, Uttar Pradesh, and Uttarakhand. Before describing the content and operation of these six SAPs, we note that five of these States (Bihar, Haryana, Punjab, Uttar Pradesh, and Uttarakhand) maintain

²⁹ Brazil's first written submission, para. 32 (referring to Exhibit JE-48). See also Australia's first written submission, para. 28 (referring to Exhibit JE-48); and Guatemala's first written submission, para. 40 and fn 54 thereto. India does not contest this explanation.

³⁰ We note that India's notifications of the FRP consistently use the unit of value of *quintals*. We understand that a *quintal* is a unit of weight and one *quintal* signifies one hundred (100) kilograms. (See Brazil's first written submission, fn 3 to Table 1; Australia's first written submission, p. 27; Guatemala's first written submission, p. v). For our purposes, we convert all measurements of weight to kilograms and (where necessary) tonnes.

³¹ DFPD Communication: Fixation of FRP 2014-15 season, 14 February 2014, (Exhibit JE-2); Notification of 1 October 2015, (Exhibit AUS-19).

³² DFPD Communication: Fixation of FRP for 2015-16 season, 2 February 2015, (Exhibit JE-4); Press Release, Press Information Bureau, 16 January 2015, (Exhibit JE-3); Notification of 30 September 2016, (Exhibit AUS-20).

³³ Notification of 27 September 2017, (Exhibit AUS-22); CACP Price Policy for Sugarcane: 2016-17 Sugar Season, (Exhibit JE-5). We are aware that the complainants also adduce a newspaper report that indicates a different amount with respect to the premium rate. (See "Govt keeps cane FRP unchanged at Rs 230 per qtl for 2016-17", India Today, 6 April 2016, (Exhibit JE-47)) We agree with the parties that we should give greater weight to the official government sources than to this newspaper report. We also note India's confirmation of the FRP for the 2016-17 season through responses to questions. (See parties' responses to Panel question No. 68)

³⁴ DFPD Communication: Fixation of FRP for 2017-18 season, 1 June 2017, (Exhibit JE-7); Press Release, Press Information Bureau, 24 May 2017, (Exhibit JE-6).

³⁵ DFPD Communication: Fixation of FRP for 2018-19 sugar season, 20 July 2018, (Exhibit JE-9); Press Release, Press Information Bureau, 18 July 2018, (Exhibit JE-8). We are aware that the complainants also adduce additional evidence that does not contain certain of the details of the FRP as set out in Exhibits JE-8 and JE-9. (See Press Release, Press Information Bureau, 31 July 2018, (Exhibit AUS-15); Fair and Remunerative Price of Sugarcane in the Country, ISMA, (Exhibit JE-11)) We agree with the complainants, however, that these Exhibits do not necessarily contradict Exhibits JE-8 and JE-9 and, in any event, we consider Exhibits JE-8 and JE-9 to be sufficiently probative to establish the content of the FRP for the 2018-19 sugar season. (See complainants' responses to Panel question No. 69)

SAPs that distinguish among different "varieties" of sugarcane. We understand that the term "varieties" essentially refers to different types of sugarcane based on their "maturity period and quality".³⁶

2.2.1 Bihar

2.11. The State of Bihar enacted the Bihar Sugarcane (Regulation of Supply and Purchase) Act in 1981 ("Bihar Sugarcane Act").³⁷ The Bihar Sugarcane Act contains detailed provisions regulating the supply and purchase of sugarcane by sugar producers. Section 42(2) of the Bihar Sugarcane Act stipulates that the State of Bihar may determine the minimum price to be paid by factories³⁸ to sugarcane producers and that such price shall not be less than the price set under the Sugarcane Control Order.³⁹ The Act further states that "[t]he owner of the [sugar factory] shall make payment of the price of cane supplied to it immediately after the supply and on failing to do shall be liable to pay interest at the rate prescribed."⁴⁰ Chapter VI of the Act also provides for penalties, including imprisonment, for violations of the provisions of the Act.⁴¹

2.12. We note that the SAP in Bihar, for each sugar season from 2014-15 to 2018-19, was⁴²:

Bihar SAP (INR per 100 kg)					
Varieties	2014-15	2015-16	2016-17	2017-18	2018-19
Un-recommended/lower ⁴³ varieties	250	250	260	260	265
Central/general/normal varieties	260	260	280	280	290
Early/premium varieties	270	270	300	300	310

2.2.2 Haryana

2.13. Until 1966, the State of Haryana was part of the State of Punjab. Pursuant to the Punjab Sugarcane (Regulation of Purchase and Supply) Haryana Amendment Act, 2004 ("Haryana Amendment Act"), Haryana continues to apply the Punjab Sugarcane (Regulation of Purchase and Supply) Act of 1953 ("Punjab Sugarcane Act").⁴⁴ Specifically, we understand that the Haryana Amendment Act makes the entirety of the Punjab Sugarcane Act applicable in the State of Haryana,

³⁶ See India's response to Panel question No. 70(a). We also note Guatemala's explanation that "sugarcane of early and mid-varieties receives a higher SAP than sugarcane of normal varieties or unrecommended varieties ... because the variety, or type, of sugarcane has a major impact on sugar recovery rates." (Guatemala's first written submission, para. 53 (referring to Priyanka Singh, Manmohan Singh and BL Sharma, "Variation in sugar content between early and mid-late maturing sugarcane varieties across the crushing period in sub-tropical India", *Proceedings of the International Society of Sugar Cane Technologists*, volume 29, 2016, (Exhibit GTM-22))) Furthermore, "[s]ugarcane is considered to be mature and ready for harvest when the cane juice has over 16% sucrose and 85% purity. Early- and mid-varieties attain this level faster than normal or unrecommended varieties and, therefore, also have higher recovery rates." (Ibid.)

³⁷ Bihar Sugarcane Act, (Exhibit JE-50).

³⁸ The Bihar Sugarcane Act defines a "factory" as: "any premises, including the precincts thereof in any part of which sugar is manufactured by the means of vacuum-pan process; or any other sugar or sugarcane based products manufactured by any other technique or process based on sugarcane which includes sugarcane based Ethanol plant, Rectified Spirit plant and Co-generation plant". (Bihar Sugarcane Act, (Exhibit JE-50), Section 2(j), p. 1)

³⁹ Bihar Sugarcane Act, (Exhibit JE-50), Section 42(2), p. 19. Specifically, Section 42(2) states, *inter alia*, that "[t]he State Government may before the beginning of the crushing season, taking in to consideration the interest of the cane growers and the likely realisation from the sugarcane products determine by notification in the official gazette, the price of cane payable by the occupiers of the factories to the cane growers for cane supplied to them in the crushing year concerned".

⁴⁰ Bihar Sugarcane Act, (Exhibit JE-50), Section 43(4), p. 20.

⁴¹ Bihar Sugarcane Act, (Exhibit JE-50), Chapter VI, pp. 23-26.

⁴² For 2014-15, see CACP Price Policy for Sugarcane: 2018-19 Sugar Season, (Exhibit JE-52), p. 57, Annex Table 2.2. For 2015-16 to 2017-18, see CACP Price Policy for Sugarcane: 2019-20 Sugar Season, (Exhibit JE-53), p. 56, Annex Table 1.3. For 2016-17, see also Notification by the Bihar Government, 24 November 2016 (English translation), (Exhibit JE-54-B)) For 2018-19, see Riga Sugar Company Limited, Annual Report 2018-19, (Exhibit JE-55), p. 4.

⁴³ We note that: for 2014-15, the three categories of varieties are identified, in ascending order of price, as "un-recommended", "central", and "early" varieties; for 2016-17 and 2017-18, "central" varieties was replaced with "general" varieties; and for 2018-19, the three categories are, in ascending order of price, "lower", "normal", and "premium" varieties. (See the evidence referred to in fn 42 to para. 2.12 above)

⁴⁴ See Haryana Amendment Act, (Exhibit JE-56), p. 10, Section 1(1) and (2); Punjab Sugarcane Act, (Exhibit JE-59).

except for Section 14, which it replaces, and a particular clause in Section 20.⁴⁵ Hereafter, we use the term "Haryana Sugarcane Act" to refer to the Act that currently applies in Haryana (i.e. the Punjab Sugarcane Act as modified by the Haryana Amendment Act).⁴⁶

2.14. Under Section 14 of the Haryana Sugarcane Act, the State Government may, among other things, issue orders regulating the purchase, supply and price of sugarcane in an assigned area.⁴⁷ Section 20 of the Haryana Sugarcane Act authorizes the State Government to "make rules to carry out the provisions of this Act"⁴⁸, including "the method by which the minimum price of cane is to be fixed under this Act" and "the payment of the price for cane".⁴⁹ The Haryana Sugarcane Act also stipulates that "[a]s soon as the cane is supplied to a factory, the occupier of such factory shall be liable to pay the price of cane so supplied"⁵⁰ and any violation of the Act (or any rule issued thereunder) is an offence punishable by imprisonment, a fine, or both.⁵¹

2.15. In accordance with Section 20 of the Haryana Sugarcane Act, the Haryana Government enacted the Haryana Sugarcane (Regulation of Purchase and Supply) Rules, 1992 ("Haryana Sugarcane Rules"). Section 12 of the Haryana Sugarcane Rules indicates that "[a]n occupier of a factory or agent or purchasing agent of a factory or any person employed by him shall not purchase cane for a factory or pay for it at a price below the minimum price."⁵²

2.16. We note that the SAP in Haryana, for each sugar season from 2014-15 to 2018-19, was⁵³:

Haryana SAP (INR per 100 kg)					
Varieties	2014-15	2015-16	2016-17	2017-18	2018-19
Normal/late ⁵⁴ varieties	300	300	310	320	330 / 335 ⁵⁵
Mid varieties	305	305	315	325	335
Early varieties	310	310	320	330	340

2.2.3 Punjab

2.17. As mentioned above, Section 20 of the Punjab Sugarcane Act provides that "[t]he Government may make rules to carry out the provisions of this Act", including "the method by which the minimum price of cane is to be fixed under this Act", and "the payment of the price for cane."⁵⁶ Under Section 9(1) of the Punjab Sugarcane Act, "[a]ny person contravening any of the provisions of [this] Act or any rule made there under, for which no penalty is otherwise provided shall be punishable with [a] fine, which may extend to two thousand rupees."⁵⁷

2.18. In accordance with Section 20 of the Punjab Sugarcane Act, the State Government of Punjab adopted the Punjab Sugarcane (Regulation of Purchase and Supply) Rules, 1958 ("Punjab Sugarcane

⁴⁵ Haryana Amendment Act, (Exhibit JE-56), pp. 10-11.

⁴⁶ Haryana Sugarcane Act, (Exhibit JE-56), pp. 1-11.

⁴⁷ Haryana Sugarcane Act, (Exhibit JE-56), Section 14, p. 5. An "assigned area" is defined as "an area assigned to a factory under [the Haryana Sugarcane] Act". (Haryana Sugarcane Act, (Exhibit JE-56), Section 2(1), p. 1)

⁴⁸ Haryana Sugarcane Act, (Exhibit JE-56), Section 20, pp. 8-9.

⁴⁹ Haryana Sugarcane Act, (Exhibit JE-56), Section 20(i) and (l), pp. 8-9.

⁵⁰ Haryana Sugarcane Act, (Exhibit JE-56), Section 15-A(2), p. 6.

⁵¹ Haryana Sugarcane Act, (Exhibit JE-56), Section 9(1), p. 4.

⁵² Haryana Sugarcane Rules, (Exhibit JE-57), Section 12, p. 57.

⁵³ For 2014-15, see CACP Price Policy for Sugarcane: 2018-19 sugar season, (Exhibit JE-52), p. 57, Annex Table 2.2. For 2015-16 to 2017-18, see CACP Price Policy for Sugarcane: 2019-20 Sugar Season, (Exhibit JE-53), p. 56, Annex Table 1.3. For 2018-19, see Notification by the Haryana Government, 8 March 2019, (Exhibit AUS-63); and State of Haryana, Budget 2019-20: Explanatory Memorandum, (Exhibit JE-58).

⁵⁴ We note that for 2014-15 and 2015-16, the three categories of varieties are identified, in ascending order of price, as "normal", "mid", and "early", whereas for 2016-17 to 2018-19, "normal" varieties was replaced with "late" varieties. (See the evidence identified in fn 53 to para. 2.16 above)

⁵⁵ Exhibit JE-58, an explanatory memorandum concerning the Haryana State Budget, indicates that the 2018-19 SAP for "late" varieties was INR 330 per 100 kilograms, while Exhibit AUS-63, an official notification of the SAP by the Government of Haryana, indicates an SAP of INR 335 per 100 kilograms for all varieties other than "early" varieties. While we tend to consider an official notification to be more probative than an explanatory memorandum concerning the State Budget, we nevertheless do not consider it necessary to resolve this specific factual issue for the purposes of resolving the present disputes. (See fn 105 to para. 3.20 below)

⁵⁶ Punjab Sugarcane Act, (Exhibit JE-59), Section 20, p. 5.

⁵⁷ Punjab Sugarcane Act, (Exhibit JE-59), p. 3.

Rules").⁵⁸ Section 12 of the Punjab Sugarcane Rules is titled "Minimum Price" and states, *inter alia* that "[a]n Occupier or agent or purchasing agent or any person employed by him shall not purchase cane for a factory ... at a price below the minimum price, if any fixed by law."⁵⁹

2.19. We note that the SAP in Punjab, for each sugar season from 2014-15 to 2018-19, was⁶⁰:

Punjab SAP (INR per 100 kg)					
Varieties	2014-15	2015-16	2016-17	2017-18	2018-19
Normal/late/lower ⁶¹ varieties	280	280	285	295	295 ⁶²
Mid/medium varieties	285	285	290	300	300
Early/advance varieties	295	295	300	310	310

2.2.4 Tamil Nadu

2.20. Section 12 of the Tamil Nadu Sugar Factories Control Act, 1949 ("Tamil Nadu Sugarcane Act") stipulates that:

The Government may, at any time before the commencement of a crushing season, after consulting the Advisory Committee, by notification, specify either generally or in respect of any factory, either the price which the occupier of a factory shall be bound to pay for any sugarcane purchased by him during the season or the method of calculating such price:

Provided that the Government may specify different prices or different methods of calculating the prices of different varieties of sugarcane.⁶³

2.21. Compliance with the sugarcane price is mandatory pursuant to Section 13 of the Act. Violations are punishable with a fine, imprisonment or both.⁶⁴

2.22. We note that the SAP in Tamil Nadu for each sugar season from 2014-15 to 2017-18 was:

⁵⁸ Punjab Sugarcane Rules, (Exhibit JE-60), preamble, p. 1.

⁵⁹ Punjab Sugarcane Rules, (Exhibit JE-60), Section 12(1), p. 4.

⁶⁰ For 2014-15, see CACP Price Policy for Sugarcane: 2018-19 Sugar Season, (Exhibit JE-52), p. 57, Annex Table 2.2. For 2015-16 to 2017-18, see CACP Price Policy for Sugarcane: 2019-20 Sugar Season, (Exhibit JE-53), p. 56, Annex Table 1.3. For 2018-19, see Notification by the Punjab Government, 28 November 2019, (Exhibit JE-61); and "Punjab Govt to pay Rs 25 per quintal directly to cane farmers", *The Tribune*, 6 December 2018, (Exhibit AUS-66), p. 2.

⁶¹ We note that: for 2014-15 and 2015-16, the three categories of varieties are identified, in ascending order of price, as "normal", "mid", and "early"; for 2016-17 and 2017-18 "normal" varieties was replaced with "late" varieties; and for 2018-19 the three categories are referred to as either "late", "mid" and "early" or "lower", "medium", and "advance/early". (See the evidence referred to in fn 60 to para. 2.19 above)

⁶² We note that the State Government Notification of the SAP for the 2018-19 season indicates that "Sugarcane Medium and Lower varieties rates will be equal to advance/early varieties after 15th January". (Notification by the Punjab Government, 28 November 2019, (Exhibit JE-61)) In response to questions seeking clarity regarding this aspect of the SAP, Brazil indicates that "India is in the best position to set out the meaning of the explanatory note". (Brazil's response to Panel question No. 71(d), para. 82) Australia states that it "is not able to explain the meaning of the note". (Australia's response to Panel question No. 71(d), para. 68) Guatemala considers that the explanatory note "appears to mean that the higher 'advance and early varieties' SAPs would be applicable to medium and lower varieties after 15 January 2019". (Guatemala's response to Panel question No. 71(d), para. 65) India states that "the complainants are best placed to explain the calculations adopted by them". (India's response to Panel question No. 71(d)) In light of this lack of clarity regarding the meaning of the explanatory note, we refrain from adjusting the SAP rates on the basis of that note.

⁶³ Tamil Nadu Sugarcane Act, (Exhibit JE-67), Section 12(1), p. 42. A "factory" is defined as "any premises, including the precincts thereof, wherein ten or more workers are working or were working on any day of the preceding twelve months and in any part of which any manufacturing process connected with the production of sugar by means of vacuum pans is being carried on or is ordinarily carried on with the aid of power". (Ibid. Section 2(c), p. 36)

⁶⁴ Tamil Nadu Sugarcane Act, (Exhibit JE-67), Section 13(2)(b), pp. 42-43.

- a. For the 2014-15 sugar season: INR 265 per 100 kilograms, at a basic recovery rate of 9.5%, with an additional premium of either INR 2.21 or INR 2.32 per 100 kilograms for every 0.1% increase in recovery rate⁶⁵;
- b. For the 2015-16 sugar season: INR 285 per 100 kilograms, at a basic recovery rate of 9.5%, with an additional premium of INR 2.42 per 100 kilograms for every 0.1% increase in recovery rate⁶⁶;
- c. For the 2016-17 sugar season: INR 285 per 100 kilograms, with a basic recovery rate of 9.5% and an additional premium of INR 2.42 per 100 kilograms for every 0.1% increase in recovery rate⁶⁷; and
- d. For the 2017-18 sugar season: INR 285 per 100 kilograms, with a basic recovery rate of 9.5% and an additional premium of INR 2.68 per 100 kilograms for every 0.1% increase in recovery rate.⁶⁸

2.23. In October 2018, Tamil Nadu adopted the Tamil Nadu Sugarcane (Regulation of Purchase Price) Act, replacing the SAP with a system of "revenue sharing based sugarcane price".⁶⁹ We therefore understand that Tamil Nadu did not maintain any SAP for the 2018-19 sugar season.

2.2.5 Uttar Pradesh

2.24. Section 16(1) of The Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1953 ("Uttar Pradesh Sugarcane Act") states that "[t]he State Government may, for maintaining supplies, by order, regulate- (a) the distribution, sale or purchase of any cane ... in any reserved area or assigned area; and (b) purchase of cane in any area other than a reserved or assigned area."⁷⁰ Section 17(1) provides that "[t]he occupier of a factory shall make such provision for speedy payment of the price of cane purchased by him as may be prescribed".⁷¹ Under Section 17(2), "the occupier of a factory shall be liable to pay immediately the price of the cane so supplied".⁷² Failure to comply with the obligations under the Uttar Pradesh Sugarcane Act is punishable by a fine,

⁶⁵ Order of 14 January 2015, (Exhibit JE-62); CACP Price Policy for Sugarcane: 2018-19 Sugar Season, (Exhibit JE-52), p. 57, Annex Table 2.2. This amount includes transport costs. We note that, according to the Indian Government publication Price Policy for Sugarcane: 2018-19 Sugar Season, the premium rate was INR 2.21 per 100 kilograms, whereas the official Order by the Government of Tamil Nadu indicates a premium rate of INR 2.32 per 100 kilograms. We tend to consider the official Order by the Government of Tamil Nadu to be more probative than the Price Policy for Sugarcane publication. We note, however, that since the average recovery rate in Tamil Nadu during the 2014-15 sugar season did not exceed the basic recovery rate stipulated in the SAP, it is not necessary to resolve this issue. (See para. 3.11 below)

⁶⁶ CACP Price Policy for Sugarcane: 2019-20 Sugar Season, (Exhibit JE-53), p. 56, Annex Table 1.3; Order of 11 January 2016, (Exhibit JE-63). This amount includes transport costs.

⁶⁷ CACP Price Policy for Sugarcane: 2019-20 Sugar Season, (Exhibit JE-53), p. 56, Annex Table 1.3; Order of 5 January 2017, (Exhibit JE-64). This amount includes transport costs.

⁶⁸ CACP Price Policy for Sugarcane: 2019-20 Sugar Season, (Exhibit JE-53), p. 56, Annex Table 1.3. This amount includes transport costs. We note that the complainants also adduce two Tamil Nadu Government Orders that refer to the SAP for the 2017-18 sugar season, but which do not identify any premium rate. We agree with Australia that this is most likely because those Government Orders "relate to Tamil Nadu's production incentive payment" and "the premium was not relevant to the calculation of the production incentive payment". (Australia's response to Panel question No. 71(c), para. 65) We also note that the amount of the premium is not directly relevant to the present disputes, as the average recovery rate in Tamil Nadu during the 2017-18 sugar season did not exceed the basic recovery rate. (See para. 3.11 below)

⁶⁹ Tamil Nadu Sugarcane (Regulation of Purchase Price) Act, 2018, (Exhibit JE-65), p. 96. See also Order of 17 September 2018, (Exhibit JE-88).

⁷⁰ Uttar Pradesh Sugarcane Act, (Exhibit JE-68), Section 16(1), p. 104.

⁷¹ Uttar Pradesh Sugarcane Act, (Exhibit JE-68), Section 17(1), p. 105. A "factory" is defined as "any premises including the precincts thereof wherein twenty or more workers are working or [sic] on any day during the preceding twelve months and in any part of which any manufacturing process connected with the production of sugar by means of vacuum pan process or ethanol either directly from sugarcane juice or molasses, including B-Heavy molasses, or both as the case may be, is being carried on or is ordinarily carried on with the aid of mechanical power." (Ibid. para. 3(j), p. 93)

⁷² Uttar Pradesh Sugarcane Act, (Exhibit JE-68), Section 17(2), p. 105.

imprisonment, or both.⁷³ The Supreme Court of India has interpreted the Uttar Pradesh Sugarcane Act as granting the State Government "the regulatory power ... to fix the price of the sugarcane".⁷⁴

2.25. We note that the SAP in Uttar Pradesh, for each sugar season from 2014-15 to 2018-19, was⁷⁵:

Uttar Pradesh SAP (INR per 100 kg)					
Varieties	2014-15	2015-16	2016-17	2017-18	2018-19
Rejected/normal ⁷⁶ varieties	275	275	300	310	310
Normal/mid varieties	280	280	305	315	315
Early varieties	290	290	315	325	325

2.2.6 Uttarakhand

2.26. We understand that the State of Uttarakhand was previously part of the State of Uttar Pradesh. The Uttarakhand Sugarcane (Regulation of Purchase and Supply) (Amendment) Act, 2013 ("Uttarakhand Amendment Act"), indicates that the Uttar Pradesh Sugarcane Act, as amended, applies in Uttarakhand.⁷⁷ Since Sections 16 and 17 of the Uttar Pradesh Sugarcane Act were not amended by the Uttarakhand Amendment Act, we understand that these provisions are also applicable in Uttarakhand.

2.27. We note that the SAP in Uttarakhand, for each sugar season from 2014-15 to 2018-19, was⁷⁸:

Uttarakhand SAP (INR per 100 kg)					
Varieties	2014-15	2015-16	2016-17	2017-18	2018-19
Rejected varieties	n/a	n/a	302	306	n/a
General/normal ⁷⁹ varieties	280	280	307	316	317
Early varieties	290	290	317	326	327

3 APPLIED ADMINISTERED PRICE

3.1 General

3.1. Paragraph 8 of Annex 3 of the Agreement on Agriculture identifies the "applied administered price" (AAP) as one of the components of the methodology to calculate market price support.

3.2. The complainants submit that the FRP and SAPs constitute AAPs because they fix mandatory prices for sugarcane that differ from the market price and which must be paid by sugar producers.⁸⁰ Based on the operation of the measures, the complainants assert that the amount of the FRP and the SAP in Tamil Nadu depend, in part, on the recovery rate of the sugarcane being purchased.⁸¹ In

⁷³ Uttar Pradesh Sugarcane Act, (Exhibit JE-68), Section 22, p. 110.

⁷⁴ Judgment of the Supreme Court of India, *U.P. Co-operative Cane Unions Federations v. West U.P. Sugar Mills Association & Ors. Etc.*, 5 May 2004, (Exhibit JE-49), para. 26.

⁷⁵ For 2014-15, see CACP Price Policy for Sugarcane: 2018-19 Sugar Season, (Exhibit JE-52), p. 57, Annex Table 2.2. For 2015-16 to 2017-18, see CACP Price Policy for Sugarcane: 2019-20 Sugar Season, (Exhibit JE-53), p. 56, Annex Table 1.3; and Notification of 26 October 2017 (English translation), (Exhibit JE-70-B). For 2018-19, see Notification of 1 December 2018 (English translation), (Exhibit JE-69-B).

⁷⁶ We note that: for 2014-15 to 2017-18, the CACP Price Policy for Sugarcane publications refer to the three categories of varieties, in ascending order of price, as "rejected", "normal", and "early". For 2017-18, the Notification by the Government of Uttar Pradesh refers to "mid" varieties instead of "normal" varieties. For 2018-19, the three categories, in ascending order of price, are: "normal", "mid", and "early" varieties. (See fn 75 to para. 2.25 above)

⁷⁷ Uttarakhand Amendment Act, (Exhibit JE-71), preamble, p. 1.

⁷⁸ For 2014-15, see CACP Price Policy for Sugarcane: 2018-19 Sugar Season, (Exhibit JE-52), p. 57, Annex Table 2.2. For 2015-16 to 2017-18, see CACP Price Policy for Sugarcane: 2019-20 Sugar Season, (Exhibit JE-53), p. 56, Annex Table 1.3. For 2018-19, see Notification of 20 December 2018 (English translation), (Exhibit JE-72-B).

⁷⁹ For 2014-15, 2015-16 and 2018-19, the SAP distinguishes between "general" and "early" varieties. For 2016-17 and 2017-18, the SAP refers to, in ascending order of price, "rejected", "normal", and "early" varieties.

⁸⁰ Brazil's first written submission, paras. 137-139 and 156; Australia's first written submission, paras. 153-156; Guatemala's first written submission, paras. 140-144.

⁸¹ Brazil's first written submission, paras. 32-34 and 43 and Figure 5; Australia's first written submission, paras. 29-30 and 55; Guatemala's first written submission, paras. 40 and 54.

order to determine the precise amount of the average FRP applicable in different States, as well as the average SAP in Tamil Nadu, the complainants provide data regarding the average sugarcane recovery rates in different States and seasons.⁸² With respect to the other States that apply SAPs, the complainants assert that it is reasonable and appropriate to rely on the "middle" category of varieties in determining the amount of the AAP.⁸³

3.3. India argues that the FRP and SAPs do not constitute market price support within the meaning of the Agreement on Agriculture because they do not entail any government purchase or procurement of sugarcane.⁸⁴ India does not provide any additional arguments contesting whether the FRP and SAPs constitute AAPs within the meaning of paragraph 8 of Annex 3. India also does not contest the complainants' assertions regarding different recovery rates in India, nor does it take issue with the complainants' calculations of the amount of the AAP in different States in India.⁸⁵

3.4. We have addressed, as a matter of legal interpretation, India's arguments regarding the definition and scope of market price support in paragraphs 7.37 to 7.61 of the Panel Report. We have concluded that the existence of market price support does not require the government to purchase or procure (i.e. through government expenditure or revenue foregone) the relevant agricultural product. With that threshold issue already resolved, we examine here the specific question of whether the FRP and SAPs constitute AAPs within the meaning of paragraph 8 of Annex 3.

3.5. We recall from our discussion of the scope of market price support that the AAP refers to a price for a basic agricultural product that is determined by the administrative action of the government and not by market forces.⁸⁶ Based on our description of the FRP and SAPs above, we understand that the FRP and SAPs constitute mandatory minimum purchase prices for sugarcane, determined by the Central and State Governments respectively, and which sugar producers (i.e. sugar mills and factories processing sugarcane into sugar) are statutorily obligated to pay to sugarcane producers (i.e. sugarcane farmers). In our view, such mandatory minimum purchase prices constitute prices that are independent of market forces, and are set and maintained by administrative action of the Indian Central and State Governments.⁸⁷ We therefore conclude that the FRP and SAPs do indeed constitute AAPs within the meaning of paragraph 8 of Annex 3.

3.6. Turning to the amount of the AAP, we agree with the complainants that, since the amount of the FRP (and one SAP) actually paid to sugarcane farmers varies depending on the sugarcane recovery rate⁸⁸, in order to accurately reflect the amount of the AAP it is necessary to rely on data regarding actual recovery rates in India to calculate the average FRP (and SAP) payable in India. Since the average recovery rate in different States and seasons may differ, and since the SAPs are specific to certain States, the amount of the AAP may be different in different States. We therefore consider it appropriate to assess individual AAPs for different States in India, for each season.

3.7. We proceed with our analysis in four steps: (i) we first review the data and arguments provided by the parties regarding average seasonal recovery rates in different States in India; (ii) taking that data into account, we examine the complainants' assertions regarding the average FRP applicable in different States and seasons (including the extent to which the average recovery rate affects the FRP through the incremental premium); (iii) we assess the complainants' assertions regarding the relevant AAP in the six States that applied an SAP; and (iv) we summarize our findings regarding the amount of the AAP in each State during the 2014-15 to 2018-19 sugar seasons, for purposes of applying the methodology set out in paragraph 8 of Annex 3 of the Agreement on Agriculture.

⁸² See e.g. complainants' response to Panel question No. 65.

⁸³ Complainants' responses to Panel question 70(b).

⁸⁴ See paras. 7.20, 7.30 and 7.38 of the Panel Report.

⁸⁵ India's only comment with respect to the complainants' assertions regarding the SAPs is that the complainants have failed to demonstrate "why the SAPs qualify as an [AAP] under paragraph 8 of Annex 3 in view of paragraphs 1 and 2 of Annex 3". (India's response to Panel question No. 70(c))

⁸⁶ See para. 7.52 of the Panel Report.

⁸⁷ With respect to the SAPs, paragraph 3 of Annex 3 of the Agreement on Agriculture indicates that "[s]upport at both the national and sub-national level shall be included" in the calculation of a Member's AMS.

⁸⁸ We recall that the FRP, and the SAP in Tamil Nadu, stipulate a basic threshold recovery rate, at or below which a minimum price must be paid regardless of how low the actual recovery rate drops. If the sugarcane recovery rate exceeds that threshold rate, the amount of the AAP increases according to the premium rate. (See paras. 2.9 and 2.22 above)

3.2 Recovery rates

3.8. In support of their assertions regarding the average recovery rates in 11 Indian States during the 2014-15 to 2018-19 sugar seasons, the complainants refer to "Price Policy for Sugarcane: 2020-21 Sugar Season", a publication by the Commission for Agricultural Costs and Prices (CACP), which is part of the Indian Government's Ministry of Agriculture and Farmers Welfare.⁸⁹ Regarding the other States, for which these documents provide no data, the complainants rely on the threshold recovery rates set out in the FRP for each sugar season from 2014-15 to 2018-19 as a proxy to represent the recovery rate in these States.⁹⁰

3.9. India does not comment on the complainants' assertions regarding recovery rates.

3.10. We note that the Price Policy for Sugarcane document is published on an annual basis by the Indian Government through the CACP. In our view, these documents constitute a reliable source for us to determine the average seasonal recovery rates in different States in India. We also agree with the complainants that it is appropriate to rely on the most recent publication on the basis that it is likely to contain the most accurate and up-to-date information.⁹¹

3.11. Based on our review of the evidence, we find that the average sugarcane recovery rates during the 2014-15 to 2018-19 sugar seasons, for each of the 11 States for which State-specific data are available, were as follows⁹²:

Recovery rates in individual States (%)					
State	2014-15	2015-16	2016-17	2017-18	2018-19
Andhra Pradesh	9.72	9.31	9.34	9.43	9.33
Bihar	9.10	9.69	9.08	9.54	10.35
Gujarat	10.48	10.37	10.56	10.51	10.65
Haryana	9.89	9.39	10.19	10.46	10.31
Karnataka	10.90	10.59	10.28	10.57	10.25
Maharashtra	11.67	11.19	11.19	11.09	10.07
Punjab	9.37	10.01	9.34	9.74	10.10
Tamil Nadu	8.10	8.47	9.08	8.50	8.90
Telangana	10.47	10.83	10.32	10.84	10.21
Uttar Pradesh	9.49	10.51	10.26	10.73	10.91
Uttarakhand	9.15	9.52	8.20	10.18	10.91

3.12. We note that the data adduced by the complainants is not comprehensive. Other than the 11 individual States identified above, the Price Policy for Sugarcane documents only provide an average recovery rate for "All India"; they do not indicate the average recovery rate for other States in India.⁹³ However, given that the amount of the average FRP applicable in those other States depends on the recovery rate, it is necessary to determine the average recovery rates in these other Indian States in order to accurately calculate India's market price support to sugarcane producers.

3.13. The complainants submit that the most reasonable approach to determining the average recovery rates for these other States is to use, as a proxy, the basic (threshold) rates set out in the

⁸⁹ See complainants' responses to Panel question No. 65 (referring to CACP Price Policy for Sugarcane: 2020-21 Sugar Season, (Exhibit JE-167), p. 81, Annex Table 2.6). The complainants also adduce the CACP Price Policy for Sugarcane publications for the 2018-19 and 2019-20 sugar seasons. The complainants submit, however, that the most recently published edition of the CACP Price Policy for Sugarcane is likely to be the most accurate. (See complainants' responses to Panel question No. 64)

⁹⁰ Complainants' responses to Panel question No. 66.

⁹¹ Complainants' responses to Panel question No. 64.

⁹² See CACP Price Policy for Sugarcane: 2020-21 Sugar Season, (Exhibit JE-167), p. 81, Annex Table 2.6. Our findings correspond to the average recovery rates asserted by the complainants. (See Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)), "C1 Recovery" spreadsheet; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "RecoveryRates" spreadsheet; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "Recovery" spreadsheet)

⁹³ According to Guatemala, "the sugar recovery rates of all the other States ... are not published". (Guatemala's first written submission, fn 68 to Table 2)

FRP for each sugar season.⁹⁴ The complainants note that the 11 States for which there are data account for the overwhelming majority of sugar production in India, such that it would be inappropriate to use either the "All India" average or an average of these 11 States.⁹⁵

3.14. We agree with the complainants that using either the "All India" recovery rates or a simple average of the 11 States identified above would be inappropriate, in light of the substantial proportion of India's sugar production that is realized in these 11 States.⁹⁶ We note that India has not contested the complainants' reliance on the threshold rates set out in the FRP as a proxy for the recovery rate of the other States. Taking into account that the FRP is determined by the Indian Central Government following consultations with relevant authorities, bodies and associations, and on the basis of multiple relevant factors⁹⁷, we consider it reasonable to use the basic threshold recovery rates set out in the FRP as a proxy to represent the average recovery rate of those other States for which there is no data.

3.15. We therefore use a recovery rate of 9.5% to represent the average recovery rate for "Other States" during the 2014-15 to 2017-18 seasons and 10% to represent the average recovery rate during the 2018-19 season.⁹⁸

3.3 AAP based on the FRP

3.16. For the reasons explained above, we consider that the FRP and SAPs constitute relevant AAPs within the meaning of paragraph 8 of Annex 3 of the Agreement on Agriculture. In order to quantify the AAP, and taking into account that the FRP paid to individual sugarcane producers varies depending on the recovery rates of their sugarcane, we consider it necessary to calculate the average FRP received by sugarcane producers in different States and seasons. In States that did not apply an SAP, the average FRP would represent the AAP, for purposes of applying the paragraph 8 methodology. For States that do apply an SAP, we consider it useful to calculate the average FRP in order to verify whether the amount of the SAP is higher than the amount of the average FRP.⁹⁹

3.17. We therefore proceed to calculate the average FRP applicable in different States in India during each season from 2014-15 to 2018-19, for the purposes of determining the relevant AAP¹⁰⁰:

⁹⁴ See complainants' responses to Panel question No. 66.

⁹⁵ See complainants' responses to Panel question No. 66. According to Brazil's calculations, sugar production in these 11 States accounts for 96.6% of India's total sugar production. (Brazil's response to Panel question No. 66, para. 49) Australia observes that, since the States other than the 11 predominant States "are generally less well-suited to growing cane, it is reasonable to expect those Other States to have lower-than-average recovery rates." (Australia's response to Panel question No. 66, para. 43)

⁹⁶ See para 5.6 below.

⁹⁷ See fn 25 to para. 2.6 above.

⁹⁸ See para. 2.9 above. We recall that the FRP for the 2018-19 sugar season essentially contained two basic recovery rates: 9.5% and 10%. The complainants consider that 10% is an appropriate recovery rate to use as a proxy for "Other States". (See Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)), "C1 Recovery" spreadsheet; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "RecoveryRates" spreadsheet; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "Recovery" spreadsheet) India has not contested that approach. In light of the structure of the FRP for 2018-19, we agree with the complainants' approach.

⁹⁹ We recall our understanding that sugar producers are obliged to pay whichever minimum price is higher, as between the FRP and the SAP. (See fn 16 to para. 2.3 above)

¹⁰⁰ For the base FRP, FRP basic recovery rate, and premium rate, see para. 2.9 above. For the State recovery rate, see paras. 3.11-3.15 above. The amount of excess, if any, is calculated by subtracting the FRP basic recovery rate from the State recovery rate. The actual premium paid is calculated by multiplying the amount of excess by the premium rate, divided by 0.1 (to account for the fact that the premium is paid on an incremental basis for each 0.1% that the State recovery rate exceeds the FRP basic recovery rate). The AAP (represented by the average FRP) is the sum of the base FRP and the actual premium paid, represented in INR per tonne and rounded to two decimal places (for the sake of precision). We note that our calculations accord with the calculations performed by the complainants. (See Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)), "C2-C6 AAPs (FRPs)" spreadsheet; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "AAP" spreadsheet; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "AAP (FRP)" spreadsheet)

2014-15 AAP based on the average FRP							
State	Base FRP (INR/100 kg)	State recovery rate (%)	FRP basic recovery rate (%)	Amount of excess (%)	Premium rate (INR/100 kg)	Actual premium paid (INR/100 kg)	AAP (INR/t)
Andhra Pradesh	220	9.72	9.5	0.22	2.32	5.104	2,251.04
Bihar	220	9.10	9.5	-0.4	2.32	0	2,200.00
Gujarat	220	10.48	9.5	0.98	2.32	22.736	2,427.36
Haryana	220	9.89	9.5	0.39	2.32	9.048	2,290.48
Karnataka	220	10.90	9.5	1.4	2.32	32.48	2,524.80
Maharashtra	220	11.67	9.5	2.17	2.32	50.344	2,703.44
Punjab	220	9.37	9.5	-0.13	2.32	0	2,200.00
Tamil Nadu	220	8.10	9.5	-1.4	2.32	0	2,200.00
Telangana	220	10.47	9.5	0.97	2.32	22.504	2,425.04
Uttar Pradesh	220	9.49	9.5	-0.01	2.32	0	2,200.00
Uttarakhand	220	9.15	9.5	-0.35	2.32	0	2,200.00
Other States	220	9.5	9.5	0	2.32	0	2,200.00

2015-16 AAP based on the average FRP							
State	Base FRP (INR/100 kg)	State recovery rate (%)	FRP basic recovery rate (%)	Amount of excess	Premium rate (INR/100 kg)	Actual premium paid (INR/100 kg)	AAP (INR/t)
Andhra Pradesh	230	9.31	9.5	-0.19	2.42	0	2,300.00
Bihar	230	9.69	9.5	0.19	2.42	4.598	2,345.98
Gujarat	230	10.37	9.5	0.87	2.42	21.054	2,510.54
Haryana	230	9.39	9.5	-0.11	2.42	0	2,300.00
Karnataka	230	10.59	9.5	1.09	2.42	26.378	2,563.78
Maharashtra	230	11.19	9.5	1.69	2.42	40.898	2,708.98
Punjab	230	10.01	9.5	0.51	2.42	12.342	2,423.42
Tamil Nadu	230	8.47	9.5	-1.03	2.42	0	2,300.00
Telangana	230	10.83	9.5	1.33	2.42	32.186	2,621.86
Uttar Pradesh	230	10.51	9.5	1.01	2.42	24.442	2,544.42
Uttarakhand	230	9.52	9.5	0.02	2.42	0.484	2,304.84

2015-16 AAP based on the average FRP							
State	Base FRP (INR/100 kg)	State recovery rate (%)	FRP basic recovery rate (%)	Amount of excess	Premium rate (INR/100 kg)	Actual premium paid (INR/100 kg)	AAP (INR/t)
Other States	230	9.5	9.5	0	2.42	0	2,300.00

2016-17 AAP based on the average FRP							
State	Base FRP (INR/100 kg)	State recovery rate (%)	FRP basic recovery rate (%)	Amount of excess	Premium rate (INR/100 kg)	Actual premium paid (INR/100 kg)	AAP (INR/t)
Andhra Pradesh	230	9.34	9.5	-0.16	2.42	0	2,300.00
Bihar	230	9.08	9.5	-0.42	2.42	0	2,300.00
Gujarat	230	10.56	9.5	1.06	2.42	25.652	2,556.52
Haryana	230	10.19	9.5	0.69	2.42	16.698	2,466.98
Karnataka	230	10.28	9.5	0.78	2.42	18.876	2,488.76
Maharashtra	230	11.19	9.5	1.69	2.42	40.898	2,708.98
Punjab	230	9.34	9.5	-0.16	2.42	0	2,300.00
Tamil Nadu	230	9.08	9.5	-0.42	2.42	0	2,300.00
Telangana	230	10.32	9.5	0.82	2.42	19.844	2,498.44
Uttar Pradesh	230	10.26	9.5	0.76	2.42	18.392	2,483.92
Uttarakhand	230	8.20	9.5	-1.3	2.42	0	2,300.00
Other States	230	9.5	9.5	0	2.42	0	2,300.00

2017-18 AAP based on the average FRP							
State	Base FRP (INR/100 kg)	State recovery rate (%)	FRP basic recovery rate (%)	Amount of excess	Premium rate (INR/100 kg)	Actual premium paid (INR/100 kg)	AAP (INR/t)
Andhra Pradesh	255	9.43	9.5	-0.07	2.68	0	2,550.00
Bihar	255	9.54	9.5	0.04	2.68	1.072	2,560.72
Gujarat	255	10.51	9.5	1.01	2.68	27.068	2,820.68
Haryana	255	10.46	9.5	0.96	2.68	25.728	2,807.28
Karnataka	255	10.57	9.5	1.07	2.68	28.676	2,836.76
Maharashtra	255	11.09	9.5	1.59	2.68	42.612	2,976.12
Punjab	255	9.74	9.5	0.24	2.68	6.432	2,614.32

2017-18 AAP based on the average FRP							
State	Base FRP (INR/100 kg)	State recovery rate (%)	FRP basic recovery rate (%)	Amount of excess	Premium rate (INR/100 kg)	Actual premium paid (INR/100 kg)	AAP (INR/t)
Tamil Nadu	255	8.50	9.5	-1	2.68	0	2,550.00
Telangana	255	10.84	9.5	1.34	2.68	35.912	2,909.12
Uttar Pradesh	255	10.73	9.5	1.23	2.68	32.964	2,879.64
Uttarakhand	255	10.18	9.5	0.68	2.68	18.224	2,732.24
Other States	255	9.5	9.5	0	2.68	0	2,550.00

2018-19 AAP based on the average FRP							
State	Base FRP (INR/100 kg)	State recovery rate (%)	FRP basic recovery rate (%)	Amount of excess	Premium rate (INR/100 kg)	Actual premium paid (INR/100 kg)	AAP (INR/t)
Andhra Pradesh	261.25	9.33	9.5	-0.17	±2.75	0	2,612.50
Bihar	275	10.35	10	0.35	±2.75	9.625	2,846.25
Gujarat	275	10.65	10	0.65	±2.75	17.875	2,928.75
Haryana	275	10.31	10	0.31	±2.75	8.525	2,835.25
Karnataka	275	10.25	10	0.25	±2.75	6.875	2,818.75
Maharashtra	275	10.07	10	0.07	±2.75	1.925	2,769.25
Punjab	275	10.10	10	0.1	±2.75	2.75	2,777.50
Tamil Nadu	261.25	8.90	9.5	-0.6	±2.75	0	2,612.50
Telangana	275	10.21	10	0.21	±2.75	5.775	2,807.75
Uttar Pradesh	275	10.91	10	0.91	±2.75	25.025	3,000.25
Uttarakhand	275	10.91	10	0.91	±2.75	25.025	3,000.25
Other States	275	10	10	0	±2.75	0	2,750.00

3.4 AAP based on the SAPs

3.18. The complainants submit that, as a general matter, in States where SAPs are in force, the SAP is higher than the FRP and should be used as the relevant AAP.¹⁰¹ In those States where the SAP distinguishes between different "varieties" of sugarcane, in the absence of specific data regarding the amounts of the different varieties produced in different States, the complainants assert that it is reasonable and appropriate to rely on the "middle" SAP (i.e. the price that is neither the lowest nor the highest) as the relevant AAP.¹⁰²

3.19. India does not contest the complainants' assertions regarding the amounts of the SAPs to be used as AAPs.¹⁰³

3.20. We recall that four States, namely Bihar, Haryana, Punjab, and Uttar Pradesh, set SAPs that distinguished between three varieties of sugarcane for each sugar season from 2014-15 to 2018-19.¹⁰⁴ For these four States, we agree with the complainants that it is reasonable to use the SAP set for the middle category of sugarcane varieties. We consider this appropriate for the following reasons. First, the parties have been unable to adduce data indicating the different quantities of production of different varieties of sugarcane, and, in such circumstances, it is not possible to calculate an appropriate weighted average SAP. Second, given that the SAPs contemplate three different varieties, and that these varieties reflect the maturity period of the sugarcane, it seems reasonable to us that a representative proportion of the relevant sugarcane will fall within the middle category. Third, alternative approaches, such as using a simple average, or the highest or lowest SAP, would, in our view, be a less accurate approach given that the middle SAP was presumably determined by the State Governments in order to reflect a meaningful proportion of production. Finally, India has not presented any reasons to doubt the appropriateness or accuracy of this approach.¹⁰⁵

3.21. We recall that the SAP in Uttarakhand differentiated between two categories of sugarcane varieties for the sugar seasons 2014-15, 2015-16, and 2018-19, and differentiated between three categories of sugarcane varieties for the sugar seasons 2016-17 and 2017-18.¹⁰⁶ For the latter two seasons, we consider it appropriate to use the middle category as the relevant AAP, for the reasons explained above.¹⁰⁷ We note that, during these seasons, the relevant middle category was "normal" varieties. We further note that, during these two seasons, "normal" varieties were distinguished from "rejected" and "early" varieties. For the three sugar seasons for which the SAP only distinguished between two categories, we note that the categories were "general" and "early". We also observe that the SAPs for all seasons identified "early" varieties as a specific category of varieties. Since "early" varieties were separately identified in all five sugar seasons, we understand that the "general" varieties category captures both the "normal" and the "rejected" varieties of sugarcane. We also consider that, based on its plain meaning, the category of "general" varieties is likely to have been applicable to a greater proportion of sugarcane than the category of "early" varieties of sugarcane. We therefore consider it appropriate, in quantifying the AAP in Uttarakhand during the 2014-15, 2015-16, and 2018-19 sugar seasons, to rely on the "general" varieties price.

3.22. Finally, we recall that Tamil Nadu, during the 2014-15 to 2017-18 sugar seasons, applied an SAP that was similar in structure to the FRP, in that the amount of the SAP depended on the sugarcane recovery rate. We note, however, that under the Tamil Nadu SAP for each sugar season, the premium rate was only payable if the recovery rate exceeded 9.5%.¹⁰⁸ We have found that the average recovery rate in Tamil Nadu did not exceed 9.5% in any season from 2014-15 to 2017-18.¹⁰⁹

¹⁰¹ Brazil's first written submission, para. 35; Australia's first written submission, para. 41; Guatemala's first written submission, para. 72.

¹⁰² Complainants' responses to Panel question No. 70(b).

¹⁰³ See para. 3.3 above.

¹⁰⁴ See paras. 2.12, 2.16, 2.19, and 2.25 above.

¹⁰⁵ As a consequence of our decision to rely on the middle category of varieties, we note that it is not necessary for us to resolve ambiguities or lack of clarity in the evidence regarding the least and most expensive varieties. (See in particular fn 55 to para. 2.16 above)

¹⁰⁶ See para. 2.27 above.

¹⁰⁷ See para. 3.20 above.

¹⁰⁸ See para. 2.22 above.

¹⁰⁹ See para. 3.11 above.

Consequently, the appropriate AAP in Tamil Nadu is, in our view, equivalent to the basic price identified in the SAP, without needing to take into account the premium rate.

3.23. Based on the foregoing, we consider that the relevant AAPs based on the SAPs are as follows¹¹⁰:

AAP based on the SAPs (INR/t)					
State	2014-15	2015-16	2016-17	2017-18	2018-19
Bihar	2,600.00	2,600.00	2,800.00	2,800.00	2,900.00
Haryana	3,050.00	3,050.00	3,150.00	3,250.00	3,350.00
Punjab	2,850.00	2,850.00	2,900.00	3,000.00	3,000.00
Tamil Nadu	2,650.00	2,850.00	2,850.00	2,850.00	N/A
Uttar Pradesh	2,800.00	2,800.00	3,050.00	3,150.00	3,150.00
Uttarakhand	2,800.00	2,800.00	3,070.00	3,160.00	3,170.00

3.5 Summary

3.24. We note that, for all States that apply an SAP, the AAP based on the SAP is always higher than the AAP based on the FRP.¹¹¹ We recall that, in States where an SAP is applied, sugar producers are required to pay whichever is the higher price as between the FRP and SAPs.¹¹² Accordingly, in applying the methodology contained in paragraph 8 of Annex 3 of the Agreement on Agriculture, we consider that, for those States that apply an SAP, the AAP must be based on the SAP. For all other States and seasons, the average FRP constitutes the relevant AAP.

3.25. To summarize, for the purposes of applying the methodology set out in paragraph 8 of Annex 3, we consider it appropriate to rely on the following AAPs¹¹³:

AAP (INR/t)					
State	2014-15	2015-16	2016-17	2017-18	2018-19
Andhra Pradesh	2,251.04	2,300.00	2,300.00	2,550.00	2,612.50
Bihar	2,600.00	2,600.00	2,800.00	2,800.00	2,900.00
Gujarat	2,427.36	2,510.54	2,556.52	2,820.68	2,928.75
Haryana	3,050.00	3,050.00	3,150.00	3,250.00	3,350.00
Karnataka	2,524.80	2,563.78	2,488.76	2,836.76	2,818.75
Maharashtra	2,703.44	2,708.98	2,708.98	2,976.12	2,769.25
Punjab	2,850.00	2,850.00	2,900.00	3,000.00	3,000.00
Tamil Nadu	2,650.00	2,850.00	2,850.00	2,850.00	2,612.50
Telangana	2,425.04	2,621.86	2,498.44	2,909.12	2,807.75
Uttar Pradesh	2,800.00	2,800.00	3,050.00	3,150.00	3,150.00
Uttarakhand	2,800.00	2,800.00	3,070.00	3,160.00	3,170.00
Other States	2,200.00	2,300.00	2,300.00	2,550.00	2,750.00

4 FIXED EXTERNAL REFERENCE PRICE

4.1. Paragraph 8 of Annex 3 of the Agreement on Agriculture indicates that one component of the calculation of market price support is the "fixed external reference price" (FERP). Paragraph 9 of Annex 3 elaborates that the FERP is "based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country

¹¹⁰ See paras. 2.12, 2.16, 2.19, 2.22, 2.25, 2.27, 3.20, and 3.22 above. We convert INR per 100 kilogrammes to INR per tonnes, to accord with our calculations of the AAP based on the FRP.

¹¹¹ Compare paras. 3.17 and 3.23 above.

¹¹² See para. 2.3 above.

¹¹³ See paras. 3.17 and 3.23 above. We note that the complainants use these same AAPs in applying the methodology set out in paragraph 8 of Annex 3 of the Agreement on Agriculture. (See Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)), "C14-C20 AAPs (FRP+SAP)" spreadsheet; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "AAP" spreadsheet; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "AAP (FRP & SAP)" spreadsheet)

in the base period." Additionally, under paragraph 9, the FERP "may be adjusted for quality differences as necessary".

4.2. The complainants note that India's Supporting Tables, contained in document G/AG/AGST/IND and identified in India's Schedule, indicate an FERP of INR 156.16 per tonnes.¹¹⁴ The complainants observe that the FERP in India's Supporting Tables was calculated based on a recovery rate of 8.5%.¹¹⁵ Noting that recovery rates in India today are higher than 8.5% the complainants consider that, in accordance with paragraph 9 of Annex 3, the FERP should be adjusted for "quality differences" in order to reflect the different recovery rates in different States today.¹¹⁶ By replacing the recovery rate of 8.5% (used in India's Supporting Tables) with updated average recovery rates for different States and seasons, the complainants calculate adjusted FERPs for different States for each season from 2014-15 to 2018-19.¹¹⁷

4.3. India does not comment on the complainants' assertions regarding the FERP, nor does India object to the complainants' calculation of adjusted FERPs on a State-specific and seasonal basis.

4.4. In light of Article 1 of the Agreement on Agriculture¹¹⁸, we consider it appropriate to take into account the FERP set out in India's Supporting Tables, identified in India's Schedule¹¹⁹, to determine the amount of market price support provided to sugarcane producers for the 2014-15 to 2018-19 sugar seasons. We note, in this respect, that Supporting Table A of India's Schedule indicates an FERP for sugarcane of INR 156.16 per tonne.¹²⁰

4.5. We also observe that Supporting Table A sets out the "Calculation Details for estimating AMS for Sugarcane". The methodology for calculating the FERP identified in India's Schedule entailed, *inter alia*, dividing a "Computed International price of Sugar in terms of Sugarcane"¹²¹ by 11.76 to determine the "Estimated External reference price of Sugarcane at 8.5% recovery". A clarifying note indicates that "[t]he computed international price[] of sugar, less conversion costs, is converted to sugarcane using a recovery rate of 8.5% for comparison with [the] domestic support price of sugarcane".¹²² This calculation was performed for all three sugar seasons from 1986-87 to 1988-1989, as well as the average rate over those three seasons. The average "Estimated External reference price of Sugarcane at 8.5% recovery" is indicated as INR 156.16.¹²³

4.6. It is uncontested by the parties that the "recovery rate" referred to in India's Supporting Table A is a reference to the proportion of sugar that can be recovered from sugarcane. In our view, a difference in the recovery rates of different sugarcane is indeed a relevant "quality difference" within the meaning of paragraph 9 of Annex 3. Consequently, we agree with the complainants that, pursuant to paragraph 9 of Annex 3, it is appropriate to adjust the FERP on the basis of any

¹¹⁴ Brazil's first written submission, para. 103; Australia's first written submission, paras. 158-160; Guatemala's first written submission, paras. 145 and 147. (referring to G/AG/AGST/IND, p. 28, column 4)

¹¹⁵ Brazil's first written submission, para. 104; Australia's first written submission, para. 160; Guatemala's first written submission, paras. 145 and 147.

¹¹⁶ Brazil's first written submission, paras. 146-147; Australia's first written submission, paras. 161-162; Guatemala's first written submission, paras. 146-147.

¹¹⁷ Brazil's first written submission, para. 148; Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)), "FERP" spreadsheet; Australia's first written submission, para. 162; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "FERP" spreadsheet; Guatemala's first written submission, para. 147; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "FERP details" spreadsheet.

¹¹⁸ Pursuant to Article 1(a)(ii) of the Agreement on Agriculture, a Member's AMS during and after the implementation period is to be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". Similarly, Article 1(h)(ii) of the Agreement on Agriculture indicates that the calculation of a Member's Total AMS, for any year during or after the implementation period, is to be "in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule".

¹¹⁹ Part IV, Section I of India's Schedule states, under the heading "Relevant Supporting Tables and document reference": "AGST/IND: Supporting Tables refer."

¹²⁰ G/AG/AGST/IND, p. 28.

¹²¹ The "Computed International price of Sugar in terms of Sugarcane" was calculated for each season from 1986-87 to 1988-89, by subtracting the "most efficient conversion cost of Sugar from Sugarcane" from the "International Price of Sugar". (G/AG/AGST/IND, p. 29)

¹²² G/AG/AGST/IND, note 3 on p. 29.

¹²³ G/AG/AGST/IND, p. 29.

differences in recovery rates from the 8.5% rate used to calculate the FERP in India's Supporting Table A. We also agree with the complainants that, in light of Article 1 of the Agreement on Agriculture, any such adjustment should adhere as closely as possible to the methodology set out in India's Supporting Table A. Finally, since recovery rates may differ across different States in India, as well as over different seasons, we also agree with the complainants that an adjusted FERP should be calculated for different States and seasons.¹²⁴

4.7. We recall our findings regarding the relevant recovery rates in different States in India during the sugar seasons 2014-15 to 2018-19.¹²⁵ We also note that India's Supporting Table A indicates the average Computed International Price of Sugar for the three sugar seasons from 1986-87 to 1988-89 as INR 1836.38 per tonne.¹²⁶ In our view, it is consistent with the methodology set out in India's Supporting Table A for us to calculate adjusted FERPs for different States by multiplying the average Computed International Price of Sugar indicated in India's Supporting Table A (i.e. INR 1836.38) by the average recovery rate in those States.¹²⁷

4.8. We therefore calculate the relevant FERPs for different States and seasons as follows¹²⁸:

FERP											
State	Comp. int. price of sugar (INR/tonne)	2014-15		2015-16		2016-17		2017-18		2018-19	
		Rec. Rate (%)	FERP (INR/tonne)	Rec. Rate (%)	FERP (INR/tonne)	Rec. Rate (%)	FERP (INR/tonne)	Rec. Rate (%)	FERP (INR/tonne)	Rec. Rate (%)	FERP (INR/tonne)
Andhra Pradesh	1836.38	9.72	178.50	9.31	170.97	9.34	171.52	9.43	173.17	9.33	171.33
Bihar	1836.38	9.10	167.11	9.69	177.95	9.08	166.74	9.54	175.19	10.35	190.07
Gujarat	1836.38	10.48	192.45	10.37	190.43	10.56	193.92	10.51	193	10.65	195.57
Haryana	1836.38	9.89	181.62	9.39	172.44	10.19	187.13	10.46	192.09	10.31	189.33
Karnataka	1836.38	10.90	200.17	10.59	194.47	10.28	188.78	10.57	194.11	10.25	188.23
Maharashtra	1836.38	11.67	214.31	11.19	205.49	11.19	205.49	11.09	203.65	10.07	184.92
Punjab	1836.38	9.37	172.07	10.01	183.82	9.34	171.52	9.74	178.86	10.10	185.47
Tamil Nadu	1836.38	8.10	148.75	8.47	155.54	9.08	166.74	8.50	156.09	8.90	163.44
Telangana	1836.38	10.47	192.27	10.83	198.88	10.32	189.51	10.84	199.06	10.21	187.49
Uttar Pradesh	1836.38	9.49	174.27	10.51	193.00	10.26	188.41	10.73	197.04	10.91	200.35
Uttarakhand	1836.38	9.15	168.03	9.52	174.82	8.20	150.58	10.18	186.94	10.91	200.35
Other States	1836.38	9.50	174.46	9.50	174.46	9.50	174.46	9.50	174.46	10	183.64

¹²⁴ We also consider that this is a useful and relevant approach to take in light of the data adduced by the complainants, which provides recovery rates for different States, as well as the fact that the AAP in India varies across different States and seasons. (See para. 3.6 above)

¹²⁵ See paras. 3.11 and 3.15 above.

¹²⁶ G/AG/AGST/IND, p. 29.

¹²⁷ We are aware that the Fixed External Reference Price for sugarcane indicated in Supporting Table A of India's Schedule was calculated by dividing the Computed International Price for Sugar by 11.76, rather than multiplying by 0.085. The complainants submit that this difference is not relevant to the determination of an adjusted FERP in these disputes. Brazil also states that, in its view, dividing by 11.76 was reasonable, given that "the price of 1 kg of sugar would equal the price of approximately 11.76 kg of sugarcane, ... rounded to two decimal places". India, for its part, submits that "dividing a figure by 11.76 is indeed equal to calculating 8.5 per cent of that figure". (See parties' responses to Panel question No. 62(b)) For our purposes, we note that Supporting Table A clearly indicates that this calculation was intended to "convert" an international reference price for *sugar* into a reference price for *sugarcane*, using the average recovery rate in India of 8.5%. (G/AG/AGST/IND, note 3 on p. 29)

¹²⁸ For the computed international price of sugar, see India's Schedule, Supporting Table A (G/AG/AGST/IND, p. 29). Our findings regarding relevant recovery rates are set out at paras. 3.11 and 3.15 above. The FERPs for different States and seasons are determined by calculating the decimal equivalent of the recovery rate (i.e. dividing by 100) and multiplying the result by the computed international price of sugar. We note that India's Schedule identifies an FERP accurate to two decimal places. (See G/AG/AGST/IND, p. 29) In applying the paragraph 8 methodology, the complainants, however, rely on precise FERP figures. (See Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)), "FERP" spreadsheet; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "FERP" spreadsheet; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "FERP details" spreadsheet) We recall that Article 1(a)(ii) of the Agreement on Agriculture indicates that AMS should be calculated "taking into account the constituent data and methodology used in the tables of supporting material incorporated" in Members' Schedules. For our purposes, we consider it appropriate to rely on an FERP that is accurate to two decimal places, in accordance with the constituent data and methodology contained in India's Schedule.

5 QUANTITY OF ELIGIBLE PRODUCTION

5.1. Paragraph 8 of Annex 3 of the Agreement on Agriculture indicates that one of the components in the calculation of market price support is the "quantity of production eligible to receive the applied administered price". We refer to this as the "quantity of eligible production" (QEP).

5.2. The complainants note that paragraph 8 of Annex 3 refers to the quantity of production "eligible" to receive the AAP and not the quantity of production that "actually" receives the AAP.¹²⁹ The complainants argue that all sugarcane produced in India is eligible to receive the FRP.¹³⁰ The complainants also assert that, in States where an SAP applies, all sugarcane produced in that State is eligible for the SAP.¹³¹ Since there is no limitation in India's legal framework on the quantity of sugarcane that is required to be purchased at the AAP, the complainants submit that all production of sugarcane is eligible to be purchased at the AAP.¹³² The complainants provide data regarding the quantity of sugarcane production in India on a State-specific and seasonal basis.¹³³

5.3. India does not contest the complainants' assertions regarding the QEP.

5.4. We recall that paragraph 8 of Annex 3 refers to the "quantity of production *eligible* to receive the applied administered price".¹³⁴ In our view, this shows that the QEP signifies the amount of production that is eligible to receive the AAP, and not the amount of production that actually received the AAP. We note that our approach finds support in findings made in past disputes on the same issue.¹³⁵ We further note that India does not contest this understanding of the QEP.

5.5. In our view, the evidence adduced by the parties regarding the content and operation of the FRP and SAPs confirms the complainants' assertion that there is no limitation on the quantity of sugarcane that is eligible to be purchased at the AAP in India.¹³⁶ We therefore turn to determine, based on the evidence adduced by the complainants, the total quantity of sugarcane production in relevant States for each sugar season from 2014-15 to 2018-19.

5.6. Based on our review of the evidence, we find that the relevant QEPs for different States and seasons were as follows¹³⁷:

¹²⁹ Brazil's first written submission, para. 109; Australia's first written submission, paras. 124-130; Guatemala's first written submission, paras. 123-126.

¹³⁰ Brazil's first written submission, paras. 150-152; Australia's first written submission, para. 164; Guatemala's first written submission, paras. 150-152.

¹³¹ Brazil's first written submission, paras. 156 and 159; Australia's first written submission, para. 164; Guatemala's first written submission, para. 152.

¹³² Brazil's first written submission, paras. 150-152; Australia's first written submission, paras. 164-165; Guatemala's first written submission, paras. 150-152.

¹³³ For the seasons from 2014-15 to 2016-17, the complainants refer to Directorate of Sugarcane Development, Sugarcane in India: State wise Production (Exhibit JE-140). For the 2017-18 and 2018-19 seasons, the complainants refer to Department of Agriculture & Farmers Welfare: 1st advance estimates for 2019-20, (Exhibit JE-141). (Brazil's first written submission, fn 376 to Table C-8; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "Production" spreadsheet; Guatemala's response to Panel question No. 72; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "QEP" spreadsheet) (Australia also refers to First Advance Estimates of Production of Foodgrains for 2019-20, Ministry of Agriculture and Farmers Welfare, 23 September 2019 (Exhibit AUS-49) (Australia's first written submission, fn 575 to Table 17))

¹³⁴ Emphasis added.

¹³⁵ See Panel Reports, *Korea – Various Measures on Beef*, para. 831; *China – Agricultural Producers*, para. 7.296; and Appellate Body Report, *Korea – Various Measures on Beef*, para. 120.

¹³⁶ See sections 2.1 and 2.2 above.

¹³⁷ For the sugar seasons 2014-15 to 2016-17, see Directorate of Sugarcane Development, Sugarcane in India: State wise Production (Exhibit JE-140). For the 2017-18 and 2018-19 sugar seasons, see Department of Agriculture & Farmers Welfare: 1st advance estimates for 2019-20, (Exhibit JE-141). Where there are discrepancies between Exhibits JE-140 and JE-141, for instance with respect to the data for the 2017-18 sugar season, we have relied on the most recent data (i.e. Exhibit JE-141) on the basis that the most up-to-date statistics are likely to be more accurate. (See parties' responses to Panel question No. 64) We also note that the data in Exhibit JE-140 is indicated in "lakh tonnes". We understand from the complainants that one *lakh* refers to one hundred thousand (i.e. 100,000). (Brazil's first written submission, fn 3 to Table 1; Australia's first written submission, p. 27; Guatemala's first written submission, p. v) India does not contest this understanding. We further note that the residual "other" States entries in Exhibits JE-140 and JE-141 refer to States different from

QEP (thousands of tonnes)					
State	2014-15	2015-16	2016-17	2017-18	2018-19
Andhra Pradesh	9,987	9,353	7,830	7,789.6	8,091.2
Bihar	14,034	12,649	13,036	13,824.6	11,660.9
Gujarat	14,330	11,120	11,950	12,072.1	12,036.4
Haryana	7,169	6,692	8,223	9,632.9	7,570.6
Karnataka	43,776	37,834	27,378	31,135.2	42,006.3
Maharashtra	84,699	73,680	52,262	82,984.0	92,442.6
Punjab	7,039	6,607	7,152	8,023.7	7,773.7
Tamil Nadu	28,093	25,494	18,988	17,154	16,207.6
Telangana	3,343	2,405	2,061	2,604.5	2,800
Uttar Pradesh	133,061	145,385	140,169	177,033.3	179,714.8
Uttarakhand	6,165	5,886	6,477	6,271.4	6,329.3
Other States	10,634	11,343	10,544	11,379.6	13,523.4

6 CALCULATION OF MARKET PRICE SUPPORT

6.1. Having determined the individual components of the methodology set out in paragraph 8 of Annex 3 of the Agreement on Agriculture, we proceed to apply that methodology to calculate the amount of market price support provided to sugarcane producers in different States and seasons. We also sum up these State totals to determine the total market price support provided to all sugarcane producers in India during each season.

6.2. For the reasons set out in this Appendix, we conclude that India provided market price support to sugarcane producers, during each sugar season from 2014-15 to 2018-19, as follows¹³⁸:

Market price support (2014-15 sugar season)				
State	FERP (INR per tonne)	AAP (INR per tonne)	QEP (thousands m/t)	MPS (millions INR)
Andhra Pradesh	178.50	2,251.04	9,987	20,698.46
Bihar	167.11	2,600.00	14,034	34,143.18
Gujarat	192.45	2,427.36	14,330	32,026.26
Haryana	181.62	3,050.00	7,169	20,563.42
Karnataka	200.17	2,524.80	43,776	101,763.00
Maharashtra	214.31	2,703.44	84,699	210,826.82
Punjab	172.07	2,850.00	7,039	18,849.95
Tamil Nadu	148.75	2,650.00	28,093	70,267.62
Telangana	192.27	2,425.04	3,343	7,464.15
Uttar Pradesh	174.27	2,800.00	133,061	349,382.26
Uttarakhand	168.03	2,800.00	6,165	16,226.10
Other States	174.46	2,200.00	10,634	21,539.59
Total – All India				903,750.80

the "Other States" for which we require data. We therefore calculate the relevant figures for our purposes by subtracting the sum of production for the relevant individual States from the "Grand Total"/"All-India" figures indicated in Exhibits JE-140 and JE-141. In this respect, we observe that the figures indicated in Exhibits JE-140 and JE-141 regarding the "Grand Total"/"All-India" sugar production are further substantiated by First Advance Estimates of Production of Foodgrains for 2019-20, 23 September 2019, (Exhibit AUS-49). Finally, we note that our determination of the relevant QEP figures corresponds to the figures identified by the complainants. (See Brazil's Calculation of India's Domestic Support for Sugarcane, (Exhibit BRA-1 (revised-3)), "C8 Production" spreadsheet; Australia's Domestic Support Calculations, (Exhibit AUS-1 (revised 23 March 2021)), "Production" spreadsheet; Guatemala's Calculations of India's AMS (Exhibit GTM-45 (revised 12 May 2021)), "QEP" spreadsheet)

¹³⁸ See paras. 3.25, 4.8, and 5.6 above. We calculate market price support (i.e. MPS) by multiplying the difference between the FERP and the AAP by the QEP, in accordance with paragraph 8 of Annex 3 of the Agreement on Agriculture, and dividing the result by 1,000 to yield a figure representing millions of INR, rounded to two decimal places. The amount of market price support for "Total – All India" is calculated by summing the various amounts of market price support provided in each State during each season. We recognize that the results of our calculations differ marginally from the results of the complainants' calculations. We understand that these differences result from our reliance on an FERP rounded to two decimal figures, in accordance with the FERP set forth in India's Schedule, rather than the precise FERP figures relied upon by the complainants. (See fn 128 to para. 4.8 above)

Market price support (2015-16 sugar season)				
State	FERP (INR per tonne)	AAP (INR per tonne)	QEP (thousands m/t)	MPS (millions INR)
Andhra Pradesh	170.97	2,300.00	9,353	19,912.82
Bihar	177.95	2,600.00	12,649	30,636.51
Gujarat	190.43	2,510.54	11,120	25,799.62
Haryana	172.44	3,050.00	6,692	19,256.63
Karnataka	194.47	2,563.78	37,834	89,640.47
Maharashtra	205.49	2,708.98	73,680	184,457.14
Punjab	183.82	2,850.00	6,607	17,615.45
Tamil Nadu	155.54	2,850.00	25,494	68,692.56
Telangana	198.88	2,621.86	2,405	5,827.27
Uttar Pradesh	193.00	2,800.00	145,385	379,018.70
Uttarakhand	174.82	2,800.00	5,886	15,451.81
Other States	174.46	2,300.00	11,343	24,110.00
Total – All India				880,418.99

Market price support (2016-17 sugar season)				
State	FERP (INR per tonne)	AAP (INR per tonne)	QEP (thousands m/t)	MPS (millions INR)
Andhra Pradesh	171.52	2,300.00	7,830	16,666.00
Bihar	166.74	2,800.00	13,036	34,327.18
Gujarat	193.92	2,556.52	11,950	28,233.07
Haryana	187.13	3,150.00	8,223	24,363.68
Karnataka	188.78	2,488.76	27,378	62,968.85
Maharashtra	205.49	2,708.98	52,262	130,837.39
Punjab	171.52	2,900.00	7,152	19,514.09
Tamil Nadu	166.74	2,850.00	18,988	50,949.74
Telangana	189.51	2,498.44	2,061	4,758.70
Uttar Pradesh	188.41	3,050.00	140,169	401,106.21
Uttarakhand	150.58	3,070.00	6,477	18,909.08
Other States	174.46	2,300.00	10,544	22,411.69
Total – All India				815,045.69

Market price support (2017-18 sugar season)				
State	FERP (INR per tonne)	AAP (INR per tonne)	QEP (thousands m/t)	MPS (millions INR)
Andhra Pradesh	173.17	2,550.00	7,789.6	18,514.55
Bihar	175.19	2,800.00	13,824.6	36,286.95
Gujarat	193	2,820.68	12,072.1	31,721.62
Haryana	192.09	3,250.00	9,632.9	29,456.54
Karnataka	194.11	2,836.76	31,135.2	82,279.44
Maharashtra	203.65	2,976.12	82,984.0	230,070.65
Punjab	178.86	3,000.00	8,023.7	22,635.98
Tamil Nadu	156.09	2,850.00	17,154	46,211.33
Telangana	199.06	2,909.12	2,604.5	7,058.35
Uttar Pradesh	197.04	3,150.00	177,033.3	522,772.25
Uttarakhand	186.94	3,160.00	6,271.4	18,645.25
Other States	174.46	2,550.00	11,379.6	27,032.69
Total – All India				1,072,685.61

Market price support (2018-19 sugar season)				
State	FERP (INR per tonne)	AAP (INR per tonne)	QEP (thousands m/t)	MPS (millions INR)
Andhra Pradesh	171.33	2,612.50	8,091.2	19,751.99
Bihar	190.07	2,900.00	11,660.9	31,600.22
Gujarat	195.57	2,928.75	12,036.4	32,897.65
Haryana	189.33	3,350.00	7,570.6	23,928.17
Karnataka	188.23	2,818.75	42,006.3	110,498.41
Maharashtra	184.92	2,769.25	92,442.6	238,902.18
Punjab	185.47	3,000.00	7,773.7	21,879.31
Tamil Nadu	163.44	2,612.50	16,207.6	39,693.38

Market price support (2018-19 sugar season)				
State	FERP (INR per tonne)	AAP (INR per tonne)	QEP (thousands m/t)	MPS (millions INR)
Telangana	187.49	2,807.75	2,800	7,336.73
Uttar Pradesh	200.35	3,150.00	179,714.8	530,095.76
Uttarakhand	200.35	3,170.00	6,329.3	18,795.81
Other States	183.64	2,750.00	13,523.4	34,705.91
Total – All India				1,110,085.53