

Before the World Trade Organization
Panel Proceedings

INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

(DS580)

AUSTRALIA'S SECOND WRITTEN SUBMISSION

11 February 2021

TABLE OF CONTENTS

TABLE OF CASES.....	5
LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS	7
LIST OF JOINT EXHIBITS	8
LIST OF AUSTRALIA'S EXHIBITS	9
I. INTRODUCTION	10
II. INDIA'S DOMESTIC SUPPORT IN FAVOUR OF SUGARCANE PRODUCERS VIOLATES ITS OBLIGATIONS UNDER THE AGREEMENT ON AGRICULTURE.....	12
A. THERE ARE NO SIGNIFICANT FACTS IN DISPUTE WITH RESPECT TO AUSTRALIA'S DOMESTIC SUPPORT CLAIMS	13
1. Measures included in Australia's domestic support calculations	13
<u>(a) Market price support: the FRP and SAPs</u>	<u>14</u>
<u>(b) Non-exempt direct payments and other non-exempt policies: the three state programmes.....</u>	<u>15</u>
2. Measures not included in Australia's domestic support calculations: budgetary payments made to maintain the "gap"	15
B. INDIA'S FRP AND SAP MEASURES CONSTITUTE MARKET PRICE SUPPORT	16
1. The meaning of "market price support" in the Agreement on Agriculture	17
<u>(a) Ordinary meaning</u>	<u>17</u>
<u>(b) Context.....</u>	<u>20</u>
<u>(c) Object and purpose</u>	<u>22</u>
<u>(d) Conclusion.....</u>	<u>23</u>
2. The Panel should reject India's reasoning in support of its misinterpretation of "market price support"	24
<u>(a) India's interpretation of paragraphs 1 and 2 of Annex 3 is incorrect... </u>	<u>24</u>
<u>(b) Paragraph 8 of Annex 3 is not limited to offering a calculation methodology for market price support.....</u>	<u>27</u>
<u>(c) Paragraph 8 does not distinguish between the price paid for a product and so-called "transactional costs"</u>	<u>28</u>
<u>(d) Previous panel reports are relevant and support Australia's arguments</u>	<u>29</u>
C. CONCLUSION	32
III. INDIA'S EXPORT SUBSIDIES FOR SUGAR ARE INCONSISTENT WITH ITS OBLIGATIONS UNDER THE AGREEMENT ON AGRICULTURE AND THE SCM AGREEMENT	33

A.	INDIA PROVIDES "DIRECT SUBSIDIES" THAT ARE "CONTINGENT ON EXPORT PERFORMANCE" WITHIN THE MEANING OF ARTICLE 9.1(A) OF THE AGREEMENT ON AGRICULTURE.....	33
1.	Legal standard applicable under Article 9.1(a).....	34
2.	India's production subsidies, buffer stock subsidies and its MAEQ and DFIA schemes are Article 9.1(a) subsidies.....	35
3.	The Panel should reject India's misinterpretation of the legal standard applicable for establishing the existence of "direct subsidies" within the meaning of Article 9.1(a)	36
	<u>(a) There "is" a financial contribution</u>	<u>37</u>
	<u>(b) Benefit.....</u>	<u>38</u>
	<u>(c) Australia has provided evidence of actual disbursements under India's export subsidies</u>	<u>39</u>
	<u>(d) Footnote 1 of the SCM Agreement is not relevant to Australia's export subsidy claims under the Agreement on Agriculture</u>	<u>40</u>
B.	INDIA HAS NOT ESTABLISHED A DEFENCE UNDER ARTICLE 9.4 OF THE AGREEMENT ON AGRICULTURE IN RELATION TO THE MAEQ SCHEME	40
1.	Burden of proof.....	41
2.	Legal standards applicable under Articles 9.1(d) and (e)	42
3.	India has failed to prove that the MAEQ scheme meets the legal standards applicable under Articles 9.1(d) and (e).....	42
	<u>(a) The Panel should reject India's selective reading of the legal instrument notifying the MAEQ scheme</u>	<u>43</u>
	<u>(b) The Panel should reject India's arguments regarding the MAEQ scheme's design, structure and operation</u>	<u>45</u>
	<i>i. India's "liquidity" argument does not support its assertion that the MAEQ scheme satisfies the legal standards applicable under Articles 9.1(d) and (e).....</i>	<i>45</i>
	<i>ii. The evidence of India's stakeholder consultation is deficient.....</i>	<i>46</i>
	<i>iii. The MAEQ scheme is not designed to ensure the assistance does not exceed actual costs incurred by sugar mills.....</i>	<i>48</i>
C.	THE PROHIBITION UNDER ARTICLE 3.1(A) OF THE SCM AGREEMENT APPLIES TO INDIA.....	54
1.	The correct interpretation of Article 27 and Annex VII of the SCM Agreement	54
2.	The Panel should reject India's misinterpretation of Article 27 and Annex VII of the SCM Agreement	55
	<u>(a) Ordinary meaning of Article 27.2(b)</u>	<u>56</u>
	<u>(b) The panel's reasoning in India – Export Related Measures is relevant</u>	<u>57</u>

(c)	<u>An ordinary meaning interpretation does not render other parts of the SCM Agreement ineffective</u>	57
(d)	<u>The ordinary meaning of Article 27.2(b) is consistent with the SCM Agreement's object and purpose</u>	60
(e)	<u>The SCM Agreement provides avenues for developing countries seeking further flexibility</u>	61
D.	INDIA'S EXPORT SUBSIDIES ARE PROHIBITED UNDER ARTICLE 3.1(A) OF THE SCM AGREEMENT	62
1.	The Panel should reject India's misinterpretation of the legal standard applicable for establishing the existence of a subsidy under Article 1.1 .	62
2.	The DFIA scheme does not fall within footnote 1 of the SCM Agreement	63
E.	CONCLUSION	66
IV.	INDIA HAS FAILED TO NOTIFY ITS DOMESTIC SUPPORT IN FAVOUR OF SUGARCANE PRODUCERS AND EXPORT SUBSIDIES FOR SUGAR IN BREACH OF ITS WTO OBLIGATIONS	66
A.	INDIA'S NOTIFICATION OBLIGATIONS UNDER THE AGREEMENT ON AGRICULTURE, THE SCM AGREEMENT AND THE GATT 1994	66
1.	Agreement on Agriculture	66
(a)	<u>The Panel should reject India's misinterpretation of Article 18 of the Agreement on Agriculture</u>	<u>67</u>
2.	SCM Agreement	68
3.	GATT 1994.....	68
B.	INDIA HAS BREACHED ITS NOTIFICATION OBLIGATIONS BY FAILING TO NOTIFY ITS DOMESTIC SUPPORT IN FAVOUR OF SUGARCANE PRODUCERS AND ITS EXPORT SUBSIDIES FOR SUGAR	68
V.	CONCLUSION	69
ANNEX A	REVISED TABLES 10, 12, 13, 15, 18, 22, 23 AND 24 OF AUSTRALIA'S FIRST WRITTEN SUBMISSION	71

TABLE OF CASES

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
<i>Argentina – Textiles and Apparel</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
<i>China – Agricultural Producers</i>	Panel Report, <i>China – Domestic Support for Agricultural Producers</i> , WT/DS511/R and Add.1, adopted 26 April 2019
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/RW and Add.1, adopted 28 May 2018, as modified by Appellate Body Report WT/DS316/AB/RW, DSR 2018:VI, p. 2519
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>India – Export Related Measures</i>	Panel Report, <i>India – Export Related Measures</i> , WT/DS541/R and Add.1, circulated to WTO Members 31 October 2019 [appealed by India 19 November 2019]
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97

Short Title	Full Case Title and Citation
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Various Measures on Beef</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, p. 59
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
<i>Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines</i> , WT/DS371/RW2 and Add.1, circulated to WTO Members 12 July 2019 [appealed by Thailand 9 September 2019]
<i>Turkey – Textiles</i>	Panel Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, p. 2363
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<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 – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3

Short Title	Full Case Title and Citation
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
AMS	Aggregate Measurement of Support
AAP	Applied Administered Price
CIF	Cost, Insurance and Freight
DFIA	Duty Free Import Authorisation
DFPD	Department of Food and Public Distribution
EXW	Ex Works
FERP	Fixed External Reference Price
FOB	Free on Board
FRP	Fair and Remunerative Price
GATT 1994	General Agreement on Tariffs and Trade 1994
ICC	International Chamber of Commerce
MAEQ	Maximum Admissible Export Quantities
MIEQ	Minimum Indicative Export Quota
MPS	Market Price Support
mT	metric tonne
SAP	State Advised Price
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Vienna Convention	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

LIST OF JOINT EXHIBITS

Exhibit No.	Exhibit Name
JE-154	Chairman's note on options in the agricultural negotiations, MTN.GNG/AG/W/1, 24 June 1991
JE-155	Oxford English Dictionary, OED Online, "both, pron., adv., and adj."
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, 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	Green Pool Commodity Specialists, Consultancy Report, February 2021
JE-165 Appendix 1	Appendix 1: Example screen shot of FOIS online interface
JE-165 Appendix 2	Appendix 2: Nira to JNPT
JE-165 Appendix 3	Appendix 3: Takari to JNPT
JE-165 Appendix 4	Appendix 4: Pandharpur to JNPT
JE-165 Appendix 5	Appendix 5: Latur to JNPT
JE-165 Appendix 6	Appendix 6: SaiNagar to JNPT
JE-165 Appendix 7	Appendix 7: Baramati to JNPT
JE-165 Appendix 8	Appendix 8: Baramati to Ratnagiri
JE-165 Appendix 9	Appendix 9: Kolhapur to JNPT

Exhibit No.	Exhibit Name
JE-165 Appendix 10	Appendix 10: Kolhapur to Ratnagiri
JE-165 Appendix 11	Appendix 11: Nira to Ratnagiri
JE-165 Appendix 12	Appendix 12: Pandharpur to Ratnagiri
JE-165 Appendix 13	Appendix 13: Pune to Ratnagiri
JE-165 Appendix 14	Appendix 14: Pune to JNPT
JE-165 Appendix 15	Appendix 15: Sainagar to Ratnagiri
JE-165 Appendix 16	Appendix 16: Sangli to Ratnagiri
JE-165 Appendix 17	Appendix 17: Sangli to JNPT
JE-165 Appendix 18	Appendix 18: Vaibhavwadi Rd to JNPT
JE-165 Appendix 19	Appendix 19: Vaibhavwadi Rd to Ratnagiri
JE-165 Appendix 20	Appendix 20: Takari to Ratnagiri
JE-165 Appendix 21	Appendix 21: Latur to Ratnagiri
JE-166	Fundoodata, Top 10 Sugar Companies in India

LIST OF AUSTRALIA'S EXHIBITS

Exhibit No.	Exhibit Name
AUS-102	Hindu Business Line, "Govt allows export of 2 million tonnes of sugar", 29 March 2018

I. INTRODUCTION

1. This submission presents Australia's rebuttal to the arguments advanced by India in its first written submission, at the first substantive meeting and in its answers to the Panel's questions both before and after the first substantive meeting. It builds on Australia's earlier submissions, including the rebuttal of India's arguments contained in those submissions.

2. Australia has established that India maintains domestic support for sugarcane producers and export subsidies for sugar contrary to its obligations pursuant to the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Further, Australia has shown that India has breached its obligations under those Agreements (or, in the alternative, under the General Agreement on Tariffs and Trade 1994 (GATT 1994)) by failing to notify the WTO Membership of its measures relating to sugarcane and sugar.

3. For the reasons outlined in this submission, Australia requests the Panel find that India has not provided any legal or factual basis to rebut Australia's *prima facie* case in this dispute. In the main, India has responded to Australia's claims with a collection of unpersuasive legal arguments based on clear misinterpretations of the relevant provisions. Unsurprisingly, none of the third parties that have made submissions in this dispute support India's legal reasoning.

4. As Australia will discuss in Section II, there are no significant factual matters in dispute with respect to Australia's domestic support claims. Contrary to India's contention, market price support under the Agreement on Agriculture is not limited to government procurement of a basic agricultural product at the applied administered price (AAP). Thus, the Fair and Remunerative Price (FRP) and State Advised Price (SAP) measures are market price support and properly included in Australia's calculations of India's domestic support for sugarcane producers.

5. In Section III, Australia rebuts, as outlined below, India's arguments in defence of its export subsidies:

- First, India's argument – in relation to its production and buffer stock subsidies, and the Maximum Admissible Export Quantities (MAEQ) scheme – that Australia has not established the existence of a subsidy rests on a misinterpretation of the legal standard applicable under Article 9.1(a) of the Agreement on Agriculture and Article 1.1 of the SCM Agreement.
- Second, India has failed to substantiate its assertion that the MAEQ scheme is an export subsidy of a kind covered by Articles 9.1(d) and (e) and therefore permitted under Article 9.4.
- Third, India's insistence that it is exempt from the prohibition on export subsidies under Article 3.1(a) of the SCM Agreement, by virtue of Article 27.2(b) and Annex VII, rests on a flawed interpretation of the relevant Articles. India's argument is inconsistent with customary rules of treaty interpretation.
- Lastly, India's claim that the Duty Free Import Authorisation (DFIA) scheme is not an export subsidy because it falls within the carve out created by footnote 1 to the SCM Agreement is not supported by the facts, as the measure provides a customs duty exemption on raw sugar that is not physically incorporated into exported white sugar.

6. Next, in Section IV, Australia addresses India's attempt to diminish its legal obligations under the Agreement on Agriculture to notify the Membership of its domestic support to sugarcane and export subsidies for sugar. India ignores the mandatory language used in Article 18 and seeks to rely on hortatory language used in a less-than-treaty level instrument. India does not contest that it has failed to notify its measures, or the binding nature of its notification obligations pursuant to Article 25 of the SCM Agreement and Article XVI:1 of the GATT 1994.

7. Finally, in Section V, Australia concludes by requesting the Panel to resolve this dispute by making the findings and recommendations Australia seeks.

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

8. Australia has established that India's non-exempt domestic support in favour of sugarcane producers violates its commitment under the Agreement on Agriculture not to provide support in excess of the *de minimis* level of 10 per cent of the value of production.

9. Australia recalls that, at the first substantive meeting, it submitted updated calculations of India's domestic support to sugarcane in the 2014–15 to 2018–19 sugar seasons, reflecting the latest official Indian data on value of production.¹ As illustrated in Table 1 (Revised), India's non-exempt domestic support to sugarcane exceeded 100 per cent of the value of production in each of the sugar seasons from 2014–15 to 2018–19. Australia has also updated other tables originally presented in its first written submission to reflect the revised calculations submitted at the first substantive meeting.² These tables are set out in Annex A to this submission.

TABLE 1 (Revised) – Product-specific domestic support for sugarcane as a percentage of value of production³

Sugar Season	Product-specific Aggregate Measurement of Support (AMS) (INR millions)	Value of production (INR millions)	Product-specific AMS as percentage of value of production ⁴
	A	B	C=(A/B)
2014–15	903,817.21	784,330.00	115%
2015–16	880,484.37	746,600.00	118%
2016–17	815,049.84	724,410.00	113%
2017–18	1,076,850.41	989,670.00	109%
2018–19	1,147,868.60	1,055,920.00	109%

10. India does not dispute its domestic support commitment made pursuant to Article 7.2(b) of the Agreement on Agriculture. India agrees with Australia⁵ that, as a developing country Member with no Total Aggregate Measurement of Support (AMS)

¹ Australia's opening statement at the first substantive meeting, para. 19.

² Australia's domestic support calculations, Microsoft Excel workbooks, Revision 2 (**Exhibit AUS-1 (Revision 2)**).

³ This Table 1 replaces the Table 1 revised by Australia's response to Panel question 28(d), para. 89, as originally presented in Australia's first written submission, para. 13. *See also*, Australia's domestic support calculations, Microsoft Excel workbooks, Revision 2 (**Exhibit AUS-1 (Revision 2)**).

⁴ Figures in this column have been rounded to the nearest percentage.

⁵ Australia's first written submission, paras. 107–108 and 110.

commitment in Part IV of its Schedule, India must not provide non-exempt domestic support in excess of *de minimis*.⁶

11. Further, with one inconsequential exception relating to a measure that maintains the "gap", India does not dispute the facts established by Australia, the data used in Australia's domestic support calculations, or Australia's calculation methodology – all of which underpin Australia's domestic support claims.

12. India's sole defence is its claim that the FRP and SAP measures do not "qualify" as market price support and "the complainants have failed to demonstrate as to how the support under... [the three state] programs taken together exceeds the *de minimis* level".⁷ According to India, "market price support only exists where the government or its agent pays the administered price and procures the product."⁸

13. Australia submits that India's defence should fail. It is inconsistent with a proper interpretation of the relevant provisions of the Agreement on Agriculture and relies on flawed reasoning.

A. THERE ARE NO SIGNIFICANT FACTS IN DISPUTE WITH RESPECT TO AUSTRALIA'S DOMESTIC SUPPORT CLAIMS

14. Australia (with Brazil and Guatemala) has submitted substantial and compelling evidence of India's domestic support measures, including the FRP, the SAPs, the three state programmes,⁹ and the measures directed principally at maintaining the gap between the Fixed External Reference Price (FERP) and the AAP.

1. Measures included in Australia's domestic support calculations

15. Beginning with the measures included in Australia's domestic support calculations, in view of the Panel's preliminary ruling of 9 November 2020, there are no contested facts that the Panel need determine in order to accept Australia's calculations of India's AMS in the

⁶ India's first written submission, paras. 54 and 57; India's response to Panel question 15(a), p. 13 and question 46, p. 4.

⁷ India's first written submission, para. 51. *See also*, India's opening statement at the first substantive meeting, paras. 8 and 11.

⁸ India's response to Panel question 18(c), p. 14.

⁹ The three State programmes are the Andhra Pradesh purchase tax remittance, the Karnataka incentive price payment and the Tamil Nadu production incentive payment: Australia's first written submission, paras. 189–203.

relevant sugar seasons. Further, India does not dispute the Indian government data¹⁰ on which the calculations are based, or the calculation methodology.

16. Yet India denies "any suggested admission of facts and/or legal claims that India has not expressly and specifically admitted".¹¹ However, India simply has not met its burden to rebut Australia's *prima facie* case.¹² Australia notes that India has had ample opportunity to dispute the facts and the domestic support calculations. Despite being invited by the Panel to elaborate any objections to the calculations and the data used in them, India elects to just reiterate its argument that the FRP and SAP measures are not market price support.¹³

(a) Market price support: the FRP and SAPs

17. With respect to India's market price support, India agrees that it continues to set the FRP and has not contested the floor prices established by that measure in any of the relevant sugar seasons.¹⁴

18. Of the six states that Australia claims maintain or have maintained a SAP, India agrees that four of those states (Haryana, Punjab, Uttarakhand and Uttar Pradesh) set a SAP.¹⁵ India also does not dispute that these four states applied SAPs during the five sugar seasons for which Australia has presented calculations of India's AMS.¹⁶

19. With respect to the fifth state, India does not dispute that Tamil Nadu did – in some previous sugar seasons – set a SAP, as reflected in Australia's calculations and supported by the evidence. In fact, by claiming that Tamil Nadu's SAPs in some previous sugar seasons have "expired", India has admitted that Tamil Nadu did set SAPs in those seasons.¹⁷

¹⁰ For example, total and state-wise sugar production, and the value of production: Australia's domestic support calculations, Microsoft Excel workbooks, Revision 2 (**Exhibit AUS-1 (Revision 2)**).

¹¹ India's closing statement at the first substantive meeting, para. 5.

¹² Australia has adduced sufficient evidence regarding India's domestic support measures to raise a presumption that what is claimed is true. India has failed to adduce sufficient evidence to rebut this presumption. See Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

¹³ India's response to Panel question 45, p. 4. See also, India's response to Panel question 25(b), p. 18.

¹⁴ India's first written submission, paras. 16–18, 41.

¹⁵ India's first written submission, paras. 29–30.

¹⁶ India's first written submission, paras. 29–30, 42(v), 42(vi) and 42(viii).

¹⁷ India's first written submission, para. 42(vii).

20. Finally, India does not dispute that Bihar set a SAP in each of the sugar seasons included in Australia's domestic support calculations.¹⁸

(b) Non-exempt direct payments and other non-exempt policies: the three state programmes

21. Australia recalls that it modified its original claims regarding the amounts disbursed for the Andhra Pradesh purchase tax remittance scheme during the 2016–17 sugar season.¹⁹ There is now no dispute between the parties regarding the existence of the three state programmes in the relevant seasons or the budgetary outlays made in connection with them. India does not contest that these measures are non-exempt direct payments or other non-exempt policies that may be added to the AMS calculation.²⁰ Further, India agrees that the domestic support provided through both non-exempt direct payments and other non-exempt measures may be calculated using budgetary outlays pursuant to Annex 3 of the Agreement on Agriculture.²¹

2. Measures not included in Australia's domestic support calculations: budgetary payments made to maintain the "gap"

22. Turning to Australia's claims regarding India's measures that maintain the "gap",²² with one minor exception, India does not dispute the existence or nature of these measures. Nor has India argued that any of the measures are exempt.

23. India contends that the purchase tax remission schemes applied by certain states have been discontinued with effect from 14 November 2018.²³ This contention is of relevance only to Australia's claim that Telangana maintained such a scheme in the 2018–19 sugar season.²⁴ The Panel may consider it necessary to make a factual finding regarding the

¹⁸ India argues that Bihar "no longer sets an SAP": India's first written submission, para. 30. *See also*, India's response to Panel question 6, p. 8. Australia disagrees: see Australia's comments on India's request for a preliminary ruling, para. 49. *See also*, Australia's first written submission, paras. 48–49, including Table 4 and the exhibits cited therein; Australia's opening statement at the first substantive meeting, para. 27.

¹⁹ Australia's response to Panel question 28(d), paras. 87–91.

²⁰ India's response to Panel question 25(a), pp. 17–18.

²¹ India's response to Panel question 49, pp. 6–7.

²² Australia's first written submission, paras. 181–187; Australia's response to Panel question 20, paras. 46–52; Australia's opening statement at the first substantive meeting, paras. 30–32.

²³ India's first written submission, para. 43.

²⁴ Australia considers that the purchase tax remission schemes in four states constitute non-exempt measures involving payments to maintain the sugarcane price "gap" during the sugar seasons identified in paragraph 183 of Australia's first

Telangana scheme, or it may opt to exercise judicial economy. Either way, this will have no bearing on Australia's domestic support calculations because, consistent with paragraph 8 of Annex 3 of the Agreement on Agriculture, Australia has not included in its calculations the measures involving payments made to maintain the "gap".

B. INDIA'S FRP AND SAP MEASURES CONSTITUTE MARKET PRICE SUPPORT

24. India's defence of its FRP and SAP measures rests on its contention that market price support must, in all cases, be provided by the government (or its agents) purchasing the basic agricultural product at the AAP. If that argument fails, so too does India's defence of those measures.

25. To support its misinterpretation of market price support, India has put forward flawed reasoning, which may be summarised as follows:

- Paragraphs 1 and 2 of Annex 3 limit market price support to subsidies in the form of budgetary outlays or revenue foregone by a government or its agents.²⁵
- "[W]hen a market price support can be said to exist" is a different question to "how to calculate or measure a market price support".²⁶ "Article 6 read with paragraph 1 and paragraph 2 of Annex 3 identifies the scope of domestic support [including market price support] that goes into the calculation of AMS"²⁷ while paragraph 8 stipulates only how to calculate market price support.²⁸

written submission. Of those schemes, Australia has presented evidence that Telangana's scheme existed in the 2018–19 sugar season. *See also*, Australia's first written submission, paras. 184–186.

²⁵ India's first written submission, paras. 60–65; India's response to Panel question 18(a), p. 14 and question 18(c), p. 14; India's opening statement at the first substantive meeting, para. 9; India's closing statement at the first substantive meeting, paras. 24–28.

²⁶ India's closing statement at the first substantive meeting, para. 14 (emphasis added). *See also*, India's response to Panel question 48(b), p. 5.

²⁷ India's closing statement at the first substantive meeting, para. 13. *See also*, paras. 17–18.

²⁸ India's closing statement at the first substantive meeting, paras. 14 and 16. *See also*, para. 18.

- Paragraph 8, second sentence, distinguishes between the cost "for the products" and "additional costs", which may include "transactional costs".²⁹ Budgetary payments for these "costs associated with implementing an applied administered price"³⁰ are excluded.
- Previous panel reports relied upon by Australia "are either not applicable or do not support the view of the complainants."³¹

26. Australia first outlines the proper interpretation of "market price support" in the Agreement on Agriculture and then explains why the Panel should reject India's argument and each of its lines of reasoning.

1. The meaning of "market price support" in the Agreement on Agriculture

27. Consistent with Article 31(1) of the Vienna Convention on the Law of Treaties (Vienna Convention), "market price support" must be interpreted in accordance with its ordinary meaning, read in context, and in light of the Agreement on Agriculture's object and purpose.³²

(a) Ordinary meaning

28. "Market price support" is not defined in Article 1 of the Agreement on Agriculture, which provides definitions for a range of terms that are used in the Agreement. Annex 4 of the Agreement on Agriculture states that market price support is "defined in Annex 3".³³ Indeed, apart from Annex 4, Annex 3 is the only other part of the Agreement that refers to "market price support".

29. Annex 3 stipulates the method for calculating in monetary terms a Member's non-exempt domestic support or AMS.³⁴ This is reflected in the title of Annex 3, which is "Domestic

²⁹ India's closing statement at the first substantive meeting, para. 31 (emphasis original).

³⁰ India's response to Panel question 48(a), p. 5.

³¹ India's first written submission, para. 67. *See also*, India's closing statement at the first substantive meeting, paras. 35–36.

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

³³ Agreement on Agriculture, Annex 4, para. 1.

³⁴ Australia's opening statement at the first substantive meeting, para. 42.

Support: Calculation of Aggregate Measurement of Support", and confirmed by Article 1(a)(ii).³⁵ Paragraphs 1 and 8 of Annex 3 both refer to "market price support".

30. Paragraph 1 of Annex 3 lists three kinds of product-specific domestic support – being market price support, non-exempt direct payments and other non-exempt policies – that constitute domestic support and, subject to Article 6, are to be included in the calculation of AMS, consistent with Article 7.2(a).³⁶ Other paragraphs in Annex 3 then stipulate how the value of each kind of support is to be calculated. For market price support, paragraph 8 applies.³⁷ Nothing in paragraph 1 limits market price support to the procurement of a basic agricultural product at the AAP by government or its agents.

31. Paragraph 8 of Annex 3 provides:

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

32. The first sentence of paragraph 8 sets out the formula for calculating the value of market price support to be included in the AMS. The components of the formula are:

- The FERP: a reference price for the basic agricultural product concerned from a base period (the years 1986–88 for original Members).³⁸
- An AAP: a price that is set, determined, made effective or brought to bear by administrative action (including regulatory action), rather than being determined by market forces. It need not be a price that is achieved by government expenditure and it need not involve budgetary payments or procurement.³⁹

³⁵ Article 1(a)(ii) of the Agreement on Agriculture provides that AMS is "calculated in accordance with the provisions of Annex 3 of this Agreement...".

³⁶ Australia's first written submission, para. 135; Australia's opening statement at the first substantive meeting, para. 42. See also, European Union's third party submission, para. 45; European Union's third party oral statement, para. 7.

³⁷ For non-exempt direct payments, paragraphs 10 and 12 apply. For other non-exempt policies or measures, paragraph 13 applies.

³⁸ Australia's first written submission, paras. 120–122.

³⁹ Australia's first written submission, paras. 118–119. See also, United States' third party submission, para. 15.

- The quantity of eligible production: the quantity or volume of production entitled, fit or able to receive the AAP – not the amount that actually receives the AAP.⁴⁰

33. Accordingly, 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.⁴¹ Paragraph 8, first sentence, does not stipulate or imply that the government or its agents must procure the product at the AAP. The European Union and the United States agree.⁴²

34. The second sentence of paragraph 8 provides that budgetary payments made to maintain the gap between the FERP and the AAP must not be included in the AMS.⁴³ Again, the plain words of this sentence do not limit market price support to situations in which the product is procured by the government (or its agents) at the AAP.⁴⁴

35. Thus, India's argument that such procurement is a "necessary element"⁴⁵ of market price support is incompatible with the ordinary meaning of paragraphs 1 and 8 of Annex 3 and attempts to read into the text a limitation that is not there.

36. Unsurprisingly, in its first written submission, India ignores paragraph 8 of Annex 3 in setting out the legal standard and in advancing its argument that the FRP and SAP measures do not "qualify"⁴⁶ as market price support under Annex 3.⁴⁷ India seeks to address this glaring omission in its argumentation by advancing two lines of reasoning with respect to paragraph 8. Neither is persuasive and Australia explains why the Panel should reject them in Sections II.B.2(b) and II.B.2(c) below.

⁴⁰ Australia's first written submission, paras. 123–130. *See also*, United States' third party submission, para. 15.

⁴¹ *See* United States' third party submission, para. 16; United States' third party executive summary, para. 15. Market price support may also exist in the absence of a FERP, in which case such support is calculated in accordance with the Agreement on Agriculture, Annex 4, para. 2. *See* paragraph 42 below.

⁴² European Union's third party submission, para. 51; United States' third party submission, para. 25.

⁴³ Australia's first written submission, paras. 113–115; Australia's opening statement at the first substantive meeting, para. 49.

⁴⁴ *See* Australia's response to Panel question 47, para. 5. *See also*, United States' third party submission, para. 25.

⁴⁵ India's first written submission, para. 63.

⁴⁶ India's first written submission, para. 51.

⁴⁷ India's first written submission, paras. 52–65.

(b) Context

37. Articles 6.1 and 6.2, paragraph 1 of Annex 2, and Annex 4 of the Agreement on Agriculture, as well as India's Schedule, each provide relevant context for interpreting "market price support" in this dispute. That context serves to reinforce the ordinary meaning of the terms of Annex 3 to the effect that government procurement of a product at the AAP is not a constituent element of "market price support" under the Agreement on Agriculture.

38. Australia recalls that paragraph 1 of Annex 3 is "[s]ubject to the provisions of Article 6".⁴⁸ Article 6.1 provides that a Member's domestic support commitments:

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 [6] and in Annex 2 to this Agreement.⁴⁹

39. Article 6.1, therefore, confirms that the only domestic support measures that are not subject to a Member's commitments are those that are exempt. As Australia has explained previously, the burden of showing that an exemption applies falls on India.⁵⁰ India has not made any arguments or adduced any evidence that the FRP and SAP measures (or any of the other domestic support measures challenged by Australia) are exempt under Articles 6.2 or 6.5, or under Annex 2.⁵¹ The practical effect of India's argument that market price support only exists if the government (or its agents) procures the product at the AAP would be to create a new category of exempt measures. This reading would be contrary to the text, negotiating history, and underlying structure of the domestic support disciplines in the Agreement on Agriculture.⁵²

⁴⁸ Agreement on Agriculture, Annex 3, para. 1. See paragraph 30 above.

⁴⁹ Agreement on Agriculture, Article 6.1 (emphasis added).

⁵⁰ Australia's response to Panel question 26(b), paras. 64–66.

⁵¹ Australia's response to Panel question 51, paras. 16–17.

⁵² The Agreement on Agriculture divides domestic support measures into four categories broadly reflecting their potential to distort trade. Measures exempt under Annex 2 are "green box"; measures exempt under Article 6.5 are "blue box"; and developing country Members can benefit from the exemptions under Article 6.2 (the "development box"). "The remaining domestic support measures fall into a less precisely defined residual category (often called the amber box) of interventions and subsidies...": David Orden, David Blandford and Tim Josling, "Introduction" in Orden, Blandford and Josling (eds.), *WTO Disciplines on Agricultural Support: Seeking a Fair Basis for Trade* (Cambridge University Press, 2011) (**Exhibit AUS-12**), pp. 4–5. See also, World Trade Organization, *The WTO Agreements Series: 3. Agriculture* (World Trade Organization, 2003) (**Exhibit AUS-13**), p. 13: "All domestic support measures in favour of agricultural producers that do not fit into any of the above exempt categories are subject to reduction commitments." This understanding is confirmed by the Agreement on Agriculture's negotiating history. The negotiators acknowledged that if the "green box" was defined – as ultimately occurred – "the residual is amber": Chairman's note on options in the agricultural negotiations, MTN.GNG/AG/W/1, 24 June 1991 (**Exhibit JE-154**), para. 9.

40. Article 6.2 also provides important context for the interpretation of "market price support". That Article indicates that both "direct" and "indirect" governmental measures of assistance are subject to domestic support reduction commitments unless they are exempt.⁵³ Domestic support need not be provided directly by government (or its agents) to producers but may also be achieved through indirect means, such as by regulating the price paid by consumers of a basic agricultural product. Thus, the Agreement on Agriculture recognises that governments may provide domestic support to producers indirectly, and such support is disciplined by the Agreement.

41. Paragraph 1 of Annex 2 provides that measures exempt from the reduction commitments pursuant to Annex 2 must not involve "transfers from consumers", among other criteria and conditions. The Agreement on Agriculture therefore contemplates that domestic support may be achieved through payments from consumers to producers. As the European Union has observed, "[t]his shows that financing by the government is not a requirement for a measure to constitute domestic support."⁵⁴

42. Annex 4 describes how to calculate an equivalent measurement of support when market price support exists but it "is not practicable"⁵⁵ to calculate that component of the AMS. The first alternative calculation methodology is to use the AAP and the quantity of eligible production.⁵⁶ If that alternative is not practicable, then the calculation is made using the "budgetary outlays used to maintain the producer price".⁵⁷ Accordingly, budgetary outlays may only be used to calculate the value of market price support when it is not practicable to use the formula in paragraph 8 of Annex 3 or the alternative methodology in paragraph 2 of Annex 4. Also, the budgetary outlays are not limited to those used for government procurement of the product – the outlays must simply be used to maintain the price. Annex 4, therefore, adds further weight to the argument that market price support may exist in the absence of budgetary outlays used to procure the product at the AAP.⁵⁸

⁵³ See Australia's response to Panel question 51, paras. 18–19. See also, Brazil's response to Panel question 51, para. 36; Guatemala's response to Panel question 51, para. 19.

⁵⁴ European Union's third party submission, para. 49. See also, Brazil's opening statement at the first substantive meeting, para. 26.

⁵⁵ Agreement on Agriculture, Annex 4, para. 1.

⁵⁶ Agreement on Agriculture, Annex 4, para. 2.

⁵⁷ Agreement on Agriculture, Annex 4, para. 2.

⁵⁸ See Brazil's opening statement at the first substantive meeting, paras. 19–21.

43. Finally, the tables of supporting material incorporated by reference in Part IV of India's Schedule confirm that India considered the Sugarcane (Control) Order 1966 in force during the base period established an AAP and constituted market price support.⁵⁹ That Order, which was amended in 2009 to introduce the FRP,⁶⁰ fixed the minimum price of sugarcane to be paid by all producers of sugar (the mills) to the producers of sugarcane (the farmers).⁶¹ Like the FRP, the floor price was paid by the mills, not by the Indian government.⁶²

44. India seeks to minimise the relevance of its supporting tables to the interpretation of its domestic support commitments.⁶³ Moreover, according to India:

[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.⁶⁴

45. Australia disagrees. Members' Schedules may provide relevant context for interpreting Members' legal obligations.⁶⁵ A Member's Schedule cannot override the ordinary meaning of the terms of the Agreement on Agriculture, as India implies it would, but a Schedule may provide relevant context for interpreting those terms. In this instance, the context provided by India's supporting tables reinforces the ordinary meaning of the terms. Further, the supporting tables underscore India's own interpretation of the terms at the time of constituting its Schedule.

(c) Object and purpose

46. The object and purpose of the Agreement on Agriculture also support an interpretation of "market price support" that is not limited to government procurement of a product at the AAP. The Agreement's object and purpose, as stated in its preamble, is relevantly to discipline and reduce domestic support measures, with a view to preventing distortions in world agricultural markets and establishing a "fair and market-oriented

⁵⁹ G/AG/AGST/IND, p. 28 incorporated by reference by India's Schedule, Part IV, Section I, Column 3. In notifying its market price support for the base period (1986–88), in a table titled "Aggregate Measurement of Support: Market Price Support", India lists the prices fixed by the Sugarcane (Control) Order 1966 then in force as an "Applied administered price" and uses that price to calculate its market price support for sugarcane.

⁶⁰ See Australia's first written submission, para. 25.

⁶¹ Sugarcane (Control) Order 1966 (**Exhibit JE-148**), Clause 3(1).

⁶² See Australia's opening statement at the first substantive meeting, paras. 53–54. *See also*, Brazil's opening statement at the first substantive meeting, paras. 22–23; Guatemala's opening statement at the first substantive meeting, para. 3.12.

⁶³ India's closing statement at the first substantive meeting, para. 37; India's response to Panel question 48(c), p. 5.

⁶⁴ India's response to Panel question 48(e), p. 6.

⁶⁵ Panel Report, *China – Agricultural Producers*, para. 7.263, citing Appellate Body Report, *US – Gambling*, paras. 178 and 182.

agricultural trading system".⁶⁶ Distortions occur when prices or production are not determined by the market. Price support is recognised in the Agreement on Agriculture as being inherently trade-distorting and as having production effects.⁶⁷

47. As demonstrated by India's FRP and SAP measures, government mandated floor prices for basic agricultural products impact production decisions and distort trade irrespective of who purchases the product.⁶⁸ Moreover, if the concept of market price support is limited as India proposes, the Agreement on Agriculture's object and purpose would be easily undermined. Members would be able to circumvent the Agreement's disciplines simply by ensuring they (or their agents) did not procure the product.⁶⁹

48. India contends "the object and purpose of an agreement cannot be read to expand the scope of the coverage of an agreement when the agreement itself specifically identifies the scope of what it aims to discipline."⁷⁰ India bases this argument on its incorrect view that paragraphs 1 and 2 of Annex 3 limit domestic support to subsidies in the form of budgetary outlays and revenue foregone by governments (or their agents).

49. Australia does not seek to use the Agreement on Agriculture's object and purpose to expand its coverage. Instead, Australia relies on the object and purpose to confirm the ordinary meaning of the Agreement's terms. As to India's arguments in purported reliance on paragraphs 1 and 2 of Annex 3, Australia rebuts these arguments in Section II.B.2(a) below.

(d) Conclusion

50. "Market price support" under the Agreement on Agriculture will exist when a Member establishes an AAP and determines the production eligible to receive that AAP. A proper interpretation of "market price support" – based on the ordinary meaning of the terms, read in context and in light of the Agreement on Agriculture's object and purpose – is incompatible with India's argument that procurement at the AAP by a government (or its agent) is essential.

⁶⁶ Agreement on Agriculture, Preamble, recitals 2 and 3. *See also*, Australia's first written submission, para. 126.

⁶⁷ Agreement on Agriculture, Annex 2, para. 1. *See also*, Australia's first written submission, para. 126.

⁶⁸ See the evidence that India's FRP and SAP measures impact production decisions cited in footnote 171 of Australia's first written submission, para. 126.

⁶⁹ See Brazil's opening statement at the first substantive meeting, paras. 27–28; Guatemala's opening statement at the first substantive meeting, para. 3.13.

⁷⁰ India's closing statement at the first substantive meeting, para. 18.

2. The Panel should reject India's reasoning in support of its misinterpretation of "market price support"

51. To support its contention that market price support cannot exist unless the AAP is paid by the government (or its agents), India has advanced four lines of reasoning in purported reliance on the text of the Agreement on Agriculture. Australia submits that India's reasoning is without basis and should be rejected by the Panel for the reasons that follow.

(a) India's interpretation of paragraphs 1 and 2 of Annex 3 is incorrect

52. India argues that, pursuant to paragraphs 1 and 2 of Annex 3 of the Agreement on Agriculture, market price support must be a subsidy, and such subsidies are limited to budgetary outlays and revenue foregone by governments or their agents.⁷¹ According to India, therefore, the FRP and SAP measures are not market price support because the Indian government (or its agents) does not procure the sugarcane by paying the AAP.⁷²

53. India's interpretation of paragraphs 1 and 2 of Annex 3 is flawed. Neither paragraph supports India's attempt to constrain the meaning of market price support.

54. Turning first to paragraph 1, India argues that the phrase "or any other subsidy" means that market price support – and non-exempt direct payments – must take the form of a subsidy.⁷³

55. Australia recalls that paragraph 1 of Annex 3 specifically identifies three kinds of domestic support: "market price support", "non-exempt direct payments", and "any other subsidy not exempted from the reduction commitment".⁷⁴ Each type is separated by a comma. The final item in this list is distinguished by the word "or".

⁷¹ India's first written submission, paras. 62–63; India's response to Panel question 18(a), p. 14 and question 25(b), p. 18; India's opening statement at the first substantive meeting, para. 9; India's closing statement at the first substantive meeting, paras. 24–28.

⁷² India's first written submission, para. 63; India's response to Panel question 25(a), p. 18.

⁷³ India's response to Panel question 18(a) and 18(c), p. 14; India's opening statement at the first substantive meeting, paras. 24–25.

⁷⁴ See paragraph 30 above.

56. This interpretation of paragraph 1 is supported by the negotiating history of Annex 3.⁷⁵ The negotiators identified that market price support, non-exempt direct payments and other non-exempt policies were "three broad groups of polic[i]es".⁷⁶

57. Accordingly, Australia considers that the phrase "any other" in paragraph 1 reflects an intent to ensure that all non-exempt domestic support – including support that is neither market price support nor a direct payment – is included in the AMS. Paragraph 13 of Annex 3 provides an example of such an "other subsidy" being "marketing-cost reduction measures".⁷⁷

58. As the European Union observes, the objective of the Agreement on Agriculture is broader than that of limiting domestic subsidies in favour of agricultural products. The Agreement relevantly aims to achieve "substantial progressive reductions in agricultural support" through specific binding commitments including with respect to "domestic support".⁷⁸ If Members' domestic support commitments were limited to subsidies, the Agreement would simply refer to subsidies for agricultural products, rather than specifying three distinct kinds of domestic support, each with alternative methods of calculation.⁷⁹

59. Turning next to paragraph 2 of Annex 3, India submits that this paragraph "delineates the scope of subsidies under paragraph 1".⁸⁰ In India's view, the words "shall include both", mean that paragraph 2 provides an exhaustive definition of what may constitute a subsidy under paragraph 1.⁸¹ Australia disagrees. Paragraph 2 simply provides that "both budgetary outlays and revenue foregone by governments or their agents" are subsidies for the purposes of the AMS calculation.

⁷⁵ "Recourse may be had to supplementary means of interpretation... in order to confirm the meaning resulting from the application of article 31...": Vienna Convention on the Law of Treaties, Article 32.

⁷⁶ Chairman's note on options in the agricultural negotiations, MTN.GNG/AG/W/1/Add.4 (**Exhibit JE-156**), para. 3. *See also*, Chairman's note on options in the agricultural negotiations, MTN.GNG/AG/W/1, 24 June 1991 (**Exhibit JE-154**), para. 18.

⁷⁷ Agreement on Agriculture, Annex 3, para. 13.

⁷⁸ Agreement on Agriculture, Preamble, recitals 3 and 4.

⁷⁹ European Union's third party submission, para. 43; European Union's third party oral statement, para. 6.

⁸⁰ India's first written submission, para. 62. *See also*, India's response to Panel question 26(a), p. 18; India's opening statement at the first substantive meeting, para. 9.

⁸¹ India's opening statement at the first substantive meeting, paras. 26–28; India's closing statement first substantive meeting, para. 28.

60. At the first substantive meeting, Guatemala set out the ordinary meaning of "include" and how it has been interpreted by other panels and the Appellate Body:

The ordinary meaning of the term "include" is "[c]ontain as part of a whole", "that what follows is not an exhaustive, but a partial, list of all covered items". The term "include" is used to indicate that the examples that follow are "illustrative, not exhaustive", "illustrative and expansive", that there may be other issues to be considered among those mentioned.⁸²

61. The term "includes" is, by its very nature, not exclusive or restrictive.

62. Canada, the European Union, Japan and the United States agree that the term "include" in paragraph 2 of Annex 3 indicates that budgetary outlays and revenue foregone by governments or their agents are examples of the types of support that would be considered "subsidies" under paragraph 1, rather than an exhaustive list.⁸³

63. According to India, however, "[t]he term 'both' has a limiting effect on the term 'include'..."⁸⁴ and, if the complainants' arguments were to be accepted, "it would mean that the term 'both' is redundant in paragraph 2."⁸⁵

64. Once again, Australia disagrees with India's argument. "Both", when used with two coordinated words, phrases or clauses, is defined as "...emphasizing the inclusion of both (and not only one) of the elements specified: not only — but —".⁸⁶ Thus, in the context of paragraph 2 of Annex 3, "both" is not a word of limitation nor is it redundant. It emphasises that "budgetary outlays and revenue foregone by governments or their agents" are subsidies that are included in the calculation of AMS, but paragraph 2 does not limit all domestic support to subsidies in these forms.

65. This interpretation is also consistent with how the phrase "including both" is used in paragraph 2(c) of Annex 2 of the Agreement on Agriculture, which sets out that "training services, including both general and specialist training facilities" are exempt from reduction commitments.⁸⁷ "Training service" is a much broader category than "training facilities". In this context, "including both" emphasises the inclusion of general and specialist training

⁸² Guatemala's opening statement at the first substantive meeting, para. 3.8 (footnotes omitted).

⁸³ Canada's third party submission, paras. 7–12; Canada's third party oral statement, paras. 3–7; European Union's third party submission, para. 46; Japan's third party oral statement, paras. 3–6; United States' third party submission, para. 22.

⁸⁴ India's closing statement at the first substantive meeting, para. 27 (emphasis added).

⁸⁵ India's closing statement at the first substantive meeting, para. 27.

⁸⁶ Oxford English Dictionary, OED Online, "both, pron., adv., and adj." (**Exhibit JE-155**).

⁸⁷ Subject to meeting the other requirement, criteria and conditions in Annex 2.

facilities, but does not limit the meaning of "training services" to only "training facilities". Australia considers that "including both" and "include both" should be interpreted consistently throughout the Agreement on Agriculture.

66. Finally, Australia's interpretation of paragraph 2 of Annex 3 is supported by the negotiating history of Annex 3. Specifically, an Addendum to a note produced by the Chairman in the Negotiating Group on Agriculture suggests that paragraph 2 was intended to relate only to non-exempt direct payments and other non-exempt policies – not to market price support.⁸⁸ There 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...".⁸⁹

67. In sum, India's arguments regarding paragraphs 1 and 2 of Annex 3 are flawed and should be rejected by the Panel. Those arguments are based on a misreading of the text and fail to properly take into account other highly relevant provisions – particularly paragraph 8 of Annex 3.

(b) Paragraph 8 of Annex 3 is not limited to offering a calculation methodology for market price support

68. To justify its selective focus on paragraphs 1 and 2 of Annex 3, India seeks to create an artificial distinction between those paragraphs, on the one hand, and paragraph 8 of Annex 3, on the other.⁹⁰ India argues that the former address "when a market price support can be said to exist"⁹¹ while the latter is relegated to "how to calculate or measure a market price support".⁹² In India's view, these are "two distinct questions"⁹³ and paragraph 8 "in no way clarifies"⁹⁴ the meaning of market price support or who must pay the AAP.

⁸⁸ In listing the "three broad groups of polic[i]es" that would form part of the AMS calculation, non-exempt direct payments and other non-exempt policies are identified as "including revenue foregone" or "including non-exempt revenue foregone", as well as "budgetary outlays". The description of market price support, by contrast, refers to neither budgetary outlays nor revenue foregone: Chairman's note on options in the agricultural negotiations, MTN.GNG/AG/W/1/Add.4 (**Exhibit JE-156**), paras. 3–6.

⁸⁹ Chairman's note on options in the agricultural negotiations, MTN.GNG/AG/W/1/Add.4 (**Exhibit JE-156**), para. 4.

⁹⁰ India's closing statement at the first substantive meeting, paras. 13–14, 16 and 30.

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

⁹² India's closing statement at the first substantive meeting, para. 14.

⁹³ India's closing statement at the first substantive meeting, para. 14 (emphasis original).

⁹⁴ India's response to Panel question 48(b), p. 5.

69. Australia has explained in the preceding Section II.B.2(a) why India's arguments based on its interpretation of paragraphs 1 and 2 of Annex 3 are incorrect. Market price support is not limited to budgetary outlays and revenue foregone by a government (or its agents).

70. Similarly, India's claim that paragraphs 1 and 2 of Annex 3 limit the plain meaning of paragraph 8 of that Annex should also be dismissed as an attempt to diminish the importance of paragraph 8, given that paragraph undermines India's purported defence. India's argument finds no support in the text of Annex 3. As Australia has already outlined,⁹⁵ the purpose of Annex 3 – as reflected in its title: "Domestic Support: Calculation of Aggregate Measurement of Support" – is to stipulate the method for calculating in monetary terms a Member's non-exempt domestic support or AMS. Thus, the Annex does not differentiate between when market price support exists and how to calculate the value of such support, as India argues. Further, as Australia has already explained, the effect of paragraph 8 is that market price support will exist and be measurable when a Member establishes an AAP that is higher than the relevant FERP, and determines the production eligible to receive that AAP.⁹⁶

(c) Paragraph 8 does not distinguish between the price paid for a product and so-called "transactional costs"

71. In an apparent effort to reconcile its defence of its FRP and SAP measures with paragraph 8, second sentence, India has invented a distinction between the price paid for the product (i.e. the AAP) and "additional costs",⁹⁷ such as "transactional costs".⁹⁸ According to India, the reference in paragraph 8 to budgetary payments in the form of buying-in costs means the "costs associated with the procurement of the product concerned (other than the [AAP]) incurred or paid by a government."⁹⁹ India argues such costs are excluded from the AMS because they "do not cause the distortion which Article 6 read with Annex 3 of the [Agreement on Agriculture] aims to discipline."¹⁰⁰

⁹⁵ See paragraph 29 above.

⁹⁶ See paragraph 33 above.

⁹⁷ India's closing statement at the first substantive meeting, para. 31.

⁹⁸ India's closing statement at the first substantive meeting, para. 31.

⁹⁹ India's response to Panel question 47, p. 4 (emphasis added). *See also*, India's response to Panel question 18(c), p. 14.

¹⁰⁰ India's response to Panel question 47, p. 4.

72. India does not explain how the text of paragraph 8 provides a basis for this argument. Paragraph 8, second sentence, does not refer to "additional" or "transactional" costs. Nothing in the text indicates an intention on the part of the drafters to differentiate between the price paid for the product (the AAP) and costs that may be associated with that purchase.

73. Rather, the words of the second sentence of paragraph 8 undermine India's argument. They provide that "[b]udgetary payments made to maintain this gap [between the FERP and the AAP]"¹⁰¹ are not included in the AMS. Thus, the distinguishing feature of budgetary payments falling within paragraph 8, second sentence, is that they contribute to maintaining the "gap".¹⁰²

74. Similarly, with respect to the example of buying-in costs, Australia recalls that "buying-in" means the act of purchasing a basic agricultural product, or a product produced from a basic agricultural product.¹⁰³ Yet, under India's interpretation of buying-in costs, those costs would not include the actual purchase price of the product. India offers no explanation for this obvious inconsistency in its reasoning.

(d) Previous panel reports are relevant and support Australia's arguments

75. India contends that the reports of the panels in *Korea – Various Measures on Beef* (as upheld by the Appellate Body) and *China – Agricultural Producers* "are either not applicable or do not support the view of the complainants".¹⁰⁴ According to India, there is no rule of binding precedent in WTO dispute settlement.¹⁰⁵ Australia agrees there is no such rule. However, Australia disputes India's suggestion that "the complainants are effectively advocating that a prior ruling by a panel... should apply to all future disputes no matter what the facts and issues those future disputes involve."¹⁰⁶

76. A panel is required to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and

¹⁰¹ Emphasis added.

¹⁰² See Australia's first written submission, paras. 131–133.

¹⁰³ Australia's response to Panel question 47, para. 4.

¹⁰⁴ India's first written submission, para. 67. *See also*, India's closing statement at the first substantive meeting, para. 36.

¹⁰⁵ India's first written submission, para. 67.

¹⁰⁶ India's closing statement at the first substantive meeting, para. 35.

conformity with the relevant covered agreements..."¹⁰⁷ In performing their task, panels must interpret the meaning of the covered agreements in order to apply the legal obligations to the facts and determine whether a measure conforms. Though the facts of every dispute will differ, the legal principles and reasoning applied by panels are relevant to the task of subsequent panels that are interpreting the legal meaning of the same (or a related) covered agreement.¹⁰⁸ Panel reports also "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."¹⁰⁹

77. Australia agrees that the facts in *Korea – Various Measures on Beef* and *China – Agricultural Producers* differ in some respects from this dispute. However, the legal reasoning of those panels regarding the interpretation of Members' domestic support commitments pursuant to the Agreement on Agriculture is highly relevant and should be considered by this Panel.

78. Australia recalls that the panel in *China – Agricultural Producers* found the ordinary meaning of "applied administered price" to be "the price set by the government at which specified entities will purchase certain basic agricultural products."¹¹⁰ India claims "the interpretation of the phrase 'applied administered price'... must be viewed in context of the specific facts of that dispute".¹¹¹ Aside from noting the factual differences in that dispute, India does not elaborate or explain why the meaning given to AAP should not be applied by this Panel.

79. As China outlines, the panel in *China – Agricultural Producers* adopted an "ordinary meaning approach",¹¹² consistent with the general rule of interpretation.¹¹³ The European Union agrees.¹¹⁴ In other words, the panel's legal reasoning regarding the meaning of "applied administered price" was entirely independent of the facts in that dispute.¹¹⁵ Thus,

¹⁰⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 11.

¹⁰⁸ See Guatemala's opening statement at the first substantive meeting, para. 3.17.

¹⁰⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14.

¹¹⁰ Panel Report, *China – Agricultural Producers*, para. 7.177. See also, Australia's first written submission, para. 117.

¹¹¹ India's first written submission, para. 69.

¹¹² China's third party oral statement, para. 5; Panel Report, *China – Agricultural Producers*, para. 7.177; Australia's first written submission, para. 117.

¹¹³ Vienna Convention on the Law of Treaties, Article 31.

¹¹⁴ European Union's third party submission, para. 56.

¹¹⁵ See Guatemala's opening statement at the first substantive meeting, para. 3.17.

Australia considers the panel's reasoning regarding the meaning of AAP is applicable to this dispute.

80. India also argues that the panel in *China – Agricultural Producers* did not state that the specified entities that purchase the product at the AAP "may be any entity, including a purely private entity, which is not an agent of a government...".¹¹⁶ Australia agrees that the panel in that dispute did not elaborate on the defining characteristics of the purchasing entity. However, while the panel found that the AAP is set by "government", it identified the purchasers of the product as "specified entities".¹¹⁷ The panel did not identify the purchasers as "government" or "government or its agents" despite the fact that the Chinese government funded and controlled all purchases. Based on an ordinary meaning interpretation of "applied administered price", the panel's findings left open the possibility that market price support could exist even if the AAP was not paid by government or its agents.

81. India advances similar arguments with respect to *Korea – Various Measures on Beef*, in an attempt to diminish the relevance of the panel's findings and legal reasoning. In particular, with respect to the panel's statement that "the quantification of market price support in AMS terms is not based on expenditures by government",¹¹⁸ India argues this "does not state or even remotely suggest that market price support may exist where the procurement and payments towards such procurement... was to be done by private actors."¹¹⁹ Australia disagrees. India has ignored the sentences in the report that follow immediately after the cited statement. The panel stated:

Market price support as defined in Annex 3 can exist even where there are no budgetary payments. Market price support gauges the effect of a government policy measure on agricultural producers of a basic product rather than the budgetary cost of that measure borne by government.¹²⁰

¹¹⁶ India's first written submission, para. 71.

¹¹⁷ Panel Report, *China – Agricultural Producers*, para. 7.177.

¹¹⁸ Panel Report, *Korea – Various Measures on Beef*, para. 827.

¹¹⁹ India's first written submission, para. 74 (footnotes omitted).

¹²⁰ Panel Report, *Korea – Various Measures on Beef*, para. 827. See also, Chairman's note on options in the agricultural negotiations, MTN.GNG/AG/W/1, 24 June 1991 MTN.GNG/AG/W/1 (**Exhibit JE-154**), p. 4, para. 18: "The AMS includes the effects of policies in three broad groups which are market price support, non-exempt direct payments and other non-exempt policies."

82. The panel's reasoning was based on the text of paragraph 8 of Annex 3 of the Agreement on Agriculture rather than being confined to the facts or, as India has claimed, to the specific issue of the meaning of eligible production.¹²¹

83. Finally, India argues that the reference to "governmental purchases" in paragraph 827 of the panel's report "suggests that the panel did not speculate about the existence of 'market price support' where purchases and payments are made by purely private actors which are neither government nor its agents."¹²² The panel referred to "governmental purchases" in the context of outlining a hypothetical example of market price support involving purchases by "a governmental intervention agency".¹²³ As Australia has already outlined, the panel considered that the AMS calculation gauges the effect of a measure and did contemplate that market price support could exist where there are no budgetary payments or cost to government.

84. To conclude, Australia considers there is no reason to depart from the legal interpretation of market price support, AAP and eligible production used by the panels in *China – Agricultural Producers* and *Korea – Various Measures on Beef*. The consistent interpretation of the Agreement on Agriculture in different factual contexts provides predictability and security for the Membership in upholding their WTO obligations.¹²⁴ India is effectively arguing that any differences in the facts considered by prior panels renders all of the panels' reasoning inapplicable or irrelevant. Such an approach would greatly increase uncertainty for Members with respect to their obligations under the covered agreements.

C. CONCLUSION

85. There are no contested factual matters that would have a bearing on the calculation of India's domestic support in favour of sugarcane producers in the relevant sugar seasons. India's FRP and SAP measures constitute market price support. Australia requests the Panel reject India's argument that they do not.

¹²¹ See the European Union's third party submission, paras. 57–58.

¹²² India's first written submission, para 76.

¹²³ Panel Report, *Korea – Various Measures on Beef*, para 827.

¹²⁴ European Union's third party submission, para. 55; European Union's third party oral statement, para. 12.

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

86. Australia has established that India's export subsidies for sugar – provided through its production subsidies, buffer stock subsidies, MAEQ scheme and DFIA scheme – violate its obligations under both the Agreement on Agriculture and the SCM Agreement.

87. India's defences of these measures rely on flawed interpretations of applicable legal standards that find no support in the text of the Agreement on Agriculture or the SCM Agreement, and unsubstantiated factual characterisations of certain measures' design, structure and operation.

88. In the following Sections III.A to III.D, Australia explains in detail why the Panel should reject India's arguments in defence of these measures.

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

89. India's export subsidies to sugar producers are inconsistent with its obligations under both the Agreement on Agriculture and the SCM Agreement. Australia begins its analysis with the Agreement on Agriculture because, to the extent of any conflict between the two agreements, the Agreement on Agriculture prevails.¹²⁵ India acknowledges the hierarchy between the two Agreements.¹²⁶

90. India's export subsidies are inconsistent with its obligations under the Agreement on Agriculture, pursuant to which India has committed:

- not to provide export subsidies to agricultural producers otherwise than in conformity with the Agreement and Part IV of its Schedule;¹²⁷

¹²⁵ Agreement on Agriculture, Article 21.1; Australia's first written submission, paras. 210–216.

¹²⁶ India's first written submission, paras. 91–92.

¹²⁷ See Agreement on Agriculture, Articles 3.1 and 8; Australia's first written submission, paras. 236–239.

- not to provide export subsidies of the types listed in Article 9.1 in excess of the reduction commitments in Section II, Part IV of its Schedule;
- for unscheduled agricultural products, to comply with the general prohibition on Article 9.1 subsidies;¹²⁸ and
- not to use export subsidies of kinds not listed in Article 9.1 in a manner that circumvents its reduction commitments, or threatens to do so.¹²⁹

91. India agrees with the relevant disciplines and accepts that its Schedule contains no export subsidy reduction commitments with respect to sugar.¹³⁰ Sugar is, therefore, an unscheduled agricultural product for India attracting the general prohibition on Article 9.1 export subsidies.

92. In response to Australia's claims that India's production and buffer stock subsidies and MAEQ scheme are "direct subsidies" within the meaning of Article 9.1(a), India argues that the relevant measures do not satisfy the legal standard against which the existence of an Article 9.1(a) subsidy must be assessed.

93. Australia begins by recalling that legal standard, then explains why India's measures satisfy it, and lastly rebuts India's mischaracterisation of a key element of the standard, namely the existence of "direct subsidies."

1. Legal standard applicable under Article 9.1(a)

94. The Agreement on Agriculture defines "export subsidies" as subsidies "contingent on export performance", including the practices listed in Article 9.1.¹³¹

95. An export subsidy falling within Article 9.1(a) takes the following form. First, it involves "direct subsidies", entailing a transfer of economic resources (or revenue foregone) between a grantor and a recipient, for less than full consideration.¹³² Second, a government or its agencies must provide the subsidy.¹³³ Third, its recipients must be among those in the

¹²⁸ See Agreement on Agriculture, Article 3.3; Australia's first written submission, para. 242; Appellate Body Report, *US – FSC*, paras. 145–146.

¹²⁹ See Agreement on Agriculture, Article 10.1; Australia's first written submission, para. 246.

¹³⁰ India's response to Panel question 38, pp. 25–26.

¹³¹ Agreement on Agriculture, Article 1(e).

¹³² Australia's first written submission, paras. 261–272.

¹³³ Australia's first written submission, paras. 258–260.

broad but exhaustive list that the Article identifies.¹³⁴ Finally, it must be "contingent on export performance", meaning it is conditional, or depends for its existence, upon, or tied to, export performance.¹³⁵

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

96. India's production subsidies, buffer stock subsidies, and the MAEQ and DFIA schemes are unambiguously Article 9.1(a) export subsidies:

- They involve direct transfers of economic resources from the Indian government to sugar mills.¹³⁶ Pursuant to the production¹³⁷ and buffer stock subsidies¹³⁸ and the MAEQ scheme,¹³⁹ the Department of Food and Public Distribution (DFPD) makes funds available to clear mills' debts to cane farmers, or provides grants. Under the DFIA scheme, the government foregoes import tax revenue that sugar mills would otherwise owe it.¹⁴⁰
- The financial contributions are offered for less than full consideration, leaving sugar mills better off, with respect either to debts owed or funds available, than they would otherwise have been.¹⁴¹
- Sugar mills are "producers of an agricultural product." Collectively, they may also constitute an "industry" and, individually, may qualify as "cooperative(s)" or "firm(s)."¹⁴²

¹³⁴ Australia's first written submission, paras. 273–275.

¹³⁵ Australia's first written submission, paras. 276–284.

¹³⁶ India has not contested Australia's assertion that sugar mills are the recipients of India's production and buffer stock and MAEQ scheme subsidies (Australia's response to Panel question 55, paras. 26–33). India has merely asserted that this fact is for Australia to establish (India's response to Panel question 55, p. 9). In the absence of any evidence or argument to the contrary, Australia submits that the Panel should accept Australia's assertion.

¹³⁷ Australia's first written submission, paras. 291–294.

¹³⁸ Australia's first written submission, paras. 307–308.

¹³⁹ Australia's first written submission, paras. 345–346.

¹⁴⁰ Australia's first written submission, 354–361.

¹⁴¹ Australia's first written submission, paras. 291–294, 307–308, 345–346 and 354–361.

¹⁴² Australia's first written submission, paras. 295–296, 309, 347 and 362.

- Finally, the measures either link the availability of subsidies to the achievement of export quotas, targets or to past export performance, or make export performance a determinant of the subsidy rate.¹⁴³

97. As the facts underpinning the design, structure and operation of its export subsidies are clear and indisputable, India advances an incorrect interpretation of the legal standard for establishing the existence of a subsidy in an attempt to avoid its obligations under the Agreement on Agriculture.¹⁴⁴

3. The Panel should reject India's misinterpretation of the legal standard applicable for establishing the existence of "direct subsidies" within the meaning of Article 9.1(a)

98. Australia and India agree on the four elements that must be present to satisfy the legal standard under Article 9.1(a).¹⁴⁵

99. Australia and India also agree that Article 1.1 of the SCM Agreement provides relevant context for interpreting the terms "subsidy" or "subsidies" as they appear in the Agreement on Agriculture.¹⁴⁶

100. However, a flawed reading of one element of the subsidy definition in Article 1.1 has led India to an unsustainable interpretation of what is required to demonstrate the existence of "direct subsidies" within the meaning of Article 9.1(a). India argues that because the SCM Agreement deems a subsidy to exist where "there is a financial contribution",¹⁴⁷ evidence of an actual disbursement of government funds is required.¹⁴⁸

¹⁴³ Australia's first written submission, paras. 297–304, 310–342, 348–351 and 363–365; Australia's response to Panel question 8, paras. 17–19. India argues that its production and buffer stock subsidies "do not contain any requirement to export": India's response to Panel question 32(b), p. 22. Australia has rebutted this assertion comprehensively: see Australia's opening statement at the first substantive meeting, paras. 57–67. In the absence of any evidence or argument to the contrary, Australia submits that the Panel should accept Australia's explanation of the relevant facts underpinning the production and buffer stock subsidies' export contingency.

¹⁴⁴ India's response to Panel question 29, p. 21.

¹⁴⁵ Australia's first written submission, para. 256; India's first written submission, para. 100; India's response to Panel question 54(a), p. 9. India has declined to engage directly with the Panel's questions regarding "overlap" between the categories of subsidy recipients under Article 9.1(a). Although sugar mills are capable of satisfying many of the recipient types identified in Article 9.1(a), Australia does not consider it necessary for the Panel to determine which term best describes India's sugar mills, who are the recipients of India's export subsidies: Australia's response to Panel question 54(a)–(b), paras. 24–25 and question 55, paras. 26–33.

¹⁴⁶ Australia's first written submission, para. 266; India's first written submission, paras. 93–96.

¹⁴⁷ India's first written submission, para. 107 (emphasis original).

¹⁴⁸ India's first written submission, paras. 107–109; India's response to Panel question 39, p. 26; India's opening statement at the first substantive meeting, para. 13.

101. India's interpretation turns on its identification of "is" as the operative term in Article 1.1(a)(1). This rigid approach colours India's reading of Article 9.1(a) and leads it to conclude that Australia has not demonstrated that any of the challenged schemes constitute export subsidies because it has not produced evidence of actual government payments to mills.¹⁴⁹ Evidence that the challenged measures give the Indian government the legal authority to make financial contributions to mills, or of relevant budgetary allocations is, India claims, insufficient.¹⁵⁰

102. While India does not contest the legal standard applicable to demonstrate the existence of a "benefit" within the meaning of the subsidy definition in Article 1.1(b) of the SCM Agreement, it claims that Australia has failed to perform the market comparison necessary to meet that standard.

103. Australia rebuts each of India's assertions in turn.

(a) There "is" a financial contribution

104. India's understanding of what 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.

105. Article 9.1(a) concerns the "provision" of direct subsidies by governments or their agencies. The ordinary meaning of "provide" is "to make available".¹⁵¹ A promise by a government to make payments under a scheme, combined with a budgetary allocation towards the scheme, are actions by which that government makes funds available to eligible recipients.¹⁵²

¹⁴⁹ India's first written submission, paras. 107–109; India's response to Panel question 39, p. 26; India's opening statement at the first substantive meeting, para. 13.

¹⁵⁰ India's first written submission, paras. 107–109; India's response to Panel question 39, p. 26; India's opening statement at the first substantive meeting, para. 13.

¹⁵¹ Oxford English Dictionary, OED Online, "provide, v.", available at: <https://www.oed.com/view>, last viewed 25 November 2020 (**Exhibit BRA-3**). The Appellate Body has accepted both government conduct by which financial resources are "made available" to a recipient, and a measure under which some disbursements are yet to be made, as comprising direct transfers of funds: Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614; Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.290. See also Australia's response to Panel question 59, para. 77.

¹⁵² Brazil's opening statement at the first substantive meeting, para. 41.

106. Further, Article 9.2(a)(i) of the Agreement on Agriculture notes that Members may have expressed their scheduled export subsidy reduction commitments in terms of budgetary outlays, and recognises that compliance with these commitments in any given year is measurable on the basis of budgetary outlays "allocated or incurred".¹⁵³ This context makes clear that, for the purposes of the Agreement on Agriculture, the existence of a subsidy may be demonstrable from an allocation of funds alone.¹⁵⁴ Actual budgetary disbursements are not required.

107. Equally compelling on this point is Article 1.1(a)(1)(i) of the SCM Agreement, which provides expressly that a "financial contribution" may be constituted by, among other things, "potential direct transfers of [government] funds".¹⁵⁵ This phrase contemplates that a financial contribution can be constituted by prospective funds transfers, where any possible payments or disbursements remain firmly in the future.¹⁵⁶

108. Costa Rica, Japan and the United States agree that India's interpretation of "financial contribution" is unsupported by the text of the relevant Agreements and inconsistent with observations of the Appellate Body and previous panels. They also observe that it would place an unsustainable evidentiary burden on complainants and could potentially shield WTO inconsistent measures from scrutiny.¹⁵⁷

(b) Benefit

109. Based on the contextual relevance of Article 1.1 of the SCM Agreement, India argues that to qualify as a "subsidy" within the meaning of Article 9.1(a) a measure must confer a "benefit".¹⁵⁸ Again, Australia accepts that the SCM Agreement provides relevant context for interpreting Article 9.1(a).¹⁵⁹ This includes Article 14 of the SCM Agreement, which nominates

¹⁵³ Article 9.2(a)(i) (emphasis added).

¹⁵⁴ Agreement on Agriculture, Article 9.2(a)(i); Australia's opening statement at the first substantive meeting, paras. 87–88; Australia's response to Panel question 59, paras. 70–73.

¹⁵⁵ Australia's opening statement at the first substantive meeting, para. 89; Australia's response to Panel question 59, para. 76; Australia's closing statement at the first substantive meeting, para. 23.

¹⁵⁶ Australia's opening statement at the first substantive meeting, para. 89; Australia's response to Panel question 59, para. 76; Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 7.164.

¹⁵⁷ Costa Rica's third party submission, paras. 17–25; Japan's third party oral statement, paras. 7–9; United States' third party submission, paras. 47–54.

¹⁵⁸ SCM Agreement, Article 1.1(b); India's first written submission, paras. 94–96.

¹⁵⁹ Australia's first written submission, para. 266.

the "market" as the benchmark against which to assess whether certain government actions confers a benefit.¹⁶⁰

110. Australia agrees that the market may provide a useful benchmark against which to determine the existence of a benefit, and has not, as India asserts, failed to make a market comparison here.¹⁶¹ Rather, Australia has concluded that the comparison is a simple one because, under India's export subsidy schemes, the Indian government gratuitously discharges mills' obligations to satisfy outstanding sugarcane arrears or, for those mills without debts to cane farmers, offers direct financial windfalls. No entity operating pursuant to commercial considerations would make such payments. They are gifts or grants, that automatically leave mills better off than they would otherwise have been.¹⁶²

111. The present facts may be distinguished from those of previous disputes that India cites in its defence, such as *Canada – Feed-in-Tariff Program*,¹⁶³ which concerned government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.¹⁶⁴ In such a scenario, the benchmark comparison exercise would clearly be more complex.

(c) Australia has provided evidence of actual disbursements
under India's export subsidies

112. The irony of India's flawed argument is that, even though it is not required to, Australia has provided evidence of actual disbursements of funds under the following challenged measures:¹⁶⁵

- the "Scheme for extending production subsidy to sugar mills" for the 2015–16 sugar season;¹⁶⁶

¹⁶⁰ Australia's first written submission, para. 383; Australia's response to Panel question 53, para. 20. Australia notes, however, that Article 14 of the SCM Agreement establishes market benchmarks for limited classes of subsidies, namely governmental provision of equity capital (Article 14(a)), government loans and loan guarantees (Article 14(b)) and governmental provision of goods or services or purchases of goods (Article 14(d)).

¹⁶¹ India's first written submission, paras. 111–113.

¹⁶² Australia's first written submission, para. 269, citing Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 7.1501; Australia's response to Panel question 53, paras. 21–22.

¹⁶³ India's first written submission, para. 112, citing Appellate Body Report, *Canada – Feed-in-Tariff Program*, para. 5.164.

¹⁶⁴ Appellate Body Report, *Canada – Feed-in-Tariff Program*, para. 5.128.

¹⁶⁵ See Australia's response to Panel question 59, para. 82.

¹⁶⁶ The Central Government of India's 2019-20 Expenditure Budget (**Exhibit JE-121**), line 15.04. The budget paper entry reads "Production Subsidy to Sugar Mills to offset cost of Cane and facilitate timely payment of cane price dues of farmers". This language mirrors 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 (**Exhibit JE-76**), chapeau.

- the "Scheme for Assistance to Sugar Mills" for the 2017–18 sugar season;¹⁶⁷
- the "Scheme for Assistance to Sugar Mills" for the 2018–19 sugar season;¹⁶⁸
- the "Scheme for Creation and Maintenance of Buffer Stock of 30 Lakh MT" for the 2018–19 sugar season;¹⁶⁹ and
- the MAEQ scheme.¹⁷⁰

113. India has not disputed this evidence.

(d) Footnote 1 of the SCM Agreement is not relevant to
Australia's export subsidy claims under the Agreement on
Agriculture

114. Australia notes India's argument concerning the relevance of footnote 1 of the SCM Agreement for interpreting the term "subsidy" or "subsidies" in the Agreement on Agriculture.¹⁷¹ As Australia explains in Section III.D.2 below, the DFIA scheme does not fall within footnote 1. Thus, Australia considers it unnecessary for the Panel to determine whether, as a matter of legal principle, measures falling within footnote 1 of the SCM Agreement would naturally be excluded from the scope of Article 9.1(a).

**B. INDIA HAS NOT ESTABLISHED A DEFENCE UNDER ARTICLE 9.4 OF THE
AGREEMENT ON AGRICULTURE IN RELATION TO THE MAEQ SCHEME**

115. Australia has established that the MAEQ scheme is an export subsidy within the meaning of Article 9.1(a) of the Agreement on Agriculture.¹⁷² India agrees that the MAEQ scheme provides lump sum payments for every metric tonne (mT) of sugar exported¹⁷³ and

¹⁶⁷ Central Government of India's 2018-19 Expenditure Budget (**Exhibit AUS-48**), line 11.05; Expenditure Budget 2020–2021 for the Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution (**Exhibit JE-142**), line 10.

¹⁶⁸ Dhampur Sugar Mills Limited, Annual Report 2019–20 (**Exhibit JE-149**), pp. 161–162, line i., read together with note (a).

¹⁶⁹ Central Government of India's 2018-19 Expenditure Budget (**Exhibit AUS-48**), line 11.05; Expenditure Budget 2020–2021 for the Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution (**Exhibit JE-142**), line 13; Dhampur Sugar Mills Limited, Annual Report 2019–20 (**Exhibit JE-149**), pp. 161–162, lines v(a)–(b), read together with note (d).

¹⁷⁰ Dhampur Sugar Mills Limited, Annual Report 2019–20 (**Exhibit JE-149**), pp. 161–162, line iii., read together with note (c).

¹⁷¹ India's first written submission, paras. 97–98, 124–125, 149–155; India's opening statement at the first substantive meeting, para 18; India's closing statement at the first substantive meeting, paras. 42 – 43; India's response to Panel question 53(b), p. 8; India's response to Panel question 58(c), pp. 12–13.

¹⁷² Australia's first written submission, paras. 343–351.

¹⁷³ Australia's first written submission, paras. 345 and 501; India's response to Panel question 29, p. 21.

accepts that mills must export at least 50 per cent of their MAEQ allocations to be eligible to claim the assistance.¹⁷⁴

116. However, in the alternative to its flawed argument that Australia has not established the existence of a subsidy in relation to the MAEQ scheme,¹⁷⁵ India argues that the MAEQ scheme provides export subsidies that fall within the meaning of Article 9.1(d) and (e) and are therefore permitted by virtue of Article 9.4.¹⁷⁶

1. Burden of proof

117. The principle that "the burden of proof rests upon the party, whether claiming or defending, who asserts the affirmative of a particular claim or defence" is widely accepted in WTO dispute settlement.¹⁷⁷ Indeed, it is a principle that accords with "normal international legal standards",¹⁷⁸ and is "applicable in any adversarial proceedings".¹⁷⁹

118. India agrees with this principle,¹⁸⁰ yet, paradoxically, claims that it is for Australia to show that the MAEQ scheme does not fall within Article 9.1(d) and (e).¹⁸¹

119. Australia has established a *prima facie* case of inconsistency with Articles 8 and 3.3, read together with Article 9.1(a).¹⁸² India has invoked Article 9.4 as an exception, or an affirmative defence. Thus, unequivocally, it is for India to prove that the conditions of its defence are met.¹⁸³ In Australia's view, this includes India providing sufficient evidence and argument to prove that the MAEQ scheme is an export subsidy within the meaning of either Article 9.1(d) or (e).

¹⁷⁴ Australia's first written submission, paras. 234 and 504; India's response to Panel question 29, p. 21 and question 32(a), p. 22.

¹⁷⁵ India's first written submission, para. 115.

¹⁷⁶ India's first written submission, paras. 114–123; India's response to the complainants' comments on India's request for a preliminary ruling, paras. 51–56; India's response to Panel question 32(c), p. 23, question 35, p. 24, question 38, pp. 25–26, question 41, pp. 27–28, question 42(b), pp. 29–30, question 56, pp. 10–11 and question 57, pp. 11–12; India's opening statement at the first substantive meeting, paras. 14–15; India's closing statement at the first substantive meeting, paras. 38–41.

¹⁷⁷ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

¹⁷⁸ Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.13.

¹⁷⁹ Appellate Body Report, *EC – Hormones*, para. 98.

¹⁸⁰ India's response to Panel question 26(b), p. 19.

¹⁸¹ India's first written submission, para. 123; India's response to Panel question 35, p. 24 and question 57(a), p. 11; India's opening statement at the first substantive meeting, para. 17.

¹⁸² Appellate Body Report, *Japan – Apples*, para. 157.

¹⁸³ Panel Report, *Turkey – Textiles*, para. 9.57. See also, Panel Report, *Argentina – Textiles and Apparel*, paras. 6.34–6.40.

2. Legal standards applicable under Articles 9.1(d) and (e)

120. Australia has outlined in detail the legal standards applicable for determining whether a measure may properly be characterised as falling within Article 9.1(d) or (e).¹⁸⁴

121. In short, to qualify as an export subsidy 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". Further, the relationship between the subsidy and marketing costs must be quantifiable, in that the purpose of the assistance must be to reduce, and not exceed, those costs.

122. Export subsidies under Article 9.1(e) involve governmental actions undertaken for the distinct purpose of creating advantageous conditions for "internal transport and freight charges on export shipments" vis-à-vis domestic shipments. Again, the relationship between the subsidy and internal transport and freight charges must be quantifiable, in that, at a minimum, the assistance must not exceed actual charges or costs.

123. India agrees that Article 9.1(d) and (e) subsidies must not be "in excess of the costs incurred".¹⁸⁵

3. India has failed to prove that the MAEQ scheme meets the legal standards applicable under Articles 9.1(d) and (e)

124. Although Australia bears no burden of proving that the MAEQ scheme does not fall under Article 9.1(d) or (e), Australia (with Brazil and Guatemala) has pointed to ample evidence demonstrating that India does not provide assistance under the MAEQ scheme for the requisite purpose of either Article 9.1(d) or (e).¹⁸⁶

125. Rather, the evidence of the MAEQ scheme's design, structure and operation shows that the measure serves the clear purposes of assisting mills to offset the cost of purchasing sugarcane and incentivising exports by making eligibility to claim assistance conditional on

¹⁸⁴ Australia's response to Panel question 56(a), paras. 34–45.

¹⁸⁵ India's response to Panel question 35, p. 24 and question 56(a), p. 10.

¹⁸⁶ Australia's comments on India's request for a preliminary ruling, paras. 73–80; Australia's comments on India's response regarding India's request for a preliminary ruling, paras. 59–78; Australia's response to Panel question 43, paras. 123–134; Australia's opening statement at the first substantive meeting, paras. 92–102; Australia's closing statement at the first substantive meeting, paras. 26–27.

meeting an export target.¹⁸⁷ In all material aspects, the measure is the same in essence as India's production and buffer stock subsidy schemes.¹⁸⁸

126. India has made limited arguments concerning:

- the content of the MAEQ scheme's notification; and
- the scheme's design, structure and operation.

127. These arguments fall short of substantiating India's defence. Australia addresses them in turn.

(a) The Panel should reject India's selective reading of the legal instrument notifying the MAEQ scheme

128. India highlights wording used in paragraph 3 of one of the legal instruments notifying the MAEQ scheme that partially replicates the wording of Articles 9.1(d) and (e).¹⁸⁹ It asserts that this text "expressly states that the assistance is provided towards 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".¹⁹⁰

129. To accept the notification's wording as evidence of its purpose would be to defer to India's characterisation of its own municipal law, as opposed to conducting an objective analysis of the instrument.¹⁹¹

130. On an objective reading of the notification as a whole, the words used in paragraph 3 do not provide sufficient evidence to enable the Panel to conclude that the MAEQ scheme

¹⁸⁷ Australia's comments on India's request for a preliminary ruling, paras. 73–80; Australia's comments on India's response regarding India's request for a preliminary ruling, paras. 59–78.

¹⁸⁸ In its closing statement at the first substantive meeting, India stated at para. 39 that "Australia... notes that it does not dispute key differences in eligibility criteria, amounts of assistance and the methodologies used to determine these". This is an attempt by India to mischaracterise Australia's submissions on the matter. Australia does not consider these to be "key" differences at all; in fact, in its opening statement at the first substantive meeting, Australia quite clearly stated at para. 71 that such differences "are immaterial to the key issues to be determined". Previously, Australia has provided detailed comments on why it considers differences in eligibility criteria, amounts of assistance and methodologies for determining these do not render India's production subsidies, buffer stock subsidies and MAEQ scheme distinct from each other. All three measures are emanations, or seasonal iterations, of India's ongoing policy of subsidising sugar exports: Australia's comments on India's response regarding India's request for a preliminary ruling, paras. 59–78.

¹⁸⁹ 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 (**Exhibit JE-114**), para. 3; India's first written submission, paras. 119–120 and 122; India's response to the complainants' comments on India's request for a preliminary ruling, para. 53.

¹⁹⁰ India's response to Panel question 57(b), p. 12.

¹⁹¹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.445, citing Appellate Body Report, *India – Patents (US)*, para. 66; Guatemala's opening statement at the first substantive meeting, para. 4.22.

falls within Article 9.1(d) or (e). The words of paragraph 3 alone do not overcome competing evidence, on the face of the notification, that the subsidy is paid to satisfy cane dues owed to sugarcane farmers for the 2019–20 sugar season and arrears from previous sugar seasons.¹⁹² The notification demonstrates that the financial assistance is credited directly into sugarcane farmers' bank accounts to satisfy debts,¹⁹³ and that mills must certify that the assistance has been used for that purpose.¹⁹⁴

131. By contrast, the notification does not contain any provision demonstrating that the subsidy is linked to the payment of actual costs of marketing exports or internal transport and freight costs, as India claims. For example, the notification does not require mills to prove that they have incurred any marketing costs or internal transport and freight costs.¹⁹⁵ It only requires them to prove they have exported.¹⁹⁶ The only metric used to calculate the subsidy's value is the number of tonnes of sugar exported.¹⁹⁷ Actual costs of marketing or transport and freight are not a relevant consideration.¹⁹⁸

132. Faced with clear evidence that contradicts its arguments, India states that:

[t]here is no legal requirement under Article 9.1(d) and (e) for the legal instrument providing the assistance to contain the methodology of the assistance provided, or to demonstrate how the assistance provided is linked to the types of costs incurred under Articles 9.1(d) and (d) [sic].¹⁹⁹

133. Australia agrees that Articles 9.1(d) and (e) do not impose requirements concerning, specifically, the content of the legal instruments that reflect a measure. However, this observation is beside the point. Legal instruments can serve as evidence of a measure's

¹⁹² 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 (**Exhibit JE-114**), para. 1; Australia's response to Panel question 43(a), paras. 128–130.

¹⁹³ 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 (**Exhibit JE-114**), para. 5.

¹⁹⁴ 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 (**Exhibit JE-114**), para. 6; Notification No. 1(14)/2019-SP-I of the Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution, 5 November 2019 (**Exhibit JE-143**), p. 2.

¹⁹⁵ Australia's opening statement at the first substantive meeting, para. 95.

¹⁹⁶ 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 (**Exhibit JE-114**), Proforma-A.

¹⁹⁷ 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 (**Exhibit JE-114**), para. 3, Proforma-A.

¹⁹⁸ See Guatemala's opening statement at the first substantive meeting, para. 4.24; Brazil's response to Panel question 56, para. 58.

¹⁹⁹ India's response to Panel question 57(b), p. 12.

operation.²⁰⁰ To that end, India has engaged in a selective reading of the MAEQ scheme notification. The result is that India has failed to explain how the text of the notification supports its assertion that the MAEQ scheme is an export subsidy within the meaning of Articles 9.1(d) and (e).

(b) The Panel should reject India's arguments regarding the
MAEQ scheme's design, structure and operation

134. Regarding the MAEQ scheme's design, structure and operation, India has argued that:

- MAEQ scheme subsidies "improve the liquidity of the sugar mills, ultimately reducing the cost of transport and marketing costs incurred",²⁰¹ and
- "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".²⁰²

135. Australia addresses these arguments in turn.

- i. India's "liquidity" argument does not support its assertion that the MAEQ scheme satisfies the legal standards applicable under Articles 9.1(d) and (e)*

136. India claims:

The complainants... have emphasized that the amount provided under the MAEQ scheme is utilized to pay sugarcane arrears to farmers. The complainants' arguments are irrelevant. Payments made under the MAEQ scheme have a direct relationship to the costs normally incurred towards such expenses and improve the liquidity of sugar mills, ultimately reducing the cost of transport and marketing costs incurred.²⁰³

137. In the absence of any evidence of the "direct relationship to the costs normally incurred", it is difficult to conclude that the clear fact the assistance is used to pay sugarcane

²⁰⁰ Australia's comments on India's request for a preliminary ruling, para. 6, citing, for example, Panel Report, *China – Agricultural Producers*, para. 7.83.

²⁰¹ India's opening statement at the first substantive meeting, para. 15.

²⁰² India's opening statement at the first substantive meeting, para. 17.

²⁰³ India's opening statement at the first substantive meeting, para. 15.

arrears is "irrelevant". In acknowledging this fact, India, whether intentionally or not, appears to concede that the subsidy is not paid for the requisite purposes of Articles 9.1(d) and (e). In view of this reality, India argues, loosely, that by "improv[ing] the liquidity of sugar mills" the subsidy "ultimately reduc[es]" marketing and transport costs.

138. India's excessively broad interpretation of the legal standards applicable cannot stand. To recall, "costs of marketing" within the meaning of Article 9.1(d) are not merely any "cost of doing business" that "effectively reduce[s] the costs of marketing products", but rather "are specific types of costs that are incurred as part of and during the process of selling a product".²⁰⁴ Sugarcane is the primary input that mills crush to produce sugar and other sugarcane products.²⁰⁵ Mills incur the cost of purchasing sugarcane at an early stage in the production process – not as part of and during the process of selling raw, white or refined sugar. Thus, purchasing sugarcane is not a "cost of marketing" for export.

139. If the cost of purchasing production inputs could be considered an export marketing cost, "then so too [could] virtually any other cost incurred by a business engaged in exporting".²⁰⁶ The mere fact that a subsidy may improve a recipient's liquidity status, and thus "ultimately" make it easier for the recipient to meet costs of marketing, does not mean there is a "direct relationship"²⁰⁷ between the subsidy and those costs. In this regard, the MAEQ scheme fails to meet the legal standard set in Article 9.1(d).

140. Moreover, the cost of purchasing sugarcane is, quite clearly, unrelated to "internal transport and freight charges on export shipments". In this regard, the MAEQ scheme fails to meet the legal standard for Article 9.1(e).

ii. The evidence of India's stakeholder consultation is deficient

141. India states that "the amount of assistance has been calculated based on extensive stakeholder consultation" which, India would have the Panel believe, enabled its authorities

²⁰⁴ Australia's response to Panel question 56(a), para. 38, citing Appellate Body Report, *US – FSC*, paras. 129–131 (emphasis original).

²⁰⁵ Australia's first written submission, para. 6.

²⁰⁶ Appellate Body Report, *US – FSC*, para. 131; Brazil's response to Panel question 56, para. 60.

²⁰⁷ India's opening statement at the first substantive meeting, para. 15.

to determine a subsidy amount that does not exceed actual costs of marketing and internal transport and freight.²⁰⁸

142. In response to the Panel's direct request for evidence of India's stakeholder consultation, India adduced four documents²⁰⁹ that it describes as "sample communications sent to various stakeholders seeking relevant information in order to frame the MAEQ scheme".²¹⁰

143. The documents do not support India's claim. Rather, they reveal that DFPD sought, at most, mere estimates of average costs of moving "food grains" to domestic and international markets.²¹¹

144. Moreover, the communications were directed to the Food Corporation of India,²¹² the Ministry of Railways,²¹³ the Metals and Minerals Trading Corporation of India Ltd,²¹⁴ and the State Trading Corporation of India Ltd.²¹⁵ It is not clear, from this evidence, whether DFPD consulted mills or traders, the entities arguably best placed to provide accurate information regarding actual costs of marketing and transporting exports. DFPD has a demonstrated ability to design and implement measures that account for individual mills' circumstances. For example, it allocates Minimum Indicative Export Quotas (MIEQ)/MAEQ quotas, and buffer stock and stockholding volumes on individual, mill-specific bases.²¹⁶ DFPD would have been

²⁰⁸ India's opening statement at the first substantive meeting, para. 17.

²⁰⁹ Communication from Department of Food & Public Distribution dated 25 June 2019 to Food Corporation of India (**Exhibit IND-15**); Communications from Department of Food & Public Distribution dated 26 and 27 June 2019 to Ministry of Railways (**Exhibit IND-16**); Communication from Department of Food & Public Distribution dated 11 July 2019 to Metals and Minerals Trading Corporation of India Ltd (**Exhibit IND-17**); Communication from Department of Food & Public Distribution dated 11 July 2019 to State Trading Corporation of India Ltd (**Exhibit IND-18**).

²¹⁰ India's response to Panel question 57(a), p. 11.

²¹¹ Communication from Department of Food & Public Distribution dated 25 June 2019 to Food Corporation of India (**Exhibit IND-15**), subject line, paras. 1 and 2; Communications from Department of Food & Public Distribution dated 26 and 27 June 2019 to Ministry of Railways (**Exhibit IND-16**), subject line and paras. 1 and 2; Communication from Department of Food & Public Distribution dated 11 July 2019 to Metals and Minerals Trading Corporation of India Ltd (**Exhibit IND-17**), para. 3; Communication from Department of Food & Public Distribution dated 11 July 2019 to State Trading Corporation of India Ltd (**Exhibit IND-18**), para. 3.

²¹² Communication from Department of Food & Public Distribution dated 25 June 2019 to Food Corporation of India (**Exhibit IND-15**).

²¹³ Communications from Department of Food & Public Distribution dated 26 and 27 June 2019 to Ministry of Railways (**Exhibit IND-16**).

²¹⁴ Communication from Department of Food & Public Distribution dated 11 July 2019 to Metals and Minerals Trading Corporation of India Ltd (**Exhibit IND-17**).

²¹⁵ Communication from Department of Food & Public Distribution dated 11 July 2019 to State Trading Corporation of India Ltd (**Exhibit IND-18**).

²¹⁶ See, for example, 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 (**Exhibit JE-115**), annexure, and DFPD Order of 29 June 2018 regarding the final allocation of 30 Lakh MT of buffer stock to sugar mills (**Exhibit JE-123**), annexure.

capable, if it wished, of taking actual costs incurred by individual mills into account in determining the subsidy rates under the MAEQ scheme.

145. Significantly, the four documents India exhibits do not provide evidence of any feedback or data the stakeholders provided to DFPD that could be said to corroborate India's claim that the lump sum it selected does not exceed actual costs. The documents therefore provide the Panel with no basis upon which to perform an objective assessment of whether the subsidy amount exceeds actual marketing costs and internal transport and freight costs.

146. In view of India's refusal, upon an express request by the Panel, to provide documents that support its defence, Australia considers it within the Panel's authority to draw an adverse inference that India holds, and has not provided, information that is supportive of Australia's case and adverse to its own defence.²¹⁷

iii. The MAEQ scheme is not designed to ensure the assistance does not exceed actual costs incurred by sugar mills

147. India asserts, unequivocally, that "the lump sum amount arrived at does not exceed the costs typically incurred by a sugar mill towards such expenses."²¹⁸

148. Given the clear lack of a relationship between the MAEQ scheme and the kinds of costs identified in Articles 9.1(d) and (e), Australia considers it unnecessary for the Panel to consider and resolve the issue of whether MAEQ payments exceed those actual costs.

149. For the sake of argument, even if MAEQ scheme subsidies were linked to, and paid towards, Articles 9.1(d) and (e) costs, the scheme's design nevertheless fails to ensure the assistance does not exceed those costs.

²¹⁷ See Appellate Body Report, *Canada – Aircraft*, paras. 198 and 203; Panel Report, *Argentina – Textiles and Apparel*, para. 6.39.

²¹⁸ India's opening statement at the first substantive meeting, para. 17 (emphasis added). India repeated this assertion in its closing statement at the first substantive meeting, at para. 41: "As India has stated previously, the amounts provided under the MAEQ Scheme have been determined on the basis of extensive stakeholder consultations such that the lump sum amount arrived at does not exceed the costs typically incurred by a sugar mill towards such expenses" (emphasis added).

150. DFPD's apparent method of ascertaining averages or estimates of costs and, on that basis, determining a lump sum payment rate, is an insufficient way to design a subsidy if the aim is to ensure that the assistance provided will not exceed actual costs.

151. To begin with, the MAEQ scheme offers a lump sum of INR 3,428 per mT ostensibly for "internal transport and freight charges including loading, unloading, and fobbing etc".²¹⁹ India argues that this category of the subsidy falls within Article 9.1(e).²²⁰

152. However, the assistance is available to mills regardless of whether they actually incur domestic transport and freight costs. According to the Incoterms rules issued by the International Chamber of Commerce (ICC), "Ex Works" (EXW) means that:

the seller delivers when it places the goods at the disposal of the buyer at the seller's premises or at another named place (i.e., works, factory, warehouse, etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable.²²¹

153. It follows that, in EXW transactions, the purchaser, and not the seller, incurs all costs and liabilities associated with a good for export once it leaves the seller's premises, including domestic transport and freight costs from the seller to the port of export.

154. Australia notes evidence that Indian mills conduct export transactions on an EXW, or "Ex Mill" basis. For example:

- Shree Datta SSSK Ltd, a mill with a MAEQ allocation of 28,694 mT in the 2019–20 sugar season,²²² issued a tender notice inviting purchases of raw or white sugar for export "from the recognized reputed Exporter on Ex. Mill Basis".²²³ The notice requires the successful bidder to submit documents confirming the export counts towards the mill's MAEQ allocation,²²⁴ and confirms that the mill, not the purchaser, receives the subsidy,²²⁵ even

²¹⁹ 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 (**Exhibit JE-114**), para. 3(i)(b).

²²⁰ India's first written submission, paras. 121–122.

²²¹ International Chamber of Commerce (ICC), Incoterms Rules, Rules for any mode or modes of transport (**Exhibit JE-159**).

²²² 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 (**Exhibit JE-115**), annexure, line 192.

²²³ Tender Notice for Sale of Raw Sugar or White Sugar for Export (Shree Datta S.S.S.K. Ltd) (**Exhibit JE-161**), p.1.

²²⁴ Tender Notice for Sale of Raw Sugar or White Sugar for Export (Shree Datta S.S.S.K. Ltd) (**Exhibit JE-161**), lines 8.5 and 8.6.

²²⁵ Tender Notice for Sale of Raw Sugar or White Sugar for Export (Shree Datta S.S.S.K. Ltd) (**Exhibit JE-161**), line 10.

though the mill is not the party that incurs the related domestic transport and freight costs.

- Jawahar SSSK Ltd, a mill with a MAEQ allocation of 27,597 mT in the 2019–20 sugar season,²²⁶ issued a tender notice for the export of sugar noting that "[i]nterested exporters are requested to quote the rate at 'Ex-Mill'...".²²⁷
- HPCL Biofuels Ltd's (HPCL) sugar export contract specifications, issued in respect of its Sugauli and Lauriya locations, each holding MAEQ allocations of 6,319 mT and 6,947 mT respectively,²²⁸ states that "[t]he delivery shall be ex-mill basis" and "[a]ll costs outside the HPCL Sugar Units, e.g. Insurance, transportation, etc. will be borne by buyer separately as per actual; excluding loading charges in mill which will be borne by seller."²²⁹ The terms and conditions require successful bidders to submit documents confirming the exports count towards the mills' MAEQ allocations, so as to ensure that HPCL receives the MAEQ subsidy, despite it not being the party that incurs the related domestic transport and freight costs.²³⁰

155. Thus, the MAEQ scheme purportedly offers a category of assistance towards costs that some mills routinely do not incur. In these cases, the assistance exceeds the mills' actual costs by 100 per cent. This fact disproves, starkly, India's assertion that payments under the MAEQ scheme "have a direct relationship to"²³¹ and "[do] not exceed the costs normally incurred".²³²

²²⁶ 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 (**Exhibit JE-115**), annexure, line 508.

²²⁷ Tender Notice for Export of Sugar (Jawahar S.S.S.K. Ltd) (**Exhibit JE-160**), para. 4.

²²⁸ 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 (**Exhibit JE-115**), annexure, lines 20 and 19.

²²⁹ HPCL Biofuels Ltd Sugar Export Contracts Specifications (**Exhibit JE-162**), paras. 3.11.7 and 3.11.8.

²³⁰ HPCL Biofuels Ltd Sugar Export Contracts Specifications (**Exhibit JE-162**), paras. 7.1.4, 7.1.5 and 7.1.7.

²³¹ India's opening statement at the first substantive meeting, para. 15.

²³² India's opening statement at the first substantive meeting, para. 17.

156. Australia acknowledges the possibility that some Indian mills may export on a "Cost, Insurance and Freight" (CIF) basis, which according to the ICC means that:

the seller delivers the good on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination.²³³

157. In CIF transactions, mills are likely to incur some domestic transport and freight costs in relation to sugar exports. Indian mills are situated in disparate locations across India's large territory, meaning that those costs will naturally vary across the country, depending on the distance travelled from mill to port.²³⁴ As such, the single flat rate offered under the MAEQ scheme is incapable of accounting for, and bears no relationship to, the level of expenditure that mills actually incur.

158. This point can be illustrated by reference to a sample of mills located in the state of Maharashtra. As India's second largest exporting state in the 2019–20 sugar season, mills in Maharashtra exported 2,595,000 mT of sugar.²³⁵ Maharashtra mill exports accounted for approximately 41.1 per cent of the total 6,153,000 mT India exported in that season.²³⁶

159. A significant majority of Maharashtra's sugar exports – 1,995,000 mT – shipped from two ports: Jawaharlal Nehru Port (JNPT), and JSW Jaigad Port (Jaigad), each located in Maharashtra.²³⁷ The average distances from 11 Maharashtra exporting mills to those two ports are 431km and 308km, respectively.²³⁸ The average freight rail costs for those 11 mills to the two ports, calculated using the Indian government's own Freight Operations Information System, are INR 489 per mT and 817 per mT, respectively.²³⁹

160. In addition to freight rail costs, storage and handling, or "fobbing" costs – which India argues MAEQ payments are designed to reduce – average at INR 800 per mT and INR 1,000 per mT across bulk, breakbulk and containerised shipments.²⁴⁰ With fobbing

²³³ International Chamber of Commerce (ICC), Incoterms Rules, Rules for any mode or modes of transport " (Exhibit JE-159).

²³⁴ Guatemala's opening statement at the first substantive meeting, para. 4.25.

²³⁵ Green Pool Commodity Specialists, Consultancy Report, February 2021 (Exhibit JE-165), Table 1.

²³⁶ Green Pool Commodity Specialists, Consultancy Report, February 2021 (Exhibit JE-165), Table 1.

²³⁷ Green Pool Commodity Specialists, Consultancy Report, February 2021 (Exhibit JE-165), Table 1.

²³⁸ Green Pool Commodity Specialists, Consultancy Report, February 2021 (Exhibit JE-165), Table 3.

²³⁹ Green Pool Commodity Specialists, Consultancy Report, February 2021 (Exhibit JE-165), Table 4 and Appendices 1–21 (Exhibit JE-165 Appendices 1–21).

²⁴⁰ Green Pool Commodity Specialists, Consultancy Report, February 2021 (Exhibit JE-165), p. 5, note 4.

expenses at their highest end of INR 1,000 factored in, the average costs for transport, freight and fobbing from the 11 Maharashtra mills to JNPT and Jaigad would be INR 1,489 per mT and INR 1,817 per mT, respectively.

161. In the event that any of the 11 Maharashtra mills conducted export transactions on a CIF basis, the flat rate of INR 3,428 per mT ostensibly offered would far exceed their actual costs of transporting sugar from mill to port and paying for fobbing. Well beyond merely creating favourable conditions in relation to internal transport and freight charges for export-bound shipments vis-à-vis domestic shipments,²⁴¹ the subsidy would confer a substantial additional benefit upon the mills.

162. These facts demonstrate the emptiness of India's claim that the lump sum does not exceed actual costs. In reality, India has failed to design a subsidy that is tailored to, and does not exceed, actual internal transport and freight costs for a significant portion of its exports. To this end, the MAEQ scheme fails to meet the legal standard set by Article 9.1(e).

163. Further, to recall, "costs of marketing" include "the costs of international transport and freight".²⁴² The MAEQ scheme offers mills a lump sum of INR 2,620 per mT ostensibly for "ocean freight against shipment from Indian ports to the ports of destination countries etc".²⁴³ India argues that this category of the subsidy falls within Article 9.1(d).²⁴⁴ However, yet again, the assistance is available to mills regardless of whether they actually incur international shipping costs.

164. According to the ICC, "Free on Board" (FOB) means that:

the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.²⁴⁵

²⁴¹ Australia's response to Panel question 56(a), paras. 43–45.

²⁴² Agreement on Agriculture, Article 9.1(d); Australia's response to Panel question 56(a), para. 37.

²⁴³ 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 (**Exhibit JE-114**), paras. 3(i)(c).

²⁴⁴ India's first written submission, paras. 118 and 120.

²⁴⁵ International Chamber of Commerce (ICC), Incoterms Rules, Rules for any mode or modes of transport (**Exhibit JE-159**).

165. There is evidence to indicate that Indian mills routinely conduct export transactions on a FOB basis.²⁴⁶ In such transactions, mills do not pay the costs of international shipping from the port of departure to the final destination. The purchaser of the sugar meets those costs, a fact that disproves India's assertion that payments under the MAEQ scheme "have a direct relationship to the costs normally incurred".²⁴⁷ Again, the MAEQ scheme fails to meet the legal standard for Article 9.1(d).

166. Finally, annual reports of large Indian mills corroborate Australia's submission that the MAEQ scheme ostensibly provides subsidies for costs that mills often do not incur. For example, in its 2019–20 annual report, Avadh Sugar & Energy Limited (Avadh) notes in relation to government grants that:

[t]he company recognises the related costs for which the grants are intended to compensate and are netted off with the related expenditure. If not related to a specific expenditure, it is taken as income and presented under "Other Operating Revenue".²⁴⁸

167. The company did not net its MAEQ subsidy off against any expenditure of the kinds identified in Articles 9.1(d) or (e). Rather, it treated the subsidy as a simple grant and, accordingly, accounted for the assistance as "Other Operating Revenue".²⁴⁹

168. Similarly, Balrampur Chini Mill Limited (Balrampur) and Dhampur Sugar Mills Ltd (Dhampur), treated MAEQ assistance received as, respectively, "revenue from operations"²⁵⁰ and "other operating income" in their 2019-20 annual reports.²⁵¹ Avadh, Balrampur and Dhampur are among India's 10 largest mills.²⁵²

169. To conclude, there is clear evidence that MAEQ scheme payments are provided for the purpose of offsetting the cost of purchasing sugarcane and not, as India asserts, to offset marketing, transport and freight costs. The subsidy is not linked to actual Article 9.1(d) or (e)

²⁴⁶ See Reuters, "Indian sugar mills clinch export deals as prices jump – industry", 7 January 2021 (**Exhibit JE-163**): "Contracts were signed between \$375 and \$395 a tonne on a free-on-board (FOB) basis, three dealers directly involved in the deals said." (emphasis added). See also, Reuters, "Indian sugar exports poised to hit record 5 million tonnes by this year", 17 December 2019 (**Exhibit JE-164**): "Traders have contracted to export raw sugar at an average \$300 a tonne and white sugar \$300 a tonne on a free-on-board (FOB) basis, three dealers directly involved in the deals said" (emphasis added).

²⁴⁷ India's opening statement at the first substantive meeting, para. 15.

²⁴⁸ Avadh Sugar & Energy Limited Annual Report 2019–20 (**Exhibit JE-158**), p. 92, note 3.14.

²⁴⁹ Avadh Sugar & Energy Limited Annual Report 2019–20 (**Exhibit JE-158**), p. 125, note 46(b), read together with p. 111, note 28.

²⁵⁰ Balrampur Chini Mills Limited 2019–20 (**Exhibit JE-157**), p. 206, note 36, Table 8, item (e), read together with p. 207, fn. (vii).

²⁵¹ Dhampur Sugar Mills Limited Annual Report 2019-20 (**Exhibit JE-149**), p. 161, note 40, item 1(iii) and p. 162, note (c).

²⁵² Fundoodata, Top 10 Sugar Companies in India (**Exhibit JE-166**).

costs. India has not discharged its burden of proof, because it cannot: the measure falls outside the scope of Articles 9.1(d) and (e). India does not have a valid defence under Article 9.4.

C. THE PROHIBITION UNDER ARTICLE 3.1(A) OF THE SCM AGREEMENT APPLIES TO INDIA

170. The Agreement on Agriculture does not authorise India's export subsidies. They therefore remain subject to the disciplines of the SCM Agreement, including the prohibition on export subsidies under Article 3.1(a).²⁵³

171. India argues that it is exempt from this prohibition by virtue of the flexibility Article 27.2(a) affords developing countries listed in Annex VII(b). However, as Australia explains in this Section III.C, India's interpretation of the interaction between Article 27 and Annex VII is unsustainable. Its measures are prohibited export subsidies. This includes the DFIA scheme, which does not, as India claims, benefit from the carve out created by footnote 1 to the SCM Agreement.

1. The correct interpretation of Article 27 and Annex VII of the SCM Agreement

172. Article 27 of the SCM Agreement recognises "that subsidies may play an important role in economic development programmes of developing country Members" and accordingly affords these countries flexibility with respect to the use and phase-out of export subsidies.²⁵⁴

173. Article 27.2(a) exempts developing country Members identified in paragraphs (a) and (b) of Annex VII from the application of the prohibition in Article 3.1(a).

174. Article 27.2(b), meanwhile, exempted "other developing countries" from the application of the prohibition in Article 3.1(a) for a period of eight years from the WTO Agreement's entry into force, during which time they were to phase out their export subsidies progressively and not to increase them.²⁵⁵

²⁵³ Australia's first written submission, paras. 210–216.

²⁵⁴ SCM Agreement, Article 27.1.

²⁵⁵ SCM Agreement, Articles 27.2(b) and 27.4.

175. Developing countries referred to in subparagraph (b) of Annex VII – among them India – are not shielded indefinitely from the application of Article 3.1(a). Instead, they "graduate" from Annex VII and become "other developing countries" within the meaning of Article 27.2(b) once they reach a specified income level.²⁵⁶ Because Article 27.2(b) is time limited, developing countries that graduated from Annex VII(b) within eight years of the WTO Agreement's entry into force on 1 January 1995, had up until 1 January 2003 to phase out their export subsidies. For those that graduated (or will graduate) after 1 January 2003 – including India, which did so in 2017 – the flexibility under Article 27.2(b) no longer applies as the eight-year timeframe has expired.

2. The Panel should reject India's misinterpretation of Article 27 and Annex VII of the SCM Agreement

176. While India agrees that it graduated from Annex VII(b) in 2017,²⁵⁷ it does not share Australia's reading of Article 27 and Annex VII in any other respect. Instead, India argues that it continues to enjoy an eight-year export subsidy phase-out period, which began from its graduation from Annex VII(b) in 2017. India builds its argument around a single, flawed line of reasoning. In sum, India contends that customary rules of treaty interpretation do not support an ordinary meaning reading of Article 27.2(b). Multiple untenable claims flow from this contention, including that an ordinary meaning reading of Article 27.2(b) would:

- frustrate a harmonious reading of the SCM Agreement, rendering certain provisions useless or redundant;
- fail to account for the immediate textual context in which paragraph (b) sits, leading to internal inconsistencies in the operation of Article 27 as a whole; and
- deny some developing countries the full enjoyment of the special and differential treatment scheme under the SCM Agreement, contrary to the Agreement's object and purpose.

²⁵⁶ SCM Agreement, Annex VII(b).

²⁵⁷ India's first written submission, para. 132.

177. India also argues that the panel's reasoning in *India – Export Related Measures*, which addressed precisely the arguments with respect to Article 27.2(b) upon which India relies in this dispute, is "inconsequential" because its determination is not binding and is under appeal.²⁵⁸

178. Australia first outlines the ordinary meaning of Article 27.2(b) and why it should be respected, before explaining why India's argument regarding the eight-year phase period and associated reasoning are untenable.

(a) Ordinary meaning of Article 27.2(b)

179. Article 27 and Annex VII of the SCM Agreement must be interpreted in accordance with the ordinary meaning of their terms, read in context, and in light of object and purpose of the Agreement on Agriculture.²⁵⁹

180. The starting point in any treaty interpretation must be the text of the provision itself. If the "clarity of the plain textual meaning"²⁶⁰ leaves little room for speculation, a labyrinthine investigation of context, object and purpose, and supplementary materials designed to "develop interpretations" that the text does not support should not ensue.²⁶¹

181. The ordinary meaning of the text of Article 27.2(b) is clear.²⁶² A "period of eight years from the date of entry into force of the WTO Agreement" includes two inflexible numerical reference points, namely a date – that of the WTO Agreement's entry into force – and a timeframe of eight years.

182. Canada, Costa Rica, the European Union, Japan and the United States all share Australia's view that the text of Article 27.2(b) is unambiguous and that the eight-year export subsidy phase-out period to which it refers ended on 1 January 2003.²⁶³

²⁵⁸ India's first written submission, para. 144.

²⁵⁹ See footnote 32 above.

²⁶⁰ Appellate Body Report, *Peru – Agricultural Products*, para. 5.94.

²⁶¹ Appellate Body Report, *Peru – Agricultural Products*, para. 5.94. See also, United States' third party submission, paras. 68–69.

²⁶² See Appellate Body Report, *Brazil – Aircraft*, para. 139.

²⁶³ Canada's third party submission, paras. 30–38; Canada's oral statement at the first substantive meeting, paras. 10–11; Costa Rica's third party submission, paras. 28–30; European Union's third party submission, paras. 78–80; Japan's oral statement at the first substantive meeting, paras. 10–12; United States' third party submission, paras. 59–62.

183. India's interpretation of Article 27.2(b) does not reflect the provision's ordinary meaning.

(b) The panel's reasoning in *India – Export Related Measures* is relevant

184. Australia's response to India's interpretation of Article 27.2(b) draws, among other things, on the panel's comprehensive and persuasive legal analysis in *India – Export Related Measures*. Third parties intervening in this dispute concur with Australia in finding no reason why this Panel should depart from that panel's analysis.²⁶⁴ Far from being "inconsequential",²⁶⁵ that panel report, which addresses in detail the manipulation of customary treaty interpretation principles India employs to depart from the ordinary meaning of Article 27.2(b), is impossible to ignore.

(c) An ordinary meaning interpretation does not render other parts of the SCM Agreement ineffective

185. Flowing from the customary rule enshrined in Article 31(1) of the Vienna Convention is the principle of effectiveness, pursuant to which a treaty interpreter must "read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously."²⁶⁶ Corollaries of this principle are that a treaty must be read as a whole and that none of its provisions should be rendered useless or redundant.²⁶⁷

186. Reading Article 27.2(b) in isolation from "the scheme of organization of Article 27.2, Annex VII(b), and the other provisions of Article 27" would, India argues, undermine the

²⁶⁴ Canada's third party submission, para. 33; Costa Rica's third party submission, para. 30; European Union's third party submission, para. 33; Japan's oral statement at the first substantive meeting, para. 12; United States' third party submission, paras. 65–68.

²⁶⁵ India emphasises that the *India – Export Related Measures* panel report has not been adopted and is under appeal, arguing that "reliance on this panel report is inconsequential" (India's first written submission, para. 144) and that "[t]he Panel must independently examine the arguments presented by India and other parties" (India's closing statement at the first substantive meeting, para. 43). Australia agrees that panels should reach their own interpretations independently. However, Australia does not consider that this Panel is precluded in any way from following interpretations of prior panels, insofar as the Panel assesses them to be persuasive and finds they align with the Panel's own interpretation: see Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines II), para. 7.19. On the matter of the *India – Export Related Measures* report's unadopted status, Australia notes that the Appellate Body has agreed that "a panel could... find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant": Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14.

²⁶⁶ Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 (emphasis original).

²⁶⁷ Appellate Body Report, *Korea – Dairy*, para. 81; India's first written submission, paras. 136–137.

principle of effectiveness, rendering parts of the SCM Agreement useless and redundant vis-à-vis some developing countries.²⁶⁸

187. First, India argues, it would undermine the mandatory language of Annex VII(b), pursuant to which listed developing countries "shall be subject to the provisions which are applicable to other developing country Members"²⁶⁹ upon their graduation from Annex VII(b).²⁷⁰

188. Australia disagrees. India's assertion conflates the content of Annex VII(b) and its applicability.²⁷¹ The mandatory language – "shall be subject to the provisions" – concerns the applicability to Annex VII(b) developing countries of another provision of the SCM Agreement: Article 27.2(b). It does not modify the cross-referenced provision's content and, as Article 27.2(b) has a temporal limit, its applicability ceases for any developing country on 1 January 2003.

189. Moreover, the addition in Annex VII(b) of the subclause "which are applicable to other developing country Members... when GNP per capita has reached \$1,000 per annum" qualifies the applicability of Article 27.2(b) to Annex VII(b) countries in two ways. First, it makes clear that the cross-referenced provision is to apply to Annex VII(b) developing countries on exactly the same terms as it does for "other developing countries", and second, it provides that this is only to happen upon reaching a specified income threshold.²⁷²

190. This means that, after 1 January 2003, Article 27.2(b) ceased to operate both for "other developing countries" and for Annex VII(b) countries having reached GNP \$1,000 per capita. The mandatory applicability language in Annex VII(b), in providing a cross-reference to a time-limited provision, inherently accounts for the possibility that some Annex VII(b) developing countries would not benefit from the operative eight-year phase-out period if they graduated after it expired.²⁷³

²⁶⁸ India's first written submission, para. 137.

²⁶⁹ Emphasis added.

²⁷⁰ India's first written submission, paras. 138–139.

²⁷¹ Panel Report, *India – Export Related Measures*, para. 7.45.

²⁷² Panel Report, *India – Export Related Measures*, para. 7.46.

²⁷³ Panel Report, *India- Export Related Measures*, para. 7.47.

191. Second, India argues that, read in context, an ordinary meaning interpretation of Article 27.2(b) renders a harmonious reading of the Article as a whole impossible.²⁷⁴ This context includes Articles 27.4 and 27.5, which, India claims, clearly anticipate a progressive approach to phasing out export subsidies, extending over a full eight years, for all developing country Members, with these eight-year phase-outs taking place at different times.²⁷⁵ Australia disagrees with this assertion, which runs counter to the terms used in, and textual cross-references between, Articles 27.2(b) and 27.4.

192. The eight-year exemption from the application of Article 3.1(a) referred to in Article 27.2(b) is available "subject to compliance with the provisions in paragraph 4." Far from relaxing the timeframe within which the eight-year phase-out must take place, paragraph 4 imposed positive obligations on developing countries that wished to continue to benefit from the exemption after it expired.²⁷⁶ Article 27.4 makes its relationship to Article 27.2(b) clear by adverting, in its opening sentence, first to developing country Members "referred to in paragraph 2(b)" and then to "the eight-year period" during which these countries must phase out export subsidies. Use of the definite article "the" leaves no room for doubt. Article 27.4 refers to the specific eight-year period introduced in Article 27.2(b).²⁷⁷

193. India also claims that the ordinary meaning of Article 27.2(b), when read in context with the second sentence of Article 27.5 – which affords Annex VII developing countries an eight-year phase-out period for individual products that reach export competitiveness – leads to the absurd result of different phase-out periods for individual products and export subsidies generally.²⁷⁸

194. Australia sees no such absurdity. The flexibility that the second sentence of Article 27.5 affords with respect to individual products applies only to Annex VII developing countries. Once a country graduates from Annex VII, Article 27.5, including its eight-year phase-out period for individual products that reach export competitiveness, ceases to

²⁷⁴ India's first written submission, para. 141.

²⁷⁵ India's first written submission, para. 141.

²⁷⁶ Appellate Body Report, *Brazil – Aircraft*, para. 140.

²⁷⁷ Panel Report, *India – Exported Related Measures*, paras. 7.57–7.58.

²⁷⁸ India's first written submission, para. 141.

apply.²⁷⁹ As with Article 27.4, Article 27.5 qualifies, rather than expands, the flexibility available under Article 27.2(b), by providing that even countries that retain Annex VII status must phase out subsidies for products that reach export competitiveness.²⁸⁰

(d) The ordinary meaning of Article 27.2(b) is consistent with the SCM Agreement's object and purpose

195. Finally, India claims, a plain meaning interpretation of Article 27.2(b) denies developing countries equal treatment by affording those countries that graduated from Annex VII(b) within eight years of 1995 the benefit of a progressive export subsidy phase-out and denying that benefit to countries that did not. This unequal treatment would, India argues, run counter to the SCM Agreement's object and purpose, fundamental to which is a recognition that subsidies are critical to developing countries' economic development.²⁸¹

196. India insists its interpretation finds support in the SCM Agreement's negotiating history,²⁸² which, it claims, shows negotiators intended to apply different export subsidy phase-out conditions to different categories of developing countries.²⁸³ India argues that recourse to these supplementary materials – in keeping with the customary principle reflected in Article 32 of the Vienna Convention – is justified because a plain textual interpretation of Article 27.2(b) yields a manifestly absurd or unreasonable interpretation that undermines the SCM Agreement's object and purpose.²⁸⁴

197. The plain meaning of Article 27.2(b) is unambiguous. It is also entirely consistent with the provision's context and the SCM Agreement's object and purpose.

198. Far from denying special and differential treatment to any developing country, Article 27 and Annex VII afford different levels of flexibility according to Members' circumstances. With respect to Annex VII(b) countries, Article 27.2(b) ensures that those graduating rapidly from the Annex enjoy at least the same flexibility with respect to export subsidy phase-out as "other developing countries". Those that do not, meanwhile, have as

²⁷⁹ Panel Report, *India – Export Related Measures*, para. 7.62; Japan's oral statement at the first substantive meeting, para. 11.

²⁸⁰ Panel Report, *India – Export Related Measures*, para. 7.63.

²⁸¹ India's first written submission, paras. 139–140.

²⁸² India's first written submission, para. 142.

²⁸³ India's first written submission, para. 143.

²⁸⁴ India's first written submission, para. 142.

long as it takes to reach a GNP of \$1,000 per capita, even if this proves to be much longer than eight years. This arrangement has afforded India an extended exemption appropriate to its evolving income level.²⁸⁵

199. Nor are Annex VII(b) countries approaching the threshold income level faced with the inequitable prospect – as compared with "other developing countries" – of having to phase out export subsidies "overnight" as India claims.²⁸⁶ The SCM Agreement, which is fundamentally concerned with the prohibition of subsidies, arguably puts developing country Members on notice that they will have to phase out export subsidies within predictable timeframes. Also relevant is the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns, which proposes that relevant countries reach the threshold income level for three consecutive years before graduating from Annex VII(b).²⁸⁷

(e) The SCM Agreement provides avenues for developing countries seeking further flexibility

200. That developing countries might need more flexibility on the phase-out of export subsidies than the eight-year period that Article 27.2(b) offers is anticipated by Article 27.4, which allowed such countries to seek an extension, subject to annual review, no later than one year before the phase-out period's expiry. Securing such an extension based on a misinterpretation of Article 27.2(b) that is contrary to its plain meaning is, Australia submits, an unacceptable alternative to the transparent and consultative extension mechanism that Article 27.4 offered countries anticipating such difficulties. There is no reason why, as 1 January 2003 loomed, even countries yet to graduate from Annex VII, could not have used the consultation mechanism to explore their options.

201. In sum, Australia submits that the alleged inequities, internal inconsistencies and potential absurdities upon which India rests its call for an alternative reading of Article 27.2(b) do not survive scrutiny.

²⁸⁵ Panel Report, *India – Export Related Measures*, paras. 7.50–7.51; Canada's third party submission, para. 36; Costa Rica's third party submission, para. 29; United States' third party submission, paras. 64–67.

²⁸⁶ India's first written submission, paras. 139–143.

²⁸⁷ WT/MIN(01)/17, cited in Panel Report, *India – Export Related Measures*, para. 7.53; Canada's third party submission, para. 37.

**D. INDIA'S EXPORT SUBSIDIES ARE PROHIBITED UNDER ARTICLE 3.1(A) OF THE
SCM AGREEMENT**

202. Australia has established that India's production and buffer stock subsidies, and its MAEQ and DFIA schemes, are prohibited export subsidies that are inconsistent with India's obligations under Articles 3.1(a) and 3.2 of the SCM Agreement.²⁸⁸

**1. The Panel should reject India's misinterpretation of the legal
standard applicable for establishing the existence of a subsidy
under Article 1.1**

203. To recall, a measure falling within the definition of "subsidy" under Article 1.1 of the SCM Agreement will comprise:

- a "financial contribution";²⁸⁹
- by a "government or any public body";²⁹⁰
- that confers a "benefit" on the recipient.²⁹¹

204. Article 3.1(a) "prohibits subsidies that are conditional upon... or are dependent for their existence on",²⁹² or "tied to"²⁹³ export performance.²⁹⁴ Subsidies prohibited by Article 3 are deemed to be "specific" within the meaning of Article 2.²⁹⁵

205. In short, the Indian government, by means of its production and buffer stock subsidies, and its MAEQ and DFIA schemes, makes financial contributions that benefit mills, leaving them better off than they would otherwise be with respect to debts owed, funds accrued or import tax liability. The financial contributions under these schemes are tied to export performance.

²⁸⁸ Australia's first written submission, paras. 391–431.

²⁸⁹ Australia's first written submission, paras. 375–379.

²⁹⁰ Australia's first written submission, paras. 380–381.

²⁹¹ Australia's first written submission, paras. 382–384.

²⁹² Appellate Body Report, *US – Upland Cotton*, para. 572. See also Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47 and Appellate Body Report, *Canada – Aircraft*, para. 166.

²⁹³ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47 (quoting Appellate Body Report, *Canada – Aircraft*, para. 171).

²⁹⁴ Australia's first written submission, paras. 277 and 385–388.

²⁹⁵ SCM Agreement, Article 2.3.

206. To defend Australia's claims under the SCM Agreement in relation to India's production and buffer stock subsidies and MAEQ scheme, India repeats its flawed argument, based on its incorrect interpretation of Article 1.1(a)(1), that Australia is required and has failed to provide evidence of actual disbursements or payments and thus has failed to establish the existence of a financial contribution.²⁹⁶

207. India also repeats its argument that Australia has failed to identify, and make a comparison with, a market benchmark in order to establish the existence of a benefit in relation to these measures.²⁹⁷

208. For the reasons Australia outlined in Section III.A.3, the Panel should reject India's argument and find that India's production, buffer stock and MAEQ subsidies are prohibited export subsidies under Article 3.1(a).

2. The DFIA scheme does not fall within footnote 1 of the SCM Agreement

209. Australia has established that the DFIA scheme is a prohibited export subsidy under Article 3.1(a).²⁹⁸

210. In its defence, India argues that the DFIA scheme does not constitute an export subsidy as it falls within the scope of footnote 1 to the SCM Agreement.²⁹⁹

211. Read together with Annex I(i) of the SCM Agreement, footnote 1 provides that a measure will not be deemed to be a subsidy if it comprises:

- a remission or drawback, including full or partial exemption or deferral;
- of import charges;

²⁹⁶ India's first written submission, paras. 146–147.

²⁹⁷ India's first written submission, paras. 110–112.

²⁹⁸ Australia's first written submission, paras. 353–365 and 424–431.

²⁹⁹ India's first written submission, paras. 97–98, 124–125 and 149–155; India's opening statement at the first substantive meeting, para 18; India's closing statement at the first substantive meeting, paras. 42–43; India's response to Panel question 53(b), p. 8 and question 58(c), pp. 12–13.

- on imported inputs consumed in the production of an exported product;³⁰⁰
and
- the remission or drawback is not in excess of those charges levied on the inputs.³⁰¹

212. India argues that the DFIA scheme meets these criteria as the measure provides an exemption from basic customs duty on imported raw sugar used in the production of exported white sugar, and that the exemption does not exceed the customs duty that would otherwise be levied.³⁰² Specifically, India claims that "[t]he exemption from payment of import duty may be claimed subsequent to the export of the finished product that incorporates/utilizes the imported input."³⁰³

213. Australia submits that the evidence of the DFIA scheme's design, structure and operation does not support India's factual characterisation of the measure.

214. Paragraph 4.25(c) of India's Foreign Trade Policy 2015–2020, as amended on 28 March 2018, reads, relevantly: "Export of white sugar under DFIA is allowed... till 30.9.2018 and DFIA in such cases shall be issued only on or after 1.10.2019. Such DFIA's shall be valid for imports till 30.9.2021."³⁰⁴

215. When paragraph 4.25(c) was amended, certain restrictions on claiming DFIA in relation to raw sugar were also removed.³⁰⁵

216. The effect of those amendments are as follows:

- Entities that exported white sugar between 28 March 2018 and 30 September 2018 could claim DFIA on raw sugar as a result of having exported during that six-month window.

³⁰⁰ Footnote 61 of the SCM Agreement provides: "Inputs consumed in the production process are 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" (emphasis added).

³⁰¹ Panel Report, *India – Export Related Measures*, para. 7.178 and Table 2; Australia's response to Panel question 58(b), paras. 61–65.

³⁰² India's first written submission, para. 154.

³⁰³ India's first written submission, para. 154 (emphasis added).

³⁰⁴ Notification No. 57/2015-2020, Department of Commerce, 28 March 2018 (**Exhibit AUS-41**), para. 1 (emphasis added).

³⁰⁵ Notification No. 57/2015-2020, Department of Commerce, 28 March 2018 (**Exhibit AUS-41**), para. 2.

- Applications for DFIA on raw sugar could be made after 1 October 2019. This is because DFIA is available on a post-export basis only.³⁰⁶
- The DFIA granted in respect of 2018 white sugar exports did not result in a remission of the basic customs duty paid on the raw sugar consumed in the production of those sugar exports. Rather, it authorised a prospective customs duty exemption on raw sugar imported between 1 October 2019 and 30 September 2021. This is because DFIA is transferrable.³⁰⁷
- Thus, 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.

217. Put simply, the DFIA scheme permits mills to import customs duty free raw sugar in the future on account of having exported white sugar in the past.³⁰⁸ Thus, the measure fails to meet the footnote 1 requirement that the remission or drawback be on an imported input that is consumed in the production of an exported product. Rather than require the duty-exempt imported raw sugar to have been consumed in the production of white sugar for export, the scheme allows exporters to export white sugar first and then claim the exemption on raw sugar they import at a later point in time.

218. Contrary to India's assertions, the DFIA scheme reverses the logic of footnote 1. It entails a disconnect between imported raw sugar and exported white sugar. It 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 2018.³⁰⁹

219. Media reporting in India corroborates Australia's analysis of how the scheme operates.³¹⁰

³⁰⁶ Notification 01/2015-2020, Foreign Trade Policy, 2015-2020 (**Exhibit AUS-40**), p. 84, para 4.27(i).

³⁰⁷ Notification 01/2015-2020, Foreign Trade Policy, 2015-2020 (**Exhibit AUS-40**), para. 4.29.

³⁰⁸ Australia's first written submission, para. 364; Australia's response to Panel question 58(b), para. 66.

³⁰⁹ Australia's response to Panel question 58(b), para. 67.

³¹⁰ Hindu Business Line, "Govt allows export of 2 million tonnes of sugar" (**Exhibit AUS-102**).

220. For these reasons, the Panel should reject India's defence and find that the DFIA scheme is a prohibited export subsidy under Article 3.1(a).

E. CONCLUSION

221. India's defence of Australia's export subsidy claims rests on a litany of incorrect interpretations of applicable legal standards, and factual mischaracterisations regarding the design, structure and operation of its measures. 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, which India provides in violation of its obligations under both Agreements.

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

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

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

1. Agreement on Agriculture

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

- progress in the implementation of commitments negotiated under the Uruguay Round reform programme shall be reviewed by the Committee on Agriculture (Article 18.1);
- the review process shall be undertaken on the basis of notifications submitted by Members in relation to such matters and at such intervals as shall be determined (Article 18.2);

- in addition to the notifications to be submitted to inform the review process (under Article 18.2), any new domestic support measure, or modification of an existing measure, for which exemption from reduction is claimed shall be notified promptly by Members (Article 18.3); and
- domestic support notifications shall contain details of the relevant new or modified measure and its conformity with criteria set out in in the Agreement on Agriculture (Article 18.3).³¹¹

224. Accordingly, India is required to submit notifications concerning its domestic support and export subsidies to the Membership through the Committee on Agriculture. Notifications are essential for ensuring transparency and enabling the Committee to monitor the implementation of Members' commitments effectively.³¹²

(a) The Panel should reject India's misinterpretation of Article 18 of the Agreement on Agriculture

225. India claims that Article 18 of the Agreement on Agriculture does not place any obligations on Members, but merely "vests the Committee on Agriculture with the discretion to determine the conduct of the review process...".³¹³

226. In making this argument, India quite simply ignores the mandatory language and overall scheme of Article 18. Contrary to India's assertion, the Committee's role is not to be determined as a matter of discretion. Rather, the Committee shall review Members' progress in the implementation of their commitments, and its review shall be undertaken on the basis of notifications to be submitted by Members.³¹⁴ If Members had no obligation to submit notifications, the Committee would be unable to discharge its mandatory function.

227. Further, India argues that Committee document G/AG/2, which sets out the notification requirements and formats under Article 18,³¹⁵ uses "hortatory" language that is "suggestive in nature and not a binding obligation."³¹⁶

³¹¹ See Australia's response to Panel question 44(b), para. 141.

³¹² Canada's third party submission, paras. 43–46.

³¹³ India's first written submission, para. 158.

³¹⁴ Agreement on Agriculture, Articles 18.1 and 18.2.

³¹⁵ G/AG/2, 30 June 1995, p. 24.

³¹⁶ India's first written submission, para. 158.

228. India's argument is without merit. Australia re-iterates that G/AG/2 is not a treaty-level instrument. The document does not modify Members' obligations under Article 18. Australia is not bringing a claim under G/AG/2. It is bringing a claim under Article 18.³¹⁷

229. For the foregoing reasons, Australia submits that the Panel should reject India's argument that Article 18 does not impose binding obligations on Members.

2. SCM Agreement

230. Article 25 of the SCM Agreement requires India to notify the Members of subsidies falling within Article 1.1, which are specific within the meaning of Article 2, that India grants or maintains within its territory.³¹⁸

231. India does not dispute that Article 25 imposes mandatory notification obligations.³¹⁹

3. GATT 1994

232. Australia recalls that India is obliged under Article XVI:1 of the GATT 1994 to notify other Members of the extent, nature and estimated effects on trade, of any subsidy it grants or maintains, including income or price support, which operates directly or indirectly to increase exports of any product from its territory.³²⁰

233. India also does not dispute that Article XVI imposes mandatory notification obligations.³²¹

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

234. India last notified its domestic support to sugarcane in its 1995–96 notification to the Committee on Agriculture.³²² India's most recent notification of its export subsidies for sugar was in 2009–10, which covered the marketing years 2004–05 to 2009–10.³²³ India does not

³¹⁷ Australia's response to Panel question 44(b), para. 140.

³¹⁸ Australia's first written submission, paras. 444–446.

³¹⁹ India's first written submission, para. 157.

³²⁰ Australia's first written submission, paras. 447–448.

³²¹ India's first written submission, para. 157.

³²² Australia's first written submission, para. 451.

³²³ Australia's first written submission, para. 454.

dispute these facts. Thus, India has not met its legal obligations to notify the Membership of its domestic support to sugarcane and its export subsidies for sugar. Australia asks that the Panel find accordingly.

V. CONCLUSION

235. For the reasons outlined in this submission, and in Australia's prior submissions, Australia requests that the Panel make the following findings:

- Through its market price support and other non-exempt domestic support, India maintains domestic support for sugarcane producers that exceeds the *de minimis* level of 10 per cent of the value of production of sugarcane contrary to India's obligation under Article 7.2(b) of the Agreement on Agriculture.
- India's production and buffer stock subsidies operating in conjunction with the MIEQ orders, MAEQ scheme and DFIA scheme:
 - constitute export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture, and are therefore inconsistent with India's obligations under Articles 3.3 and 8 of the Agreement on Agriculture, or, in the alternative Articles 8 and 10.1; and
 - constitute prohibited export subsidies that are inconsistent with India's obligations under Articles 3.1(a) and 3.2 of the SCM Agreement.
- By failing to notify any of its annual domestic support for sugarcane and sugar subsequent to 1995–96 or to submit an export subsidy notification since 2009–10, India has acted inconsistently with its obligations under Articles 18.2 and 18.3 of the Agreement on Agriculture and Article 25 of the SCM Agreement, or, in the alternative, Article XVI:1 of the GATT 1994.

236. Pursuant to Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Australia requests the Panel to recommend that India bring its measures into conformity with the covered agreements mentioned above. In relation to the export subsidies prohibited by Article 3.1(a) of the SCM Agreement, Australia further requests

that the Panel, consistently with Article 4.7 of the SCM Agreement, recommend India withdraw those measures without delay and within a time-period specified by the Panel.

ANNEX A **Revised Tables 10, 12, 13, 15, 18, 22, 23 and 24 of Australia's First Written Submission³²⁴**

TABLE 10 (Revised) – Market Price Support calculation with base FRP as AAP³²⁵

	AAP (Base FRP)	FERP (adjusted for average quality)	Price "gap"	Quantity of eligible production	MPS	Total value of sugarcane production	% of value of sugarcane production
	(INR per mT)	(INR per mT)	(INR per mT)	(mT)	(INR millions)	(INR millions)	
Sugar season / MY	C1	C2	C3 (C1–C2)	C4	C5 (C3 * C4)	C6	C7 (C5 / C6 * 100%)
2014–15	2200.00	174.46	2025.54	362.330	733,915.32	784,330.00	94%
2015–16	2300.00	174.46	2125.54	348.448	740,641.52	746,600.00	99%
2016–17	2300.00	174.46	2125.54	306.070	650,565.22	724,410.00	90%
2017–18	2550.00	174.46	2375.54	379.905	902,480.77	989,670.00	91%
2018–19	2750.00	183.64	2566.36	400.157	1,026,947.21	1,055,920.00	97%

³²⁴ The Tables in this Annex replace the relevant Tables as originally presented in Australia's first written submission, and, in the case of Tables 15 and 22, as revised by Australia's responses to Panel questions 1 to 44 (response to question 28(d), para. 89, and Annex A). See also, Australia's domestic support calculations, Microsoft Excel workbooks, Revision 2 (**Exhibit AUS-1 (Revision 2)**).

³²⁵ This illustrative table provides the national averages. Data at the state level are provided in **Annex H, Tables 20–24** of Australia's first written submission, and in Australia's domestic support calculations, Microsoft Excel workbooks (**Exhibit AUS-1 (Revision 2)**). Percentages have been rounded to the nearest percentage. Quantity of eligible production figures are based on all sugarcane production. These figures are drawn from Indian Government sources. Eligible production figures are sourced from Department of Agriculture & Farmers Welfare, Directorate of Sugarcane Development, Sugarcane in India: State wise Production (**Exhibit JE-140**) and Department of Agriculture & Farmers Welfare, 1st advance estimates for 2019–20 (**Exhibit JE-141**). See also First Advance Estimates of Production of Foodgrains for 2019–20, Ministry of Agriculture and Farmers Welfare, 23 September 2019 (**Exhibit AUS-49**). Value of production figures are sourced from Ministry of Statistics and Programme Implementation, National Accounts Statistics 2020, Statement 8.1.2 Crop-wise value of output (**Exhibit JE-147**).

TABLE 12 (Revised) – Market price support in terms of FRPs plus average premiums, as a percentage of value of sugarcane production

	MPS (INR millions)	Value of Production (INR millions)	MPS as a percentage of value of production
2014–15	791,939.81	784,330.00	100.97%
2015–16	815,274.15	746,600.00	109.20%
2016–17	703,846.60	724,410.00	97.16%
2017–18	1,013,490.81	989,670.00	102.41%
2018–19	1,073,486.98	1,055,920.00	101.66%

TABLE 13 (Revised) – Market price support in terms of FRPs (base FRP plus average premiums) and SAPs where applicable, as a percentage of value of sugarcane production

	MPS (INR millions)	Value of Production (INR millions)	MPS as a percentage of value of production
2014–15	903,751.21	784,330.00	115.23%
2015–16	880,418.37	746,600.00	117.92%
2016–17	815,049.84	724,410.00	112.51%
2017–18	1,075,387.11	989,670.00	108.66%
2018–19	1,145,868.60	1,055,920.00	108.52%

TABLE 15 (Revised) – Product-specific AMS for sugarcane as a percentage of total value of production of sugarcane

	MPS for sugarcane (INR millions)	Non-exempt direct payments for sugarcane (INR millions)	AMS for sugarcane (INR millions)	Total value of production of sugarcane (INR millions)	AMS for sugarcane as percentage of total value of sugarcane production
	A	B	C=(A+B)	D	E=(C/D)
2014–15	903,751.21	66	903,817.21	784,330.00	115.23%
2015–16	880,418.37	66	880,484.37	746,600.00	117.93%
2016–17	815,049.84	0	815,049.84	724,410.00	112.51%
2017–18	1,075,387.11	1,463.3	1,076,850.41	989,670.00	108.81%
2018–19	1,145,868.60	2,000	1,147,868.60	1,055,920.00	108.71%

TABLE 18 (Revised) – Value of Production (Total India) (INR millions)³²⁶

	2014–15	2015–16	2016–17	2017–18	2018–19
Value of production	784,330.00	746,600.00	724,410.00	989,670.00	1,055,920.00

³²⁶ Figures sourced from Ministry of Statistics and Programme Implementation, National Accounts Statistics 2020, Statement 8.1.2 Crop-wise value of output (**Exhibit JE-147**).

TABLE 22 (Revised) – Calculations showing product-specific domestic support for sugarcane 2016–17

	Recovery Rate (RR)		AAP = FRP + average FRP premiums (INR per mT)			AAP = FRP or SAPs (INR per mT)			FERP	QEP	MPS		Product specific AMS	Value of production	Percentage of value of production
	Actual average RR	Base FRP Nominal RR	Base FRP	FRP premium	AAP in terms of FRP + average FRP premiums	SAP (mid)	Add. Amts (alt. claim)	AAP in terms of average FRP or SAPs	FERP Adjusted for average RR	QEP	MPS	Add. amts	MPS + additional amounts		
	(%)	(%)	(INR per mT)	(INR per mT per 0.1 % above nominal RR)	(INR per mT)	(INR per mT)	(INR per mT)	(INR per mT)	(INR per mT)	(million mT)	(INR millions)	(INR millions)	(INR millions)	(INR millions)	(%)
	C1	C2	C3	C4	C5 = C3+(C1- C2)/0.1 *C4 (or C3 if ≤ 2300)	C6	C7	C8 (C5, or C6 if >C5)	C9	C10	C11 = (C8- C9)* C10	C12	C14 = C11 + C12	C15	C16 = C14/C15
Andhra Pradesh	9.34	9.5	2300	24.2	2,300.00*		[60]	2,300.00	171.52	7.83	16,666.01		16,666.01		
Bihar	9.08	9.5	2300	24.2	2,300.00*	2800		2,800.00	166.74	13.04	34,327.13		34,327.13		
Gujarat	10.56	9.5	2300	24.2	2,556.52			2,556.52	193.92	11.95	28,233.05		28,233.05		
Haryana	10.19	9.5	2300	24.2	2,466.98	3150		3,150.00	187.13	8.22	24,363.70		24,363.70		
Karnataka	10.28	9.5	2300	24.2	2,488.76			2,488.76	188.78	27.38	62,968.86		62,968.86		
Maharashtra	11.19	9.5	2300	24.2	2,708.98			2,708.98	205.49	52.26	130,837.35		130,837.35		
Punjab	9.34	9.5	2300	24.2	2,300.00*	2900		2,900.00	171.52	7.15	19,514.10		19,514.10		
Tamil Nadu	9.08	9.5	2300	24.2	2,300.00*	2850†		2,850.00	166.74	18.99	50,949.68		50,949.68		
Telangana	10.33	9.5	2300	24.2	2,500.86			2,500.86	189.70	2.06	4,763.30		4,763.30		
Uttar Pradesh	10.26	9.5	2300	24.2	2,483.92	3050		3,050.00	188.41	140.17	401,105.85		401,105.85		
Uttarakhand	8.2	9.5	2300	24.2	2,300.00*	3070		3,070.00	150.58	6.48	18,909.06		18,909.06		
Other States	9.5**	9.5	2300	24.2	2,300.00			2,300.00	174.46	10.54	22,411.73		22,411.73		
Total										306.07	815,049.84		815,049.84	724,410.00	112.51%

Notes: * As the state average recovery rate is below 9.5%, the base FRP amount applies.

** This calculation assumes that 'other' recovery rates are in line with the nominal recovery rate of 9.5%.

† This figure does not incorporate a SAP premium amount that would have applied if the state average recovery rate had been above 9.5%, as detailed in Section III.A.2(e) of Australia's first written submission.

TABLE 23 (Revised) – Calculations showing product-specific domestic support for sugarcane 2017–18

	Recovery Rate (RR)		AAP = FRP + average FRP premiums (INR per mT)			AAP = FRP or SAPs (INR per mT)			FERP	QEP	MPS		Product specific AMS	Value of production	Percentage of value of production
	Actual average RR	Base FRP Nominal RR	Base FRP	FRP premium	AAP in terms of FRP + average FRP premiums	SAP (mid)	Add. Amts (alt. claim)	AAP in terms of average FRP or SAPs	FERP Adjusted for average RR	QEP	MPS	Add. amts	MPS + additional amounts		
	(%)	(%)	(INR per mT)	(INR per mT per 0.1 % above nominal RR)	(INR per mT)	(INR per mT)	(INR per mT)	(INR per mT)	(INR per mT)	(million mT)	(INR millions)	(INR million s)	(INR millions)	(INR millions)	(%)
	C1	C2	C3	C4	C5 = C3+(C1- C2)/0.1 *C4 (or C3 if ≤ 2550)	C6	C7	C8 (C5, or C6 if >C5)	C9	C10	C11 = (C8- C9)* C10	C12	C14 = C11 + C12	C15	C16 = C14/C15
Andhra Pradesh	9.56	9.5	2550	26.8	2,566.08			2,566.08	175.56	7.79	18,621.21		18,621.21		
Bihar	9.3	9.5	2550	26.8	2,550.00	2800		2,800.00	170.78	13.82	36,347.87		36,347.87		
Gujarat	10.2	9.5	2550	26.8	2,737.60			2,737.60	187.31	12.07	30,787.35		30,787.35		
Haryana	10.45	9.5	2550	26.8	2,804.60	3250		3,250.00	191.90	9.63	29,458.36		29,458.36		
Karnataka	10.61	9.5	2550	26.8	2,847.48			2,847.48	194.84	31.14	82,590.48	0.1	82,590.58		
Maharashtra	11.25	9.5	2550	26.8	3,019.00			3,019.00	206.59	82.98	233,384.80		233,384.80		
Punjab	9.78	9.5	2550	26.8	2,625.04	3000		3,000.00	179.60	8.02	22,630.06		22,630.06		
Tamil Nadu	8.03	9.5	2550	26.8	2,550.00	2850†		2,850.00	147.46	17.15	46,359.35	1,463.3	47,822.65		
Telangana	10.84	9.5	2550	26.8	2,909.12			2,909.12	199.06	2.60	7,058.34		7,058.34		
Uttar Pradesh	10.85	9.5	2550	26.8	2,911.80	3150		3,150.00	199.25	177.03	522,381.50		522,381.50		
Uttarakhand	9.4	9.5	2550	26.8	2,550.00	3160		3,160.00	172.62	6.27	18,735.06		18,735.06		
Other States	9.5**	9.5	2550	26.8	2,550.00			2,550.00	174.46	11.38	27,032.74		27,032.74		
Total										379.90	1,075,387.11		1,076,850.41	989,670.00	108.81%

Notes: * As the state average recovery rate is below 9.5%, the base FRP amount applies.

** This calculation assumes that 'other' recovery rates are in line with the nominal recovery rate of 9.5%.

† This figure does not incorporate a SAP premium amount that would have applied if the state average recovery rate had been above 9.5%, as detailed in Section III.A.2(e) of Australia's first written submission.

TABLE 24 (Revised) – Calculations showing product-specific domestic support for sugarcane 2018–19

	Recovery Rate (RR)		AAP = FRP + average FRP premiums (INR per mT)			AAP = FRP or SAPs (INR per mT)			FERP	QEP	MPS		Product specific AMS	Value of production	Percentage of value of production
	Forecast Actual average RR	Base FRP Nomin al RR	Base FRP	FRP premium	AAP in terms of FRP + average FRP premiums	SAP (mid)	Add. Amts (alt. claim)	AAP in terms of average FRP or SAPs	FERP Adjusted for average RR	QEP	MPS	Add. amts	MPS + additional amounts		
	(%)	(%)	(INR per mT)	(INR per mT per 0.1 % above nominal RR)	(INR per mT)	(INR per mT)	(INR per mT)	(INR per mT)	(INR per mT)	(million mT)	(INR millions)	(INR million s)	(INR millions)	(INR millions)	(%)
	C1	C2	C3	C4	C5 = C3+(C1- C2)/0.1 *C4 (or C3 if ≤ 2300)	C6	C7	C8 (C5, or C6 if >C5)	C9	C10	C11 = (C8- C9)* C10	C12	C14 = C11 + C12	C15	C16 = C14/C15
Andhra Pradesh	9.48	10	2750	27.5	2,612.50*			2,612.50	174.13	8.09	19,729.30		19,729.30		
Bihar	9.29	10	2750	27.5	2,612.50*	2900		2,900.00	170.65	11.66	31,826.73		31,826.73		
Gujarat	10.40	10	2750	27.5	2,860.69			2,860.69	191.03	12.04	32,133.07		32,133.07		
Haryana	9.98	10	2750	27.5	2,744.50†	3350		3,350.00	183.27	7.57	23,974.04		23,974.04		
Karnataka	10.60	10	2750	27.5	2,913.63			2,913.63	194.56	42.01	114,217.67		114,217.67		
Maharashtra	11.33	10	2750	27.5	3,114.38			3,114.38	207.97	92.44	268,675.63		268,675.63		
Punjab	9.63	10	2750	27.5	2,646.88†	3000		3,000.00	176.75	7.77	21,947.09		21,947.09		
Tamil Nadu	8.42	10	2750	27.5	2,612.50*			2,612.50	154.62	16.21	39,836.28	2000	41,836.28		
Telangana	10.62	10	2750	27.5	2,919.81			2,919.81	194.98	2.80	7,629.54		7,629.54		
Uttar Pradesh	10.28	10	2750	27.5	2,826.31	3150		3,150.00	188.73	179.71	532,183.34		532,183.34		
Uttarakhand	9.07	10	2750	27.5	2,612.50*	3170		3,170.00	166.51	6.33	19,009.97		19,009.97		
Other States	10.00**	10	2750	27.5	2,750.00			2,750.00	183.64	13.52	34,705.94		34,705.94		
Total										400.16	1,145,868.60		1,147,868.60	1,055,920.00	108.71%

Notes: * As the state average recovery rate is below 9.5%, the applicable amount is 2,612.50, as detailed in Section III.A.1 of Australia's first written submission.

** This calculation assumes that 'other' recovery rates are in line with the nominal recovery rate of 10%.

† This figure includes a proportionate reduction of INR 27.5 for every 0.1% decrease in the recovery rate, in respect of those mills with a recovery rate below the nominal rate of 10% but above 9.5%.