

*INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE*

**(DS579, DS580, and DS581)**

**THIRD PARTY SUBMISSION  
OF THE UNITED STATES OF AMERICA**

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<i>Canada – Aircraft (Panel)</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R
<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999
<i>Canada – Autos (AB)</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
<i>China – Domestic Support</i>	Panel Report, <i>China – Domestic Support for Agricultural Producers</i> , WT/DS511/R and Add.1, adopted 26 April 2018
<i>India – Export Related Measures (Panel)</i>	Panel Report, <i>India – Export Related Measures</i> , WT/DS541/R, circulated 31 October 2019
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and 4
<i>Korea – Various Measures on Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>Korea – Various Measures on Beef (Panel)</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
<i>US – FSC (AB)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000
<i>US – Gambling (AB)</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
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996

<i>US – Stainless Steel (Mexico) (AB)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008
<i>US – Upland Cotton (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005
<i>US – Upland Cotton (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005

## I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel on the proper legal interpretation of certain provisions of the *Agreement on Agriculture* (“Agriculture Agreement”) and the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) as relevant to certain issues in this dispute.

## II. COMPLAINANTS’ CLAIMS REGARDING AGGREGATE MEASUREMENT OF SUPPORT

2. In their submissions, Australia, Brazil, and Guatemala (the “Complainants”) calculated India’s Aggregate Measurement of Support (“AMS”) for sugarcane based on, amongst other measures, India’s market price support programs: the Fair and Remunerative Price (“FRP”) and relevant State Advised Price (“SAP”).

3. India may, like other Members of the WTO, maintain domestic support programs, including market price support programs, as long as the domestic support provided under those programs does not exceed the Member’s fixed commitment levels. The Agriculture Agreement provides that each Member’s “domestic support . . . commitments in Part IV of each Member’s Schedule constitute commitments limiting subsidization,”<sup>1</sup> and that “a Member shall not provide support in favour of domestic producers [of agricultural products] in excess of the commitment levels specified in Section I of Part IV of its Schedule.”<sup>2</sup>

4. India’s consistency with this commitment is measured in terms of its Current Total Aggregate Measurement of Support (“Current Total AMS”), which is the sum of the AMS provided to each basic agricultural product. Pursuant to Article 1(a) of the Agriculture Agreement, the AMS for each basic agricultural product must be “calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member’s Schedule.”<sup>3</sup> Article 1(h), in turn, provides that a Member’s “Current Total AMS” for a given year refers to “the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support[,] and all equivalent measurements of support for agricultural products.”<sup>4</sup> Pursuant to Article 6.4 of the Agriculture Agreement, a Member’s Current Total AMS does not include product-specific AMS values that do not exceed the relevant *de minimis* level of support.<sup>5</sup>

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<sup>1</sup> Agriculture Agreement, Article 3.1.

<sup>2</sup> Agriculture Agreement, Article 3.2.

<sup>3</sup> Agriculture Agreement, Article 1(a).

<sup>4</sup> Agriculture Agreement, Article 1(h) and Article 1(h)(ii) (stating that Current Total AMS is to be “calculated in accordance with the provisions of this Agreement, including Article 6”).

<sup>5</sup> See Agriculture Agreement, Article 6.4.

5. India, however, does not provide an AMS commitment level in Section I of Part IV of its Schedule of Concessions on Goods.<sup>6</sup>

6. For this scenario, Article 7.2(b) of the Agriculture Agreement provides:

7.2(b) Where no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in paragraph 4 of Article 6.

7. Article 6.4(b) of the Agriculture Agreement sets out the *de minimis* level for developing countries at 10 percent. The parties agree this is the applicable *de minimis* level for India.

8. Therefore, to determine India's Current Total AMS for each year, the Panel first must calculate the product-specific AMS for each basic agricultural product, and compare that value to the total value of production for that agricultural product. To the extent that the product-specific AMS for a basic agricultural product exceeds India's *de minimis* level of 10 percent, the full value of that product-specific AMS would be included in India's Current Total AMS. Because India has not made a Total AMS commitment in Part IV of its schedule, in the event the product-specific AMS for any basic agricultural product exceeds the *de minimis* level of 10 percent, India will have breached Articles 3.2 and 6.3 of the Agriculture Agreement.

9. Annex 3, paragraph 1 of the Agriculture Agreement sets out methodologies for calculating the value of a Member's "product-specific" AMS "for each basic agricultural product receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitments ('other non-exempt policies')." <sup>7</sup>

10. With respect to "market price support," while the Agriculture Agreement does not expressly define this term, the ordinary meaning of the constituent terms reflect the scope of domestic support programs contemplated by this term.<sup>8</sup> A "market" is the physical or geographic place where commercial transactions take place, or the business of buying and

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<sup>6</sup> See *India – Part IV, Section I of India's Schedule of Concessions on Goods*, G/AG/AGST/IND, p. 4, para. 7.

<sup>7</sup> Agriculture Agreement, Annex 3, paragraph 1.

<sup>8</sup> Pursuant to DSU Article 3.2, a WTO adjudicator is to interpret relevant provisions of the covered agreements in accordance with customary rules of interpretation of public international law. According to the *Vienna Convention on the Law of Treaties*, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See *US – Gasoline (AB)*, pp. 16-17 (quoting Article 31 of the *Vienna Convention on the Law of Treaties* and stating: "That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the *General Agreement* and the other 'covered agreements'").

selling, including the rate of purchase or sale, of a particular good or commodity.<sup>9</sup> “Price” is defined as “a sum in money or goods for which a thing is or may be bought or sold.”<sup>10</sup> “Support” is defined as “the action of holding up, keeping from falling, or bearing the weight of something” or “the action of contributing to the success of or maintaining the value of something.”<sup>11</sup>

11. Relevant to the consideration of the term “market price support,” the dictionary also supplies a number of definitions of compound terms. The *Shorter Oxford English Dictionary*, defines “market price” as “the current price which a commodity or service fetches in the market.”<sup>12</sup> Further, it defines “price support” as “assistance in maintaining the levels of prices regardless of supply and demand.”<sup>13</sup>

12. Thus, the ordinary meaning of the constituent terms, as well as the compound phrases indicates that “market price support” is the provision of assistance in holding up or maintaining the price for a product in the market, regardless of supply and demand. In the context of Annex 3, paragraph 1, an AMS for “each basic agricultural product” includes the provision of assistance in holding up or maintaining a market price for that agricultural product. As such, this assistance can be provided directly by the Government or through consumer purchases.

13. The panel in *Korea – Beef* reached the same understanding of the meaning of “market price support” under Annex 3, paragraph 8. The panel noted that the “quantification of market price support in AMS terms is not based on expenditures by government,” and that it “can exist even where there are no budgetary payments.”<sup>14</sup> Further, it stated that “all producers of the

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<sup>9</sup> *US – Upland Cotton* (Panel), para. 7.1236. The panel considering Article 6.3 of the SCM Agreement considering the term “market,” have indicate that this term “can be: ‘a place ... with a demand for a commodity or service;’ ‘a geographical area of demand for commodities or services;’ ‘the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices.’” *US – Upland Cotton* (Panel), para. 7.1236.

<sup>10</sup> *Shorter Oxford English Dictionary*, “price,” p. 2349 (ed. 1993). Also indicating that in the economic sense, “price” is the “actual cost of acquiring, producing, etc., something calculated according to some specific measure.” The panel in *US – Upland Cotton* also considered this term finding that the “ordinary meaning of ‘price’ is: ‘the amount of money or goods for which a thing is bought or sold;’ ‘value or worth.’” *US – Upland Cotton* (Panel), para. 7.1262 (considering Article 6.3 of the SCM Agreement and “price suppression” or “price depression”).

<sup>11</sup> *Shorter Oxford English Dictionary*, “support,” p. 3153 (ed. 1993).

<sup>12</sup> *Shorter Oxford English Dictionary*, “market,” p. 1699 (ed. 1993). Further note, that the panel in *US – Upland Cotton* stated provided further commentary on “market prices” stating that they are “affected by the perception and anticipation of market participants as to current and probable future movements of production and consumption as essential determinants of demand, supply, and, consequently, price.” See *US – Upland Cotton* (Panel), para. 7.1245.

<sup>13</sup> *Shorter Oxford English Dictionary*, “price,” p. 2349 (ed. 1993).

<sup>14</sup> See, e.g., *Korea – Various Measures on Beef* (Panel), para. 827.

products which are subject to the market price support mechanism enjoy the benefit of an assurance that their products can be marketed at least at the support price.”<sup>15</sup>

14. Paragraph 8 of Annex 3 provides the methodology for calculating the specific type of support at issue in this dispute – market price support. Paragraph 8 states that “market price support shall be calculated using the *gap* between a *fixed external reference price* and the *applied administered price* multiplied by the *quantity of production eligible* to receive the applied administered price.”<sup>16</sup> The paragraph goes on to provide that “[b]udgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.”<sup>17</sup>

15. Thus, the calculation of market price support is based on the price gap between the “applied administered price” identified in the domestic support measure and the “fixed external reference price,” multiplied by the quantity of eligible production.<sup>18</sup> Based on the text of the Agriculture Agreement and the ordinary meaning of the terms:

- The “applied administered price” is the price the Indian measures *provide* for each of the basic agricultural products and is *identified* for each product and each year in the Indian legal instruments implementing the program.
- The “fixed external reference price” is a *static reference value* defined by the Agriculture Agreement in Annex 3, paragraph 9. This states that the price “shall be based on the years 1986 to 1988” and “may be adjusted for quality differences as necessary.”<sup>19</sup>
- Finally, the “quantity of production eligible” to receive the applied administered price is the amount of the product *fit or entitled* to receive the price, not the amount of agricultural product actually purchased.<sup>20</sup> Because under India’s programs all production is entitled to receive either the FRP or a higher SAP, the “quantity of production eligible” is the total sugarcane production volume for that year.

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<sup>15</sup> See, e.g., *Korea – Various Measures on Beef (Panel)*, para. 827.

<sup>16</sup> Agriculture Agreement, Annex 3, paragraph 8 (italics added).

<sup>17</sup> Agriculture Agreement, Annex 3, paragraph 8.

<sup>18</sup> See *Korea – Various Measures on Beef (Panel)*, para. 828 and *China – Domestic Support*, para. 7.136 (describing the calculation methodology for market price support).

<sup>19</sup> Agriculture Agreement, Annex 3, paragraph 9. See also Agriculture Agreement, Annex 3, paragraph 7 (stating that the “AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned”).

<sup>20</sup> See *Korea – Various Measures on Beef (AB)*, para. 120 (noting that “‘production eligible’ refers to production that is ‘fit or entitled’ to be purchased rather than production that was actually purchased”) and *China – Domestic Support*, para. 7.284 (similarly noting that “‘production eligible’ refers to production that is ‘fit[] or able to benefit from the price support’ rather than production that was actually purchased” (citation omitted)).

16. That is, “market price support” requires a comparison between the “applied administered price” and the “fixed external reference price.” An “applied administered price” is the price “set by the government at which specified entities will purchase certain basic agricultural products.”<sup>21</sup> The difference between these prices is then multiplied by the “quantity of production eligible to receive the applied administered price.”<sup>22</sup> The Annex 3, paragraph 8 methodology thus indicates that a “market price support” measure would include an “applied administered price” that is available to some quantity of “eligible” production; and that such support for each unit of the product can be measured through comparison of the administered price to a fixed, external “reference” price.<sup>23</sup>

17. The calculation methodology provide in Annex 3, paragraph 8, for market price support is reflected in the following equation:

$$(Applied\ Administered\ Price - Fixed\ External\ Reference\ Price) * Quantity\ of\ Production\ Eligible = Value\ of\ Market\ Price\ Support$$

As described above, the value of market price support for a basic agricultural product should be summed along with any other non-exempt product-specific support in favor of that product to calculate the AMS for that product.

18. The Complainants’ arguments in this dispute are consistent with the calculation methodology set out in the Agriculture Agreement and as recognized by the panels in *China – Domestic Support* and *Korea – Beef*.

19. In response, India has not challenged the calculation methodology set out by the Complainants with regards to market price support, or the values used by Complainants in their calculations.<sup>24</sup> India also has not disputed Complainants descriptions of the FRP and SAP measures or their operation; for example, India has not argued either that its programs do not involve transfers from consumers, or that they do not have the effect of providing price support to producers. Ultimately, India does not claim that the final market price support calculations asserted by the Complainants are incorrect or that this value is not over the 10 percent *de minimis* level for sugarcane, a level that would breach India’s domestic support commitments under the Agriculture Agreement.<sup>25</sup>

20. Instead, India attempts to argue that its market price support measures do not qualify as domestic support at all, and therefore should not be included in its AMS calculation.

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<sup>21</sup> *China – Domestic Support*, para. 7.177.

<sup>22</sup> See, e.g., *Korea – Various Measures on Beef (AB)*, para. 116.

<sup>23</sup> Paragraph 9 of Annex 3 provides for the calculation of this Fixed External Reference Price.

<sup>24</sup> India’s First Written Submission, paras 51-65.

<sup>25</sup> India acknowledges that Article 7.2(b) of the Agriculture Agreement states that “a Member shall not provide support to agricultural producers in excess of the *de minimis* level” and does not contest that the *de minimis* level applicable to developing country members, including India, under Article 6.4(b) of the Agriculture Agreement is 10 percent. India’s First Written Submission, paras. 47-54, and 82-83.

Specifically, India argues that any market price support can only count towards a WTO Member’s AMS calculation if the “government or its agent pays the administered price and procures the specified product at such administered price.”<sup>26</sup> Because the “sugar mills that purchase sugarcane from the farmers at FRP/SAP are neither government nor its agents[,]” India claims that the FRP and the SAP programs do not qualify as “a subsidy by the government or its agents under Annex 3.”<sup>27</sup>

21. India mistakenly points to the text of Annex 3 to the Agricultural Agreement to make this argument. India cites Paragraphs 1 and 2 of Annex 3, which read as follows:

1. Subject to the provisions of Article 6, an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment (“other non-exempt policies”). Support which is non-product specific shall be totaled into one non-product-specific AMS in total monetary terms.
2. Subsidies under paragraph 1 shall include both budgetary outlays and revenue foregone by governments or their agents.

Specifically, India argues that under Paragraph 1 of Annex 3 there are three types of support – market price support, non-exempt direct payments, and any other non-exempt policies – and “Paragraph 2 delineates the scope of subsidies under paragraph 1 of Annex 3.”<sup>28</sup> That is, according to India, the subsidies described in Paragraph 1 and that must be included in a Member’s AMS calculation *only* include “budgetary outlays and revenue foregone by governments or their agents.”<sup>29</sup>

22. India’s interpretation of Annex 3 is a misreading of the text. Paragraph 2 does not limit paragraph 1. Rather, paragraph 2 specifies two forms of financial transfers that must be included in the list of support outlined in Paragraph 1. Paragraph 2 sets out this relationship with Paragraph 1 through the use of the term “shall include.” “Shall” is defined as “a command, promise, or determination”<sup>30</sup> and “include” is defined as “[t]o contain as a member of an aggregate, or a constituent part of a whole; to embrace as a sub-division or section; to comprise; to comprehend.”<sup>31</sup> Therefore, the ordinary meaning of “shall include” indicates that measures involving budgetary outlays and revenue foregone must be included as a part of the domestic support programs listed in Paragraph 1. The paragraph does not mean, as India argues, that the

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<sup>26</sup> India’s First Written Submission, para. 62.

<sup>27</sup> India’s First Written Submission, para. 63.

<sup>28</sup> India’s First Written Submission, paras. 61-62.

<sup>29</sup> India’s First Written Submission, para. 62 (emphasis in original).

<sup>30</sup> Oxford English Dictionary Online, definition of “shall”, available at: OED Online, <http://www.oed.com/view/Entry/177349>, accessed on March 30, 2020.

<sup>31</sup> Oxford English Dictionary Online, definition of “include”, available at: OED Online, <http://www.oed.com/view/Entry/93571>, accessed on March 30, 2020.

domestic support programs must be limited to only the type of transfers identified in Paragraph 2. In other words, budgetary outlays and revenue forgone form a subset, and not an outer boundary, of the kinds of support that must be included in a Member's AMS calculation.

23. Furthermore, Annex 3 is subject to Article 6 of the Agriculture Agreement, which sets out Members' "Domestic Support Commitments". While the term "domestic support" is not specifically defined in the Agriculture Agreement, the ordinary meaning of the words making up this phrase reveal the broader nature of the term. "Domestic" is defined as "[o]f or relating to one's own country or nation; not foreign, internal, inland, 'home'."<sup>32</sup> "Support" is defined as "[t]he action or an act of helping a person or thing to hold firm or not to give way; provision of assistance or backing."<sup>33</sup> India's proposed interpretation artificially limits the scope of such "assistance or backing" in a manner not supported by the ordinary meaning of the term "domestic support."

24. Moreover, India's proposed limitation on programs qualifying as market price support ignores the method for calculating market price support as set out in Paragraph 8 of Annex 3, which provides:

8. 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.

25. Nothing in the calculation of market price support set out in Paragraph 8 necessarily involves payments by a government or its agents. In fact, the methodology of Paragraph 8 expressly excludes from the calculation of market price support budgetary payments made to maintain the price gap. Under India's reading, there would be no domestic support for market price support because Paragraph 2 *limits* domestic support *to* budgetary outlays, while Paragraph 8 *excludes* budgetary payments.

26. Therefore, the AMS calculation is intended to measure the total amount of support a WTO Member provides in favour of its domestic agricultural producers. In the case of market price support programs, the level of support provided must be included in that calculation whether or not it involves budgetary outlays by the government. Consequently, the Complainants correctly include the support provided through India's FRP and SAP measures within their AMS calculations.

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<sup>32</sup> Oxford English Dictionary Online, definition of "domestic", available at: OED Online, <http://www.oed.com/view/Entry/56663>, accessed on March 30, 2020.

<sup>33</sup> Oxford English Dictionary Online, definition of "support", available at: OED Online, <http://www.oed.com/view/Entry/194673>, accessed on March 30, 2020.

### III. COMPLAINANTS' CLAIMS REGARDING EXPORT SUBSIDIES

27. The Complainants claim that India maintains export subsidies in breach of the Agriculture Agreement and the SCM Agreement.<sup>34</sup> Specifically, Australia, Brazil, and Guatemala all allege that India maintains export subsidies in breach of Articles 3.3, 8, and 9 of the Agriculture Agreement.<sup>35</sup> In addition, Australia and Guatemala allege that India maintains export subsidies in breach of Article 3 of the SCM Agreement.<sup>36</sup>

28. In this section United States will outline India's commitments on export subsidies under the Agriculture Agreement and the SCM Agreement, then comment upon India's primary defence to the Complainants' export subsidy claims.

29. Agriculture Agreement Article 1(e) defines "export subsidies" as follows:

"export subsidies" refers to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement;

30. Article 8 of Agriculture Agreement outlines the basic commitment of each WTO Member with regards to the provision of these export subsidies for agricultural products:

Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule.

31. Article 3.3 of the Agriculture Agreement further provides:

Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.

32. Accordingly, Article 3.3 sets out two categories of commitments for export subsidies: a commitment on scheduled agricultural products and a commitment on unscheduled agricultural

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<sup>34</sup> Australia's First Written Submission, paras. 210-469; Brazil's First Written Submission, paras. 168-229; and Guatemala's First Written Submission, paras. 192-325.

<sup>35</sup> Australia's First Written Submission, paras. 285-367; Brazil's First Written Submission, paras. 168-229; and Guatemala's First Written Submission, paras. 242-298.

<sup>36</sup> Australia's First Written Submission, paras. 368-433 and Guatemala's First Written Submission, paras. 299-322.

products. Section II of Part IV of India's Schedule does not list any commitments on sugar,<sup>37</sup> therefore, sugar is an unscheduled agricultural product.

33. Consequently, India has committed not to provide export subsidies for sugar of the type listed in paragraph 1(a) of Article 9 of the Agriculture Agreement, which covers:

the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance;

34. India also has committed not to provide sugar subsidies contingent on export through Articles 1 and 3 of the SCM Agreement. Article 1.1 of the SCM Agreement states:

a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) (footnote omitted);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred

35. Where a Member has granted a subsidy as defined in Article 1.1 of the SCM Agreement, it will be prohibited as an export subsidy if the subsidy is inconsistent with the prohibitions in

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<sup>37</sup> *India - Supporting Tables Relating to Commitments on Agricultural Products in Part IV of the Schedules*, G/AG/AGST/IND, p. 4, para. 7.

Articles 3.1(a) and 3.2 of the SCM Agreement. Articles 3.1(a) and 3.2 of the SCM Agreement state:

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact,<sup>4</sup> whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[];

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

FN 4: This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

36. Like Article 9.1(a) of the Agriculture Agreement's restrictions on subsidies "contingent on export performance", Article 3.1(a) of the SCM Agreement prohibits subsidies that are "contingent ... upon export performance." There is nothing in these texts to suggest that "contingent on" and "contingent upon" have different meanings.<sup>38</sup> The relevant dictionary definition of "contingent" is "[c]onditional; dependent on, upon; [d]ependent for its existence on something else."<sup>39</sup> In the export subsidy context, "the grant of a subsidy must be 'tied to' export performance."<sup>40</sup> Therefore, to find that a subsidy is an export subsidy under either the Agriculture Agreement or the SCM Agreement, the subsidy must be conditioned, solely or as one of several other conditions, on export performance.

37. This export contingency can be demonstrated "in law" (*de jure*) or "in fact" (*de facto*). Contingency "in law" means that the challenged measure itself establishes the necessary conditionality; it can be demonstrated "on the basis of the words of the relevant legislation, regulation or other legal instrument."<sup>41</sup> While the export contingency may be set out expressly, it also may be that the wording of the legal instrument necessarily implies the necessary contingency.<sup>42</sup>

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<sup>38</sup> *US – FSC (AB)*, paras. 141-142; *US – Upland Cotton (AB)*, para. 571.

<sup>39</sup> *New Shorter Oxford English Dictionary*, Volume 1, p. 494.

<sup>40</sup> *Canada – Autos (AB)*, paras. 100 and 104.

<sup>41</sup> *Canada – Aircraft (AB)*, para. 167.

<sup>42</sup> *Canada – Autos (AB)*, paras. 100, 123.

38. In contrast, a *de facto* claim of export contingency is not established on the basis of the words of the instrument itself. In a *de facto* contingency case, “instead, the existence of this relationship of contingency, between the subsidy and ... export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.”<sup>43</sup>

39. In summary, under the SCM Agreement, for the complaining Member to establish that a Member provides a prohibited export subsidy, it must show the following three elements: (1) that the government or public body provided a financial contribution through the measure at issue or there is income or price support as defined by Article XVI of GATT 1994 (SCM Agreement Article 1.1(a)); (2) that the financial contribution, income support, or price support conferred a benefit (SCM Agreement Article 1.1(b)); and (3) that the resulting subsidy is contingent – in law or in fact – on export performance (SCM Agreement Article 3.1(a)).

40. In response to the export subsidy claims made by the Complainants, India set out two broad defences. Both of these arguments, however, are inadequate for India to rebut challenges to subsidy measures under the Agriculture Agreement and the SCM Agreement.

**A. Evidentiary Proof of Actual Payments Is Not Necessary to Show that an Export-Contingent Subsidy Exists**

41. Australia, Brazil, and Guatemala all allege that India maintains various export-contingent subsidies within the meaning of Article 9.1 of the Agriculture Agreement, inconsistent with India’s commitments under Articles 3.3 and 8 of the Agriculture Agreement.

42. Australia claims that India provides export subsidies within the meaning of Article 9.1(a) of the Agriculture Agreement, including: (1) production subsidy schemes, operating in conjunction with the Minimum Indicative Export Quotas (“MIEQ”); (2) buffer stock subsidy schemes, operating in conjunction with the MIEQ; (3) transport, freight, and marketing subsidy schemes, operating in conjunction with the Maximum Admissible Export Quantity (“MAEQ”); and (4) the Duty Free Import Authorization Scheme (“DFIA”).<sup>44</sup>

43. Brazil asserts that India’s maintains export subsidies under Article 9.1(a) of the Agriculture Agreement, including: (1) the schemes for assistance to sugar mills (2) scheme for creation and maintenance of buffer stock; and (3) the scheme for extending production subsidy to sugar mills; and (4) the export subsidies found in India’s export subsidy policy.<sup>45</sup>

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<sup>43</sup> *Canada – Aircraft (AB)*, para. 167.

<sup>44</sup> Australia’s First Written Submission, paras. 285-367.

<sup>45</sup> Brazil’s First Written Submission, paras. 168-229.

44. Guatemala alleges that India’s (1) scheme for assistance to sugar mills, (2) buffer stock schemes, and (3) the MAEQ Scheme are export subsidies under Article 9.1 of the Agriculture Agreement.<sup>46</sup>

45. Furthermore, Australia and Guatemala claim that the measures they each identify with regards to the Agriculture Agreement also meet the elements for prohibited export-contingent subsidies under Article 3.1(a) of the SCM Agreement.<sup>47</sup>

46. In its first written submission, India only claims that the DFIA and MAEQ programs do not meet the legal elements for prohibited export subsidies under both the Agriculture and SCM Agreements.<sup>48</sup> With respect to the other export subsidy measures challenged by the Complainants, India does not argue that the measures do not meet the legal elements establishing them as prohibited export subsidies within the meaning of the Agreements. India also makes no claim that any of these programs are not contingent on the export of sugar. Indeed, India concedes that the Complainants provided “evidence to show that the government had the legal authority to provide a financial contribution under the challenged measures or the government made certain budgetary allocations.”<sup>49</sup>

47. With respect to all of the alleged subsidies under both the Agriculture Agreement and SCM Agreement, India instead argues that the “complainants have not met their burden to demonstrate ‘making’ of financial contribution such that they can show there is a financial contribution.”<sup>50</sup> According to India, without specific evidence of the “extent to which, if any, a government entity actually makes a financial contribution pursuant to those measures[,]” there is no proof that a subsidy exists under either the Agriculture Agreement or the SCM Agreement – even when there is evidence of a government’s legal authority to provide a financial contribution and that government has made budgetary allocations to provide that financial contribution.<sup>51</sup> In other words, India argues that a subsidy can only exist when a complainant can provide direct evidence that payments have been made under a measure.

48. India’s argument is baseless. First, India fails to recognize that export subsidies under the Agriculture Agreement are measured based on amounts “allocated or incurred” by a government.

49. Under the Agriculture Agreement, India has a zero commitment level for export subsidies. Pursuant to Article 9.2(a)(i) this commitment reflects:

in the case of budgetary outlay reduction commitments, the maximum level of expenditure for such subsidies that may be *allocated or incurred* in that year in

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<sup>46</sup> Guatemala’s First Written Submission, paras. 242-298.

<sup>47</sup> Australia’s First Written Submission, paras. 391-433 and Guatemala’s First Written Submission, paras. 299-323.

<sup>48</sup> India’s First Written Submission, paras. 114-125 and 148-155

<sup>49</sup> India’s First Written Submission, para. 107.

<sup>50</sup> India’s First Written Submission, paras. 107 and 147 (emphasis in original).

<sup>51</sup> India’s First Written Submission, paras. 107 and 147 (emphasis in original).

respect of the agricultural product, or group of products, concerned; [] (emphasis added)

That is, the export subsidy commitments India made in the Agriculture Agreement are measured based on allocation or incurrence, not solely on actual payments made. If the Panel finds that Complainants are correct that India has granted legal authority for the provision of export subsidies and has made budgetary allocations to local authorities for the payment of those subsidies, then those facts would provide a sufficient basis for the Panel to determine that India has provided export subsidies within the meaning of the Agriculture Agreement.

50. Second, India also fails to acknowledge that, under the SCM Agreement, the burden for showing that an export subsidy exists does not require specific evidence demonstrating that a direct transfer of funds, for example, has in fact been made to, or received by, a recipient entity. A measure setting out the legal elements of an export subsidy, on its face, provides sufficient evidence to demonstrate the existence of such a subsidy. India’s arguments would mean that a complainant would be prevented from demonstrating the existence of a subsidy because it did not have access to specific evidence of payment information, such as proof of bank transfers or other payment activity. Such an evidentiary standard would shield respondents from potential liability under the WTO agreements and only incentivize non-transparency.

51. The United States is not aware of any dispute in which a panel or the Appellate Body has imposed such an evidentiary burden as India suggests on a complainant. For example, the panel in *India – Export Related Measures* found the existence of subsidies based on an examination of the measures themselves, and did not find that additional evidence of actual payments was required. Instructive in this dispute is the panel’s analysis of the Merchandise Exports from India Scheme (“MEIS”).

52. Under the MEIS, India grants “scrips” “as a reward for exports.”<sup>52</sup> These scrips can be used to pay for certain customs duties, excise duties on goods purchased domestically, and certain other governmental fees and charges.<sup>53</sup> These scrips are also freely transferable<sup>54</sup> and can “be sold to third party recipients for consideration such as money.”<sup>55</sup> The panel, however, did not require the complainant to provide documentary evidence of individual scrips, for example, or direct proof that India had distributed any scrips to an individual exporter to demonstrate financial contribution. Instead, the panel relied on the legislative text, such as India’s Foreign Trade Policy, and other governmental notices as the evidence of the subsidy, the form of

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<sup>52</sup> *India – Export Related Measures (Panel)*, para. 7.429 (citing Sections 3.02 and 3.04 of the Government of India’s Foreign Trade Policy).

<sup>53</sup> *India – Export Related Measures (Panel)*, para. 7.430 (citing Sections 3.02 and 3.18 of the Government of India’s Foreign Trade Policy).

<sup>54</sup> *India – Export Related Measures (Panel)*, para. 7.431 (citing Section 3.02 of the Government of India’s Foreign Trade Policy).

<sup>55</sup> *India – Export Related Measures (Panel)*, para. 7.431.

payment, and whether or not the scrips are transferable.<sup>56</sup> In short, the panel found evidence of a subsidy under the SCM Agreement without documentation of individual transfers or other uses of scrips.

53. Furthermore, WTO Members can challenge subsidies under the SCM Agreement on an "as such" basis,<sup>57</sup> which the Complainants appear to be doing with respect to the export subsidies outlined in this dispute. Article 3 of the SCM Agreement provides an outright prohibition on subsidies contingent on export performance. The Complainants' first written submissions provide arguments and documentation that allege that Indian subsidies – as set out in relevant legislation and, in some cases, budgeted for by a government entity – are available to all sugar mills, both previously existing and newly started, that meet certain *de jure* export volume requirements. That these programs may or may not have been used in a past time period is not a necessary showing for an "as such" challenge to India's subsidies.

54. Therefore, India's attempt to interpret the Agriculture and SCM Agreements as requiring direct, evidentiary proof of actual government transfers to demonstrate the existence of a *de jure* export subsidy finds no support in the text of the agreements, and must be rejected.

#### **B. Article 3.1(a) of the SCM Agreement Applies to India**

55. India also repeats the unfounded, and unsuccessful, proposition that it used in the *India – Export Related Measures* dispute:<sup>58</sup> that it is entitled to, and is still covered by, an additional eight year period to phase out its export subsidies under the SCM Agreement, and that it is, therefore, not subject to the obligations found in Article 3 of the SCM Agreement.<sup>59</sup> This proposition, however, finds no support in the text of the SCM Agreement.

56. Although Article 27 of the SCM Agreement provides a limited exception to Article 3.1(a), India no longer qualifies for that limited exception. Article 27 states:

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO

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<sup>56</sup> *India – Export Related Measures (Panel)*, paras. 7.429-7.480, 7.470.

<sup>57</sup> See, e.g., *Canada – Aircraft (Panel)*, para. 9.124.

<sup>58</sup> *India – Export Related Measures (Panel)*, para. 7.24.

<sup>59</sup> India's First Written Submission, para. 132.

Agreement, subject to compliance with the provisions in paragraph 4.

57. Annex VII of the SCM Agreement states:

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 *when GNP per capita has reached \$1,000 per annum*<sup>60</sup>: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, *India*, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe. (emphasis added)

58. As acknowledged by India in this dispute, India's GNP per capita has already reached \$1,000 for three consecutive years (2013, 2014, and 2015).<sup>61</sup> Accordingly, India is no longer a developing country Member referred to in Annex VII and therefore paragraph 2(a) of Article 27 of the SCM Agreement no longer applies to India.

59. Paragraph 2(b) of Article 27 also does not apply to India. For "other developing country Members" not listed in Annex VII, subparagraph (b) provided a phase-out "for a period of eight years from the date of entry into force of the WTO Agreement." The WTO Agreement entered into force on January 1, 1995, and the "period of eight years" expired on January 1, 2003. Thus, because January 1, 2003 has passed, paragraph 2(b) does not apply to India, and India must terminate its export subsidies.

60. As a result, India is now subject to Article 3 of the SCM Agreement. India is simply wrong to argue that the eight year period began after it reached the relevant GNP per capita levels.

61. India's status vis-à-vis Article 3 of the SCM Agreement was confirmed by the panel in *India – Export Related Measures*. The panel in that dispute analyzed the text of Article 27 and Annex VII of the SCM Agreement, and "conclude[d] that India does not fall under Articles 27.2 and 27.7 any longer, because it has graduated from Annex VII(b) and Article 27.2(a) of the SCM Agreement, and because Article 27.2(b) expired on 1 January 2003." Therefore, the Panel found that "Articles 3 and 4 of the SCM Agreement apply in the present dispute."<sup>62</sup> India has appealed

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<sup>60</sup> Footnote omitted.

<sup>61</sup> India First Written Submission, para. 132.

<sup>62</sup> *India – Export Related Measures (Panel)*, para. 7.18.

this panel report, but that does not diminish its persuasive value for the Panel’s evaluation of the same issue in this dispute.<sup>63</sup>

62. Due to the lack of textual support for its position, India instead asks the Panel to consider such supplemental sources as negotiating history and makes amorphous references to the general support provided in the SCM Agreement for giving developing country Members the opportunity to provide export subsidies.<sup>64</sup>

63. For example, India believes interpreting Article 27 according to its ordinary meaning results in: (1) Annex VII(b) developing country Members receiving unequal treatment from other categories of developing country Members and thus (2) Annex VII(b) developing country Members being denied the special and differential treatment provided for in Article 27 of the SCM Agreement.<sup>65</sup>

64. India is mistaken because, as the panel in *India – Export Related Measures* rightly understood, Article 27 confirms that India has received *better* treatment than other developing country Members originally found in Article 27.2(b).

65. As the panel in *India – Export Related Measures* explained:

Article 27.2 and Annex VII provide for special and differential treatment and establish different degrees of flexibility in excluding developing country Members from the application of the prohibition of export subsidies under Article 3.1(a). The flexibilities differ between three categories of Members in respect of the period during which the prohibition in Article 3.1(a) “shall not apply”, i.e. the transition period. First, for developing country Members in general, Article 27.2(b) stipulates a transition period of eight years from the entry into force of the WTO Agreement. During this period, the first sentence of Article 27.4 imposes a progressive phase-out obligation on developing country Members referred to in Article 27.2(b). Second, for least developed country Members, Article 27.2(a) in connection with Annex VII(a) provides that the prohibition in Article 3.1(a) shall not apply as long as the Members in question are designated as least developed countries by the United Nations. Third, for the developing country Members listed in Annex VII(b), Article 27.2(a) in connection

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<sup>63</sup> The adoption of a report does not give the interpretation in that report some different or higher value for another adjudicator because the DSU does not assign precedential value to adopted WTO reports. Rather, under the DSU, a WTO adjudicator is to apply customary rules of interpretation of public international law to the text of the covered agreement so as to neither add to nor diminish the rights or obligations expressed in that text. The exclusive authority to adopt authoritative interpretations of the WTO agreements is expressly reserved to the Ministerial Conference or General Council acting under special procedures. WTO Agreement Art. IX:3; DSU Art. 3.9; *see* United States Trade Representative Report on the Appellate Body of the World Trade Organization, February 2020, pp. 55-64, *available at* [https://ustr.gov/sites/default/files/Report\\_on\\_the\\_Appellate\\_Body\\_of\\_the\\_World\\_Trade\\_Organization.pdf](https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf).

<sup>64</sup> India’s First Written Submission, paras. 129-145.

<sup>65</sup> India’s First Written Submission, paras. 138-140.

with Annex VII(b) provides for a transition period that lasts as long as these Members remain below the relevant threshold, *even after the eight-year period available to the first category of Members referred to above*.<sup>66</sup> (emphasis added).

66. Properly interpreted, the SCM Agreement provides different end dates for the exemption of the prohibition in Article 3.1(a). India was an Annex VII(b) developing country Member. An Annex VII(b) Member that graduated before January 1, 2003, may provide export subsidies until January 1, 2003. Those Annex VII(b) Members that graduate after January 1, 2003, like India, are not obligated to end their export subsidies until the date of their graduation. Thus, those Annex VII(b) Members that graduate after January 1, 2003, like India, would have had a *longer* period to provide export subsidies than a non-Annex VII developing country Member, described in Article 27.2(b), whose time to grant export subsidies ended on January 1, 2003.

67. In other words, a Member graduating from Annex VII(b) after January 1, 2003, would receive *better* treatment (in the sense of a longer implementation period) than the Members originally within the scope of Article 27.2(b).

68. Resort to reviewing supplemental sources is unnecessary given that the ordinary meaning of the text, in context and in light of the object and purpose of the SCM Agreement, answers the question unambiguously. India has no textual support for its position that an eight-year phase out applies, and instead requests that the Panel consider such supplemental sources as negotiating history and amorphous language about the general support for giving developing country Members the opportunity to provide export subsidies.<sup>67</sup> Such resort to reviewing supplemental sources is unnecessary when the ordinary meaning of the text, in context and in light of the object and purpose of the SCM Agreement, answers the question, and India's argument should be rejected,<sup>68</sup> just as the panel did in *India – Export Related Measures*.<sup>69</sup>

69. Furthermore, consideration of the November 6, 1990, draft text only demonstrates that Members considered this draft text and did not adopt it. Indeed, the Chairman of the Negotiating Group on Subsidies and Countervailing Measures reported that there was disagreement on Article 27 in the draft and in general it “was clear that the Group was not in a position to reach final agreement on the text” presented in the November 6, 1990, draft.<sup>70</sup> India's approach appears to be that the interpretation of an agreement can be changed by a party or parties disagreeing with the ordinary meaning of the terms after the agreement has been concluded in favour of language that was specifically left out of the final agreement. This is not what is meant by recourse to supplementary means of interpretation.

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<sup>66</sup> *India – Export Related Measures (Panel)*, para. 7.50.

<sup>67</sup> India First Written Submission, paras. 149-88.

<sup>68</sup> *US – Upland Cotton, (AB)*, para. 623; *US – Gambling, (AB)*, para. 197; *US – Stainless Steel (Mexico) (AB)*, para. 128.

<sup>69</sup> *India – Export Related Measures (Panel)*, para. 7.70 - 7.73 (“in light of the clear meaning of Article 27.2(b), we do not consider it necessary in this case to have recourse to supplementary means of interpretation”).

<sup>70</sup> MTN.GNG/NG10/24, paras. 3 and 4.

70. In sum, Article 27 of the SCM Agreement does not provide India with an additional eight years to phase out its export subsidies; therefore, India is subject to the obligations of Article 3.1(a) and 3.2 of the SCM Agreement.

#### **IV. CONCLUSION**

71. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the Agriculture Agreement and the SCM Agreement.