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INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

REPORTS OF THE PANELS

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Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
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US – Tariff Measures (China)	Panel Report, *United States – Tariff Measures on Certain Goods from China*, WT/DS543/R and Add.1, circulated to WTO Members 15 September 2020 [appealed by the United States 26 October 2020]
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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
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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", *Proceedings of the International Society of Sugar Cane Technologists*, 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", *Proceedings of the International Society of Sugar Cane Technologists*, 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, *U.P. Co-operative Cane Unions Federations v. West U.P. Sugar Mills Association & Ors. Etc*., 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 Panel[9] held an organizational meeting with the parties on 22 November 2019.

1.12. After consulting with the parties, the Panel adopted its Working Procedures[10] 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 parties[20], and the receipt of comments by the third parties[21], 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 Governments[39], 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 FRP[40]; 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 to[42]:

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 2018-19[43];

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 2015-16[44]; 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 MIEQ[47], 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 MIEQ[48], 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 Agriculture[61];

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) Scheme[64] 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 Agreement[68]

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 of 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]

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[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-specific[106] 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]

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[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 States[135] and calculate adjusted fixed external reference prices (FERPs) to account for sugarcane quality differences[136] 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

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[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]

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[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 market[162], 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 subsidies[166]; (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 subsidies[167]; 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",

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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

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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, 9e 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 instance[191] 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 refers[195] 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:

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[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 support[206], 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 Agriculture[209] 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 polices 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

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[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 season[235] 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 Australia[271] 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 3[280], 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 Manual[283], 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 payments[290], 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) Act[291], 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 Nadu[296], 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 follows[300]:

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 follows[301]:

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 follows[303]:

[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 MIEQs [311]; 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 2015-16[316], 2017-18[317], 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]

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[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, weighment, 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 2015-16[335], 2017-18[336], and 2018-19[337] sugar seasons. The total amount of the MIEQ for all sugar mills was 4 million tonnes of sugar for the 2015-16 season[338]; 2 million tonnes for the 2017-18 season[339]; 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 2015-16[346], 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 season[356], INR 5.50 per quintal of sugarcane crushed in the 2017-18 sugar season[357], 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 2018[384], 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

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[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 DFIAs 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 above[387], 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 21.1[389], 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.

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[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.

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[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 products[405] 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 costs[429], 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.

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[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.

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[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, pars. 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.

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[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 costs[467]; (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 destination[469]; 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 Maharashtran ports (Jawaharlal Nehru Port (JNPT) and Jaigad) is INR 489 and INR 817 per tonne, respectively. The fobbing costs of the Maharashtran 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

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[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]

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[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 operationalised[511], 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 assistance[520]; (ii) it is sugar mills that must satisfy the eligibility criteria for assistance[521]; (iii) the assistance is paid on a mill-specific basis[522]; 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 agree[541], 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 Unites 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[]

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[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]

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[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 appropriate[584], 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 above[590], 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 above[592], 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.

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[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".

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[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]

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[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 Custom's 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 fist 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 Schedule[650], 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:

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[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 Annex VII.[668]

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[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.

[668] India's first written submission, para. 139. (emphasis original)

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 graduating from Annex VII becomes subject to Article 27.2(b), in terms of the prohibition on export

[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.

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 performance under Article 3.1(a) of the SCM Agreement.[679] In addition, Australia raises a claim

[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."
[679] Australia's first written submission, paras. 368-369 and 391; Guatemala's first written submission, para. 300.

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 Agreement[684]

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

[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 appropriate[685] 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 Notifications[691]

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 Relates 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 year[692], 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]

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[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 record[713], 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 prejudge 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.