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Panel Proceedings**

INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

(DS580)

**AUSTRALIA'S OPENING STATEMENT AT THE SECOND
SUBSTANTIVE MEETING WITH THE PARTIES**

23 March 2021

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<i>Australia – Automotive Leather II</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126/R, adopted 16 June 1999, DSR 1999:III, p.951
<i>Brazil – Taxation</i>	Panel Report, <i>Brazil – Certain Measures Concerning Taxation and Charges</i> , WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>EC and certain member States – Large Civil Aircraft</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/RW and Add.1, adopted 28 May 2018, as modified by Appellate Body Report
<i>India – Export Related Measures</i>	Panel Report, <i>India – Export Related Measures</i> , WT/DS541/R and Add.1, circulated to WTO Members 31 October 2019
<i>US – Large Civil Aircraft (2nd complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Large Civil Aircraft (2nd complaint)</i>	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571

Short Title	Full Case Title and Citation
<i>US – Softwood Lumber IV</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
AAP	Applied Administered Price
CACP	Commission for Agricultural Costs and Prices
DFIA	Duty Free Import Authorisation
FRP	Fair and Remunerative Price
MAEQ	Maximum Admissible Export Quantities
SAP	State Advised Price
SCM Agreement	Agreement on Subsidies and Countervailing Measures
WTO	World Trade Organization

LIST OF AUSTRALIA'S EXHIBITS

Exhibit No.	Exhibit Name
AUS-1 (Revision 3)	Australia's domestic support calculations, Microsoft Excel workbooks, Revision 3

I. INTRODUCTION

1. Mr Chair, members of the Panel, fellow delegates and WTO Secretariat staff – Australia is pleased to be here at the second substantive meeting with the parties.

2. Australia, Brazil and Guatemala have clearly demonstrated, through written and oral submissions, that India maintains measures with respect to sugar and sugarcane that are inconsistent with its WTO obligations. In defending these measures, India continues to advance interpretations of applicable legal standards that the text and objectives of the WTO Agreements do not support. India's characterisation of its measures do not always accord with the available facts. In many instances, India has offered little new evidence and argumentation since the first written submission.

3. In this statement, we intend to focus on those arguments India developed further in its second written submission. For the sake of efficiency, we will not repeat the arguments made in Australia's second written submission, which we continue to stand by.

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

4. The central question for the Panel to determine in order to resolve the complainants' domestic support claims is whether or not India's FRP and SAP measures constitute "market price support" within the meaning of the Agreement on Agriculture.

5. Australia, Brazil and Guatemala contend that those measures are market price support. India disagrees on the basis that its Central and State-level governments do not procure, and have no obligation to procure, the sugarcane, by paying the applicable FRP and SAP to the sugarcane farmers.¹

A. ADOPTING INDIA'S INTERPRETATION OF "MARKET PRICE SUPPORT" WOULD HAVE NEGATIVE SYSTEMIC CONSEQUENCES

6. Before exploring in detail the reasoning advanced by India in its second written submission, I would like to highlight the significance of India's argument and the systemic

¹ India's second written submission, para. 28.

consequences it would have, if accepted by the Panel. Those consequences are of great concern to Australia.

7. If the Panel accepts India's defence of the FRP and SAP measures, the Panel's decision would send a signal to the WTO Membership that any Member may provide trade and production-distorting domestic support to its agricultural producers through legislated floor prices, as long as the government does not directly or indirectly purchase the agricultural product receiving that support.

8. Australia agrees with Brazil that accepting India's interpretation would mean that there is "a wide and easily-abused loophole"² in the Agreement on Agriculture's domestic support disciplines. Opening this avenue for circumvention would unquestionably weaken Members' domestic support commitments and undermine the realisation of the Agreement's object and purpose.³

9. Thus, the potential ramifications of such a decision by the Panel go far beyond India's support for its sugarcane farmers.

10. Further, accepting India's misinterpretation of market price support would have the practical effect of undermining the structure of the domestic support disciplines. Article 6.1 of the Agreement on Agriculture stipulates that these disciplines apply to all measures in favour of agricultural producers, unless a measure is expressly exempted.⁴ This Article reflects a deliberate decision by the Agreement's negotiators to define the exempt measures, leaving the "residual" subject to discipline.⁵

11. India has not argued that its FRP and SAP measures are exempt, nor could it credibly do so.⁶ But the effect of India's argument, that market price support only exists if the government (or its agents) procure the product at the Applied Administered Price (AAP), if accepted by the Panel, would be to create a new category of measures exempt from India's domestic support reduction commitments. This outcome would be incompatible with the text

² Brazil's second written submission, para. 68. *See also*, Guatemala's second written submission, para. 25.

³ Australia's second written submission, paras. 46–49. *See also*, Brazil's second written submission, para. 68; Guatemala's second written submission, para. 25.

⁴ Australia's second written submission, para. 39.

⁵ Chairman's note on options in the agricultural negotiations, MTN.GNG/AG/W/1, 24 June 1991 (**Exhibit JE-154**), para. 9. *See also*, Australia's second written submission, para. 39.

⁶ Australia's response to Panel question 51, para. 17; Australia's second written submission, para. 39. *See also*, Brazil's second written submission, paras. 25–26.

– and may embolden other Members to consider that they also benefit from the same "exemption".

12. These serious systemic implications are not the only reason, however, why Australia urges the Panel to reject India's defence. Far from it.

13. Australia respectfully asks the Panel to find that the FRP and SAP measures are market price support, because India's interpretation of the Agreement on Agriculture is without merit.

14. I will now turn to the reasoning advanced by India in its second written submission.

15. India has mischaracterized Australia's arguments, and falsely claimed Australia's position is unclear or "incongruous".⁷

B. ARTICLE 6.1

16. I will begin with Article 6.1, which provides relevant context for interpreting "market price support".⁸ India agrees that Article 6 is relevant.⁹

17. To recall, Article 6.1 provides that each Member's domestic support reduction commitments "apply to all of its domestic support measures in favour of agricultural producers with the exception of [measures exempt under Article 6 or Annex 2]".¹⁰

18. India argues that "the phrase 'in favour of agricultural producers' [in Article 6.1] and the scope of paragraph 2 of Annex 3 are distinct."¹¹ According to India, "[t]he former identifies the recipient of a domestic support and the latter sets out the nature of governmental assistance to such agricultural producers that the [Agreement on Agriculture] intends to discipline."¹² There is no reason, India asserts, why the phrase in Article 6.1 "is the defining element and why it overrides the provisions of paragraph 2 of Annex 3...".¹³

⁷ India's second written submission, para. 11.

⁸ Australia's second written submission, paras. 37–39.

⁹ India's second written submission, para. 38. *See also*, India's first written submission, paras. 51–56; India's closing statement at the first substantive meeting, paras. 13 and 17.

¹⁰ Agreement on Agriculture, Article 6.1.

¹¹ India's second written submission, para. 46.

¹² India's second written submission, para. 46 (emphasis added).

¹³ India's second written submission, para. 46.

19. Australia disagrees with India's arguments regarding Article 6.1 for the following reasons.

20. First, India seeks to draw the Panel's focus to the words "in favour of agricultural producers" – the "recipient" of the support as India puts it – while ignoring the words that confirm the reduction commitments "apply to all of [a Member's] domestic support measures...", excluding exempt measures. As Australia has already outlined, the Agreement on Agriculture expressly defines the domestic support that is exempt. All other support is subject to Members' reduction commitments.¹⁴ India's narrow interpretation of "market price support" would undermine this fundamental feature of the domestic support disciplines.

21. Second, contrary to India's claims, Australia does not argue that Article 6 "overrides" paragraph 2 of Annex 3. We argue that Article 6 and Annex 3 – indeed, all of the provisions regarding domestic support – may, and should, be read harmoniously.

22. Finally, the principal flaw in India's arguments with respect to Article 6.1 is that they are premised on India's misinterpretation of paragraphs 1 and 2 of Annex 3.

23. Paragraph 1 does not limit market price support to subsidies. And paragraph 2 does not "delineate the scope of [those] subsidies".¹⁵

24. India contends that the complainants have not addressed the ordinary meaning of paragraphs 1 and 2.¹⁶ Australia disagrees. On the contrary, it is India that tries to interpret those paragraphs in a way that is not supported by the text, in an attempt to prop up its tenuous arguments in this dispute. Moreover, Australia has explained in great detail how paragraphs 1 and 2 should be interpreted.¹⁷

C. PARAGRAPH 1 OF ANNEX 3

25. Turning first to paragraph 1 of Annex 3, India continues to argue that the phrase "or any other subsidy" affects the terms which precede it, such that "market price support" is a subsidy.¹⁸ Australia disagrees with this interpretation.

¹⁴ Australia's second written submission, paras. 38–39.

¹⁵ India's second written submission, para. 20.

¹⁶ India's second written submission, para. 36.

¹⁷ Australia's opening statement at the first substantive meeting, paras. 41–47; Australia's second written submission, paras. 30, 52–67. *See also*, Australia's second written submission, paras. 52–67.

¹⁸ India's second written submission, paras. 17–18.

26. The phrase "any other subsidy" does not have the limiting effect that India attributes to it. In Australia's view, the phrase reflects an intent to ensure all non-exempt product-specific domestic support is included in the Aggregate Measurement of Support.¹⁹ This is consistent with the structure of the domestic support disciplines, under which only exempt support is defined and any other support is disciplined. There is no basis in the text of paragraph 1 of Annex 3 to confine the product-specific domestic support measures to subsidies, as India argues.

27. Further, under India's interpretation of paragraph 1, "domestic support" means only "subsidies". Now, if that were correct, why then would the drafters of the Agreement on Agriculture have used the term "domestic support" when they could simply have referred to "subsidies"?²⁰ India offers no answer to this question.

28. As Guatemala has observed, the Agreement on Agriculture "applies to domestic support 'measures', not only to 'subsidies'."²¹ The many references to such measures in the Agreement reinforce this.²² Australia agrees with Guatemala that India's interpretation would render the term "domestic support" throughout the Agreement on Agriculture redundant or inutile, contrary to the accepted rules of treaty interpretation.²³

D. PARAGRAPH 2 OF ANNEX 3

29. India's interpretation of paragraph 2 of Annex 3 is similarly flawed. Even if paragraph 1 did limit domestic support to subsidies (which it does not), paragraph 2 does not delineate the scope of subsidies as India argues. According to India, based on the words "shall include both", paragraph 2 provides an exhaustive definition of "subsidies".²⁴

30. As Australia explained in its second written submission, "both" is not a word of limitation, nor does Australia's interpretation of paragraph 2 render the word "redundant" as India argues.²⁵

¹⁹ Australia's second written submission, paras. 56–57.

²⁰ European Union's third party submission, para. 43.

²¹ Guatemala's second written submission, para. 30.

²² Guatemala's second written submission, paras. 30–31.

²³ Guatemala's second written submission, para. 33.

²⁴ India's second written submission, para. 20.

²⁵ Australia's second written submission, paras. 63–65.

31. In its second written submission, India contends that "[s]ince the term 'both' has been used, it must be given a legal effect."²⁶ It does have an effect – it emphasizes that, in addition to the other types of subsidies that fall within paragraph 1, both budgetary outlays and revenue foregone are also included.

32. India seeks to further elaborate its argument by claiming that "[t]he term 'both['] immediately following the 'term' include is used where a drafter aims to capture the whole universe of items that can be included."²⁷ India then proceeds to provide two wholly irrelevant examples that have no relationship to the correct interpretation of paragraph 2 of Annex 3 of the Agreement on Agriculture.²⁸ In those hypothetical examples, there are only two possible choices: singular or plural, and elected and nominated members.

33. Finally, in its second written submission, India has advanced a new argument that subsidies under paragraph 2 "can only be in the nature of governmental expenditure"²⁹ and that only governments or their agents can provide them.³⁰

34. India's argument is beside the point. The application and scope of paragraph 2 is irrelevant because market price support under the Agreement on Agriculture is not limited to subsidies. Accordingly, in order to resolve these disputes, the Panel need not determine what other kinds of measures may fall within paragraph 2.

E. PARAGRAPH 8 OF ANNEX 3

35. As I have explained, India's approach to defining "market price support" rests on a flawed interpretation of the text of paragraphs 1 and 2 of Annex 3, read in context with Article 6.1. As a result of India's undue focus on paragraphs 1 and 2, it ignores the ordinary meaning of the only other paragraph in Annex 3 that refers to "market price support": paragraph 8.

36. Much like its arguments regarding the alleged distinctiveness of Article 6.1 and paragraph 2 of Annex 3, India seeks to create an artificial distinction between paragraphs 1 and 2, and paragraph 8. It seems that wherever a provision contradicts India's argument –

²⁶ India's second written submission, para. 24.

²⁷ India's second written submission, para. 22.

²⁸ India's second written submission, para. 22.

²⁹ India's second written submission, para. 25.

³⁰ India's second written submission, paras. 25–26 and 42.

whether it be Article 6.1 or paragraph 8 – India finds a way to claim that the provision is "distinct".

37. India contends that paragraphs 1 and 2 of Annex 3 address "when a market price support can be said to exist within the meaning of Annex 3",³¹ while paragraph 8 of Annex 3 deals only with "how to calculate or measure a market price support".³²

38. As Australia has explained in its second written submission, India's argument finds no support in the text of Annex 3.³³ India makes an artificial distinction that attempts to sidestep conveniently the plain meaning of paragraph 8 of Annex 3 because that meaning undermines its defence.³⁴

39. It is worth noting that India's interpretation of Annex 3 is inconsistent and contradictory. On the one hand, India argues that every word in paragraph 2 of Annex 3 must have "legal effect."³⁵ On the other, India seeks to reduce the legal effect of the entirety of paragraph 8 of Annex 3, in the context of the measures challenged by the complainants.

F. CONCLUSION

40. For the reasons I have outlined, Australia respectfully requests the Panel to find that India's FRP and SAP measures constitute market price support. India's arguments in its defence have no legal merit. Accepting them would have serious, negative systemic consequences.

41. Before I conclude on the topic of domestic support, I would like to note that Australia has circulated revised domestic support calculations with the provisional version of this statement.³⁶

42. We will provide a detailed explanation of these updates in our responses to the Panel's questions 1, 4 and 11.

³¹ India's second written submission, para. 39.

³² India's second written submission, para. 39.

³³ Australia's second written submission, para. 70.

³⁴ Australia's second written submission, paras. 68–70.

³⁵ India's second written submission, para. 24.

³⁶ Australia's domestic support calculations, Microsoft Excel workbooks, Revision 3 (**Exhibit AUS-1 (Revision 3)**).

43. Importantly, none of the adjustments to the calculations change the fact that India's domestic support in favour of its sugarcane producers vastly exceeds its permissible level, in breach of India's obligations pursuant to Article 7.2(b) of the Agreement on Agriculture.

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

44. I now turn to Australia's export subsidies claims.

45. By means of its production and buffer stock subsidies, and its MAEQ and DFIA schemes, India provides prohibited export subsidies for sugar. These measures are inconsistent with India's obligations under Articles 3.3 and 8 of the Agreement on Agriculture and Articles 3.1(a) and 3.2 of the SCM Agreement.

46. Faced with unambiguous evidence of its WTO-inconsistent export subsidies, India has opted to dispute the facts underpinning the export contingency of each measure, to develop flawed interpretations of relevant legal standards, and to claim exemptions that are unavailable.

A. EVIDENCE OF ACTUAL DISBURSEMENTS IS NOT REQUIRED TO DEMONSTRATE THE EXISTENCE OF A SUBSIDY

47. Australia has demonstrated comprehensively that the challenged schemes are direct subsidies contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture. We have shown that the Indian government makes funds available to sugar mills for less than full consideration, that this leaves sugar mills better off than they would otherwise be, and that to claim or access funds, sugar mills must satisfy export obligations.³⁷

48. In its second written submission, India has persevered with its flawed interpretation of the legal standard for determining whether a measure qualifies as a "subsidy" within the

³⁷ Australia's second written submission, paras. 89–97.

meaning of Article 9.1(a). India continues to insist, in particular, that evidence of actual funds transfers is required to demonstrate the existence of a direct subsidy.³⁸

49. India argues that the reference in Article 9.1(a) to "direct subsidies including payments-in-kind" is evidence of this requirement.³⁹

50. India's focus on this phrase is selective and fails to acknowledge that Article 9.1(a) identifies "payments-in-kind" as one example of a direct subsidy. The preposition "including" makes this clear. As the challenged measures do not involve payments-in-kind, Australia urges the Panel to disregard India's argument.

51. India has also tried to discredit the complainants' arguments regarding the immediate context of Article 9.1(a).⁴⁰

52. This context includes Article 9.2(a)(i), which provides that where export subsidy reduction commitments are expressed as budgetary outlays, compliance may be assessed on the basis of expenditure to subsidies allocated or incurred. As Australia and Brazil have pointed out, this means the Agreement on Agriculture recognises that a subsidy may exist in situations where a funds transfer is yet to take effect.⁴¹

53. Further, Australia does not accept India's argument that we have treated Article 9.2(a)(i) as overriding Article 9.1(a). We have simply considered the Article as context relevant to the interpretation of Article 9.1(a), which is entirely consistent with the customary principles of treaty interpretation.

54. India also challenges the complainants' understanding of what it means "to make funds available" for the purposes of establishing that a measure satisfies the subsidy definition in the SCM Agreement⁴² and, by virtue of its contextual relevance,⁴³ the term "subsidy" in the Agreement on Agriculture.⁴⁴

³⁸ India's second written submission, paras. 67–69.

³⁹ Agreement on Agriculture, Article 9.1(a) (emphasis added); India's second written submission, para. 74.

⁴⁰ India's second written submission, para. 75.

⁴¹ Australia's opening statement at the first substantive meeting, paras. 87–88; Australia's response to panel question 59, paras. 70–73; Australia's second written submission, para. 106. *See also*, Brazil's opening statement at the first substantive meeting, paras. 41–42; Brazil's response to panel question 59, para. 73.

⁴² SCM Agreement, Articles 1.1(a)(1) and (2).

⁴³ Australia's first written submission, para. 266, citing Appellate Body Report, *Canada – Dairy*, para. 87; Australia's response to Panel question 58(a), para. 57 and footnote 73.

⁴⁴ India's second written submission, para. 87, citing Australia's response to Panel question 59, para. 77; Guatemala's opening statement at the first substantive meeting, para. 4.13.

55. Australia has highlighted the Appellate Body's observation, in *US – Large Civil Aircraft (2nd complaint)*, that a "direct transfer of funds captures conduct on the part of a government by which money, financial resources, and/or financial claims are made available to a recipient."⁴⁵

56. The Appellate Body also considered a direct funds transfer to "[indicate] action involving the conveyance of funds from the government to the recipient."⁴⁶ This, India claims, is the Appellate Body's way of saying that to make available a direct funds transfer is to convey it, which only evidence of an actual payment can demonstrate.⁴⁷

57. Australia disagrees. Prior panel and Appellate Body decisions support our understanding that the provision of a subsidy involves conduct whereby a government makes financial resources available.⁴⁸ This does not require evidence of actual payments. A government's provision of legislative authority, or evidence of relevant budgetary allocations, is sufficient.⁴⁹

58. In its second written submission, India continues to draw heavily on the subsidy definition in Article 1.1 of the SCM Agreement to defend its measures.⁵⁰ Australia agrees that this definition is contextually relevant to the meaning of "subsidy" in the Agreement on Agriculture. However, we do not accept that any part of Article 1.1 supports India's conclusion that its measures are not subsidies.

59. As Brazil has identified, India has retreated from its earlier position that the phrase "there is a financial contribution" in Article 1.1(a)(1) indicates that demonstrating the existence of a subsidy requires evidence of actual funds transfers. Having conceded that potential funds transfers may constitute financial contributions for the purposes of a subsidy, India has shifted its focus to the type of contribution its measures involve.

⁴⁵ *US – Large Civil Aircraft (2nd complaint)*, para. 614 (emphasis added), cited in Australia's second written submission, footnote 151; Guatemala's opening statement at the first substantive meeting, para. 4.13 and footnote 54.

⁴⁶ *US – Large Civil Aircraft (2nd complaint)*, para. 614 (emphasis added), cited in Australia's second written submission, footnote 151; Guatemala's opening statement at the first substantive meeting, para. 4.13.

⁴⁷ India's second written submission, para. 87.

⁴⁸ *Australia – Automotive Leather II*, para. 9.39; Appellate Body Report, *US – Softwood Lumber IV*, paras. 69–72. See also, Brazil's second written submission, para. 81 and footnote 165.

⁴⁹ Australia's second written submission, para. 101; Brazil's second written submission, paras. 101–103.

⁵⁰ India's second written submission, paras. 69–73, 76–97.

60. India underscores the description by Australia, Brazil and Guatemala of the challenged measures as "grants"⁵¹ and argues that, because the SCM Agreement characterises a "grant" as a direct funds transfer, its existence depends on the execution of an actual payment.⁵²

61. Australia disagrees. The examples of "financial contributions" in Article 1.1(a)(1) of the SCM Agreement are just that – examples. India, disproportionately preoccupied with distinctions between direct and potential direct transfers, fails to appreciate the reference to "grants" in Article 1.1 as one of the many examples that together illustrate the variety of government practices that involve the transfer of financial resources to a recipient.⁵³

62. India also suggests that Australia and Guatemala, in arguing evidence of actual payments is not required, are too selective in their consideration of a compliance panel decision in *EC and certain member States – Large Civil Aircraft (Article 21.5 – United States)*. Australia and Guatemala highlight that panel's consideration of future funds disbursements as direct funds transfers,⁵⁴ which, India claims, is inconsistent with the original panel's finding that funds yet to be disbursed were "potential direct transfers".⁵⁵

63. Given the factual complexity of the *Large Civil Aircraft* disputes,⁵⁶ what India perceives to be an inconsistency between its reading of the panel's determinations and that of the complainants is unsurprising.

64. The original panel in that matter found that with respect to one scheme that contractually agreed funding amounts, yet to be transferred, were direct transfers in the forms of loans within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.⁵⁷ This scheme involved a pre-determined commitment from a government to make funds available in the

⁵¹ Australia's second written submission, para. 110; Brazil's second written submission, paras. 89, 95, 103, 144–148; Guatemala's second written submission, paras. 4, 75–77.

⁵² India's second written submission, paras. 85–86.

⁵³ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614.

⁵⁴ *EC and certain member states – Large Civil Aircraft (Article 21.5 – United States)*, para. 6.290, citing *EC and certain member states – Large Civil Aircraft*, paras. 7.378–7.379; India's second written submission, paras. 81–83; Australia's second written submission, footnote 151; Guatemala's opening statement at the first substantive meeting, para 4.14; Australia's response to Panel question 59, para. 77.

⁵⁵ India's second written submission, para. 82, citing *EC – Large Civil Aircraft*, para. 7.1495 (emphasis added).

⁵⁶ See *EC and certain member states – Large Civil Aircraft*, paras. 2.5–3.1.

⁵⁷ *EC and certain member states – Large Civil Aircraft*, paras. 7.378–7.379; Appellate Body Report, *EC and certain member states – Large Civil Aircraft*, para. 830.

future.⁵⁸ The panel found a separate set of funding arrangements,⁵⁹ however, to involve potential direct transfers.⁶⁰

65. Thus, what India believes to be "conflicting" accounts of a single panel's reasoning are simply two examples of the many forms a "financial contribution" may take.

66. The reference to "potential transfers" in Article 1.1(a)(1)(i) of the SCM Agreement is illustrative of this point and consistent with our understanding that neither the SCM Agreement nor the Agreement on Agriculture requires evidence of actual payments to demonstrate that a government makes financial resources available for the purposes of a subsidy.⁶¹

67. I have only one more brief, but important, observation to make on this point. This is that, without prejudice to Australia's argument that we are not obliged to produce evidence of completed financial transactions, we have, nevertheless, done so.⁶² India has elected not to respond to this evidence.

B. INDIA MISCHARACTERISES THE NATURE OF A BENEFIT AND RELEVANCE OF MARKET COMPARISON EXERCISES

68. I turn now to the second element of the legal standard for determining whether a measure involves a subsidy – the existence of a "benefit".

69. To understand whether the recipient of a financial contribution benefits, it is necessary to conduct some kind of comparative exercise. Australia's view continues to be that the market furnishes a useful basis for comparison.⁶³ However, we believe that the nature of the measure should guide the market comparison exercise.

70. Consider a measure involving government investment in research and development, or a government loan. Here, comparison with a commercial equivalent would likely

⁵⁸ *EC and certain member states – Large Civil Aircraft*, para. 7.379

⁵⁹ *EC and certain member states – Large Civil Aircraft*, para. 7.1415.

⁶⁰ *EC and certain member states – Large Civil Aircraft*, para. 71495.

⁶¹ Australia's opening statement at the first substantive meeting, para. 89; Australia's response to Panel question 59, paras. 76–78; Australia's second written submission, para. 107. See also Brazil's opening statement at the first substantive meeting, paras. 44–46; Brazil's response to Panel question 59, para. 74; Brazil's second written submission, paras. 94–95.

⁶² Australia's second written submission, para. 112 and, particularly, footnotes 166–170.

⁶³ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 635, citing Appellate Body Report, *Canada – Aircraft*, para. 157.

demonstrate whether the terms and conditions of the government investment or loan were more favourable than those a commercial entity would offer.⁶⁴

71. India takes issue with Australia's assessment that "gifts" comparable to its export subsidy grants would not be available in the marketplace.⁶⁵ While it is difficult to discern India's preferred approach to benefit analysis against a market benchmark, it clearly does not accept that [of] any of the complainants.⁶⁶

72. India has acknowledged that certain types of financial contribution, including grants, may leave recipients *prima facie* better off than they would otherwise be.⁶⁷ Treating the relevant benchmark as the marketplace for financial services involving the provision of funds, Australia submits that this is such an instance. The terms of a commercial loan, for an entity otherwise unable to discharge its debts, could never, Australia submits, match a government grant, given free of any repayment obligations.

73. Where a measure involves a government foregoing tax revenue via a waiver or remission, as the DFIA scheme does, the comparison is simpler still. Here, the government foregoes revenue from the standard customs duty that mills would otherwise owe it. The recipient mills are better off because imported raw sugar costs them less and they are free to use the money saved as they choose.⁶⁸

74. India also argues that having claimed its sugar market is heavily distorted, the complainants must identify a separate, undistorted market against which to test whether India's export subsidies confer a competitive advantage.⁶⁹

⁶⁴ See, e.g., *EC and certain member states – Large Civil Aircraft*, para. 7.1499, where the panel found that "in the particular context of a financial contribution in the form of a loan, a benefit will be conferred whenever it is granted to a recipient on terms more favourable than those available to the recipient in the market"; and Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 643, where the Appellate Body suggested that where the measure in question involved investment in research and development, a comparison with evidence submitted by the parties regarding how research transactions between market actors are structured would have been appropriate.

⁶⁵ Australia's first written submission, para. 269, cited by India in its second written submission, footnote 69 to para. 92; Australia's second written submission, para. 110; Guatemala's opening statement at the first substantive meeting, para. 4.18, cited by India in its second written submission, footnote 69 to para. 92.

⁶⁶ India's second written submission, para. 91.

⁶⁷ India's second written submission, paras. 92–94. See also, *EC and certain member states – Large Civil Aircraft*, para. 7.1501; Australia's first written submission, para. 400; Australia's second written submission, para. 110.

⁶⁸ See, e.g., *Brazil – Taxation*, paras. 7.491 – 7.494, where the panel adopts this simple approach to comparing the situation of tax exemption or reduction beneficiaries to what it would have been had they been obliged to pay the taxes in question.

⁶⁹ India's second written submission, para. 96, drawing on the panel's reasoning in *Based on the panel's reasoning in Canada – Renewable Energy/Canada – Feed-in Tariff Program*.

75. Australia does not accept that the Agreement on Agriculture, the SCM Agreement, or the reasoning of previous panels or the Appellate Body require such an exercise in this context.

76. India draws on the panel's reasoning in *Canada – Renewable Energy/Canada – Feed-in Tariff Program* in developing its argument.⁷⁰ As Australia explained in its second written submission, the facts of that case do not resemble the present ones, and warrant a more complex market comparison.⁷¹

77. Here we are dealing with government grants proffered in exchange for no consideration. This funding confers a debt reprieve or financial windfall that the market for financial services would never provide on comparable terms, and leaves sugar mills better off than they otherwise would be.

78. I will turn now to India's final argument on the issue of "benefit". India claims that having characterised the challenged measures as grants, the complainants must produce evidence of actual payments, because a "benefit" does not exist in the abstract but must be received and enjoyed by a beneficiary or a recipient."⁷²

79. Australia accepts that in certain circumstances, a commitment to make financial resources available may confer no immediate benefit.⁷³

80. A legislative commitment to make funds available, subject to the fulfilment of export obligations, is not such a circumstance.⁷⁴

C. INDIA ACKNOWLEDGES THAT THE PURPOSE OF THE MAEQ SCHEME IS TO RELIEVE MILLS OF CANE ARREARS

81. I now turn to Australia's arguments regarding India's MAEQ scheme, which I will not restate at length.

⁷⁰ India's second written submission, para. 95, citing Panel Report, *Canada – Renewable Energy/Canada Feed-in Tariff Program*, paras. 7.273–7.274.

⁷¹ Australia's second written submission, para. 111.

⁷² Appellate Body report, *Canada – Aircraft*, para. 154; India's second written submission, para. 73.

⁷³ As India has observed, the panel in *EC and certain member states – Large Civil Aircraft* (para. 7.1502) determined as much with respect to one of the many challenged measures (a commitment to provide research and development funds in the future) in that dispute.

⁷⁴ Australia's response to Panel question 59, para. 78; Brazil's response to Panel question 59, para. 75 and footnote 105; See also, United States' third party submission, para. 53, citing *Canada – Aircraft*, para. 9.124; Japan's third party submission, para. 9.

82. Australia is not obliged to show that the scheme is not a subsidy of the kind identified in Articles 9.1(d) or (e).⁷⁵ We note, however, the significant evidence that the scheme does not enjoy the protections of those Articles.⁷⁶

83. The MAEQ scheme does not serve any of the purposes identified in Articles 9.1(d) or (e).⁷⁷ Nor is there any relationship between MAEQ lump sums and actual costs of the types identified in those Articles.

84. The available evidence regarding the MAEQ scheme's design, structure and operation points to its purpose being to help relieve mills of debts to cane farmers.⁷⁸

85. India acknowledges this in its second written submission, insisting, incorrectly, that, "merely because the recipients are to use the funds for a specific purpose does not diminish the fact that the funds are in fact provided in lieu of marketing and transport costs."⁷⁹

86. In light of this acknowledgement and the scant evidence of any connection between payments under the MAEQ scheme and actual costs, there is no basis upon which to conclude that the scheme falls within either of the Articles 9.1(d) or (e).

D. INDIA HAS CONFIRMED AUSTRALIA'S UNDERSTANDING OF HOW THE DFIA SCHEME WORKS AND THE SCHEME DOES NOT FALL WITHIN FOOTNOTE 1 OF THE SCM AGREEMENT

87. I will now turn to India's DFIA scheme. Australia maintains that the scheme does not fall within footnote 1 to the SCM Agreement. Footnote 1 applies to situations involving the use of imported inputs in exported products.⁸⁰ The DFIA scheme operates in reverse to the sequencing logic of footnote 1.

88. As Australia will explain in its responses to the Panel's questions 23 to 27, the scheme operates post-export, waiving duties on future raw sugar imports that cannot qualify as

⁷⁵ Australia's second written submission, para. 124 and footnote 186.

⁷⁶ Australia's second written submission, para. 124 and footnote 186.

⁷⁷ Australia's second written submission, paras. 124–125, footnote 186.

⁷⁸ Australia's second written submission, paras. 124–125, footnotes 187, 188.

⁷⁹ India's second written submission, para. 104.

⁸⁰ Australia's second written submission, para. 218.

"inputs" physically incorporated, or present in, the white sugar exports upon which eligibility for duty waivers depends.

89. India has confirmed the sequence in which the scheme operates, agreeing, in particular, that it applies to "future raw sugar".⁸¹ Nonetheless, India also insists that DFIA is available for "only the specific inputs actually consumed in the export product".⁸²

90. The operation of the DFIA scheme, confirmed by India, is fundamentally inconsistent with the sequencing of footnote 1 to the SCM Agreement.

E. INDIA IS SUBJECT TO THE SCM AGREEMENT'S EXPORT SUBSIDY PROHIBITION AND THE EXEMPTION UPON WHICH IT RELIES HAS EXPIRED

91. Finally, I want to touch very briefly on India's sustained insistence that it continues to be exempt from the SCM Agreement's export subsidies prohibition.⁸³

92. Australia has rebutted comprehensively India's argument that, pursuant to Article 27.2 and Annex VII of the SCM Agreement, it is still within a flexible export subsidy phase out period.⁸⁴

93. India has not developed further the arguments regarding Article 27.2 that the panel rejected comprehensively in *India – Export Related Measures*.⁸⁵

94. Australia maintains that the eight-year export phase-out period referred to in Article 27.2(b) of the SCM Agreement has expired. This, together with the fact that India has graduated from Annex VII(b), mean it is subject to the prohibition on export subsidies in Article 3.1(a) of the SCM Agreement.

F. CONCLUSION

95. In sum, India's production and buffer stock subsidies, and its MAEQ and DFIA schemes, are export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture and Article 3.1(a) of the SCM Agreement. We urge the Panel to reject the

⁸¹ India's second written submission, para. 109.

⁸² India's second written submission, para. 109.

⁸³ SCM Agreement, articles 3.1(a) and 3.2; India's second written submission, paras. 65–66.

⁸⁴ Australia's second written submission, paras. 170–200. *See also*, Guatemala's second written submission, paras. 114–130.

⁸⁵ *India – Export Related Measures*, paras. 7.39–7.74. *See also*, Australia's second written submission, para. 184.

inaccurate factual assertions and flawed legal reasoning with which India seeks to defend its measures and, consequently, to find India in violation of its obligations under both agreements.

IV. INDIA HAS BREACHED ITS OBLIGATIONS TO NOTIFY ITS DOMESTIC SUPPORT AND EXPORT SUBSIDIES

96. I turn now to Australia's claim that India has breached its obligation to notify the WTO Membership of the measures Australia challenges in this dispute.

97. Transparency is a fundamental element of the multilateral trading system. It supports the predictability of the trading environment for all stakeholders. In the WTO, notifications are an essential mechanism to ensure transparency and facilitate monitoring of compliance with Members' WTO obligations.⁸⁶

98. Australia has established that India maintains domestic support for sugarcane producers and export subsidies for sugar.

99. Australia has also established that India has not notified its domestic support to sugarcane since its 1995–96 notification, or its export subsidies for sugar since its notification of 2009–10.⁸⁷ Put simply, India has not been transparent about its support to its sugar sector and has offered no explanation for its protracted failure to notify these measures.

100. India does not dispute its notification obligations pursuant to Article 25 of the SCM Agreement or Article XVI of the General Agreement on Tariffs and Trade 1994, but instead argues that its measures do not fall within the meaning of "subsidy" under the SCM Agreement.⁸⁸ Accordingly, should the Panel find that India does provide export subsidies, the Panel should also find that India has breached its obligation to notify those subsidies.

101. In defence of its failure to meet its obligations pursuant to Article 18 of the Agreement on Agriculture, India argues that this Article does not place any obligations on Members because "the Committee on Agriculture has chosen to frame the requirements on notifications on Members in hortatory terms...".⁸⁹ India bases this argument on the document

⁸⁶ Australia's first written submission, para. 434. See also, Canada's third party executive summary, para. 21.

⁸⁷ Australia's first written submission, paras. 451 and 454; Australia's second written submission, para. 234.

⁸⁸ India's second written submission, para. 112.

⁸⁹ India's first written submission para. 158; India's second written submission, para. 113.

G/AG/2, which sets out the notification requirements and formats, as adopted by the Committee on Agriculture on 30 June 1995.

102. As Australia has observed previously, that Committee document is an instrument of less-than-treaty status.⁹⁰ Its use of hortatory language is therefore unsurprising.⁹¹ That document has no bearing on the core obligation to notify certain support and measures, which is set out clearly in the text of the Agreement on Agriculture.

103. The Committee on Agriculture does not have the authority to diminish the status of notification obligations under the Agreement on Agriculture. Australia restates that, pursuant to Article 18 of the Agreement on Agriculture, India is required to notify its domestic support and export subsidies to the other Members through its Committee on Agriculture notifications.⁹²

104. The use of the imperative "shall" in Articles 18.1 to 18.3 makes clear that those Articles impose mandatory obligations on Members to notify the Committee on Agriculture of relevant measures so that it can fulfil its function.⁹³

105. India's blatant non-compliance with its notification obligations under the Agreement on Agriculture limits the ability of other Members, including Australia, to monitor its measures. And it impedes the Committee on Agriculture's ability to review "[p]rogress in the implementation of commitments negotiated under the Uruguay Round reform programme".⁹⁴

V. CONCLUSION

106. To conclude, Australia again requests the Panel to find that India maintains domestic support to sugarcane producers in violation of Article 7.2(b) of the Agreement on Agriculture, and export subsidies for sugar inconsistent with Articles 3.3 and 8 of that Agreement and Articles 3.1(a) and 3.2 of the SCM Agreement. In accordance with those findings, we ask the Panel to recommend India bring its measures into conformity with those agreements.

⁹⁰ Australia's response to Panel question 44(b), para. 143.

⁹¹ Australia's response to Panel question 44(b), para. 140.

⁹² Australia's first written submission, para. 437–443; Australia's response to Panel question 44(b), para. 141; Australia's second written submission, para. 223. *See also*, Canada's third party submission, paras. 43–51.

⁹³ Australia's second written submission, para. 226. *See also*, Canada's third party submission, paras. 44–46.

⁹⁴ Agreement on Agriculture, Article 18.1. *See also*, Canada's third party executive summary, para. 30.

107. Australia also requests the Panel to find that India is obliged to notify its domestic support and its export subsidy measures, that India has not done so and to recommend that India bring itself into compliance by making those notifications.

108. Consistent with Australia's commitment to transparency in WTO dispute settlement proceedings, we will publish this opening statement on the website of Australia's Department of Foreign Affairs and Trade, as we did with our opening statement at the first substantive meeting.

109. I would like to thank the Panel and the Secretariat staff for your work to resolve these disputes. We look forward to the remainder of the proceedings this week and to answering your questions.

110. Thank you.