



INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

NOTIFICATION OF AN APPEAL BY INDIA UNDER ARTICLE 16.4 AND ARTICLE 17.1 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 24 December 2021, from the delegation of India, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("**DSU**") as well as Rule 20 of the Working Procedures for Appellate Review (WT/AB/WP/6) ("**Working Procedures**"), India hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Reports¹ and certain legal interpretations developed by the Panel in the three disputes *India – Measures Concerning Sugar and Sugarcane* (WT/DS579/R, WT/DS579/R/ADD.1, WT/DS579/R/SUPPL.1; WT/DS580/R, WT/DS580/R/ADD.1, WT/DS580/R/SUPPL.1, and WT/DS581/R, WT/DS581/R/ADD.1, WT/DS581/R/SUPPL.1). Further pursuant to Rules 20(1) and 21(1) of the Working Procedures for Appellate Review, India simultaneously files this Notice of Appeal together with its Appellant's Submission with the Appellate Body Secretariat.
 2. While India's appeal focuses on certain errors of law committed by the Panel,² India's choice to not appeal against any issue must not be construed as India's agreement with the Panel's legal interpretations or conclusions on such issues.
 3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel, without prejudice to India's ability to rely on other paragraphs of the Panel Report in its appeal and associated submissions.
 4. For the reasons to be further elaborated in its submissions to the Appellate Body, India appeals and requests the Appellate Body to reverse, modify, or declare moot and of no legal effect, the findings, conclusions, rulings and recommendations of the Panel, with respect to the following errors of law or legal interpretation contained in the Panel Report.
- I. THE PANEL ERRED IN FINDING THAT THE MAEQ SCHEME WAS WITHIN ITS TERMS OF REFERENCE**
5. India seeks review by the Appellate Body of the Panel's finding that the "Scheme for providing assistance to sugar mills for expenses on marketing costs including handling, upgrading and other processing costs and costs of international and internal transport and freight charges on the export of sugar" for the 2019–20 sugar season ("**MAEQ Scheme**") is within its terms of reference. India submits that:

¹ The three Panels have issued a common report. The term "Panel Report" or "Report" in this Notice of Appeal and accompanying Appellant's Submission refers to the common report of the three Panels.

² The three Panels have been collectively referred to as the "Panel".

- The Panel errs in holding that Article 6.2 of the DSU does not set out an express temporal limitation on the measures that can be identified in a panel request. Under Article 6.2, the request for the establishment of a panel must identify "the specific measures at issue" and "a brief summary of the legal basis for the complaint." It will be impossible to identify a specific measure in precise and clear terms unless it is in existence.
 - Without prejudice to India's views on the meaning of Article 6.2 of the DSU, the Panel has failed to demonstrate that the MAEQ Scheme amends one of the existing measures identified by the complainants in their requests for the establishment of a panel.
 - The Panel grossly errs in holding that the MAEQ Scheme is of the "same essence" as other alleged export subsidies identified in the complainants' requests for the establishment of a panel.
 - India considers that the Panel has cherry-picked a few broad similarities while ignoring the differences between MAEQ and the other alleged exports subsidy measures.
 - Therefore, not only has the Panel developed an erroneous understanding of whether measures enacted after the establishment of a panel may be included in a panel's terms of reference, but the Panel has also applied such erroneous understanding of the legal standard in an arbitrary, selective and unjust manner.
6. India requests that the Appellate Body (i) *reverse* the Panel's interpretive finding, at Annex E-2, paragraphs 1.18 and 1.19, that measures established after the date of establishment of a panel, and in this particular case the MAEQ Scheme, can fall within the Panel's terms of reference; and Annex E-2, paragraphs 1.42 through 1.52 that the MAEQ Scheme is of the same essence as other measures alleged to be export subsidies; and (ii) *find* that the Panel committed a legal error in issuing findings and recommendations on the MAEQ Scheme with respect to its consistency with Articles 3.3, 8 and 9.1 (a) of the Agreement on Agriculture ("**AoA**") and Articles 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures ("**SCM Agreement**"), because the MAEQ Scheme was not within the Panel's terms of reference.

II. THE PANEL ERRED IN FINDING THAT INDIA'S FAIR AND REMUNERATIVE PRICE AND STATE ADVISED PRICE CONSTITUTE MARKET PRICE SUPPORT UNDER THE AOA.

7. India seeks review by the Appellate Body of the Panel's finding that India's Fair and Remunerative Price and State Advised Price ("**FRP/SAP**") measures constitute "market price support" within the meaning of Annex 3 of the AoA:
- The Panel makes conclusory statements without offering any reasons for its views. The Panel's reasoning throughout the Panel Report is inconsistent and contradictory.
 - The Panel errs in not making a finding on whether market price support is a subsidy under paragraph 1 read with paragraph 2 of Annex 3 of the AoA. The Panel has also erred in not adequately addressing India's arguments with respect to paragraph 2 of Annex 3 of the AoA. Moreover, the Panel, by choosing to not address what it calls "textual ambiguities" (although there is no ambiguity whatsoever in the text of paragraphs 1 and 2 of Annex 3 of the AoA) has abdicated its function of addressing the relevant provisions of the AoA.
 - The Panel errs in its reading of the second sentence of paragraph 8 of Annex 3. The budgetary payments in the second sentence are not in the nature of "applied administered price" i.e., the price paid for the purchase of the agricultural product.
 - The Panel errs in holding that the absence of budgetary outlay as a calculation methodology in paragraph 8 (unlike paragraphs 10 and 13) strongly suggests that market price support can exist even in the absence of government expenditure or revenue foregone. Contrary to the Panel's observations, Annex 4 of the AoA provides circumstances in which budgetary outlays can be used to calculate market price support.
 - The Panel also errs in drawing support from the panel reports in *China – Agricultural Producers* and *Korea – Various Measures on Beef* as these are not relevant and did not address the issues in the present disputes.
 - In light of the above, it is evident that the Panel has not only erred in interpreting relevant provisions of the AoA but has also acted contrary to its obligations under Article 7.2 and 12 of the DSU.
8. For these reasons, India respectfully requests that the Appellate Body *reverse* some of the Panel's interpretative findings (as explained in the Appellant's Submission), in paragraphs 7.52, 7.53, 7.54, 7.55, 7.56, 7.57 and 7.58, 7.59 of the Panel Report. As a result, India also requests

that the Appellate Body *reverse* all of the consequential findings of the Panel to this effect in paragraphs 7.110 and 7.111 of the Panel Report.

9. India also respectfully requests that the Appellate Body *find* that the Panel erred: (i) by failing to determine, in the first instance, whether market price support is a subsidy under paragraph 1 of Annex 3 and whether subsidy in paragraph 2 includes private expenditures; (ii) in its analysis of the meaning of the second sentence of paragraph 8 of Annex 3 and import of alternative methodology to calculate market price support in Annex 4 of the AoA. India also requests the Appellate Body to *find* that: (i) paragraph 1 of Annex 3 identifies market price support as a subsidy; and (ii) in light of paragraph 2 of Annex 3, subsidies do not include private expenditures.

III. THE PANEL HAS ERRED IN ITS INTERPRETATION OF ARTICLE 27.2(B) OF THE SCM AGREEMENT AS APPLICABLE TO DEVELOPING COUNTRY MEMBERS GRADUATING FROM ANNEX VII(B)

10. India seeks review of the Panel's interpretation of Article 27.2(b) and Annex VII of the SCM Agreement. Specifically, India submits that:
- The Panel has erred in finding that Article 27.2(b) of the SCM Agreement does not apply to developing country Members graduating from Annex VII(b).
 - The interpretation developed by the Panel renders express words of Annex VII(b) ineffective and runs contrary to the object and purpose of the SCM Agreement.
 - The interpretation developed by the Panel denies the rights granted to developing country Members by Annex VII(b) of the SCM Agreement.
11. Consequently, India requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.313, 7.314, 7.319, 7.321 and 7.322 that Article 27.2(b) of the SCM Agreement does not apply to developing country Members graduating from Annex VII(b), and its consequential findings under Article 3 of the SCM Agreement contained in paragraphs 8.6 and 8.13 of the Panel Report.
12. Further, India requests the Appellate Body to *find* that developing country Members graduating from Annex VII(b) are entitled to an eight-year phase-out period for eliminating their export subsidies.

IV. THE PANEL HAS ERRED IN FINDING THAT THROUGH THE DFIA SCHEME INDIA PROVIDES SUBSIDIES CONTINGENT ON EXPORT PERFORMANCE INCONSISTENTLY WITH ARTICLES 3.3 AND 8 OF THE AOA AND ARTICLES 3.1 (A) AND 3.2 OF THE SCM AGREEMENT

13. India requests that the Appellate Body review the Panel's findings with respect to the DFIA Scheme. Specifically, India submits that:
- The Panel erred by finding that the DFIA Scheme does not fall within the scope of footnote 1 of the SCM Agreement.
 - The Panel's conclusions are unsupported by the text of footnote 1 read with paragraph (i) of Annex I of the SCM Agreement which focuses on the quantum of remission or drawback of import charges. Paragraph (i) of Annex I does not require that inputs which are subject to remission or drawback of import charges must be the very same inputs that are in fact used in the production process of an exported product.
 - Neither Footnote 61 to Annex II nor paragraph 3 of part II of Annex II require that inputs that are subject to remission or drawback of import charges must be the very same inputs that are in fact used in the production process of an exported product.
 - The Panel's conclusions are contrary to the objective sought to be achieved by Footnote 1 to the SCM Agreement which is based on the "destination principle" of taxation. The DFIA Scheme meticulously follows the destination principle.
 - The Panel's reading that inputs that are used in the production process must be the very same imported inputs that are subject to remission or drawback of import charges makes it onerous or rather impossible to implement duty remission or drawback schemes.
 - Annex III recognises that drawback systems can allow for refund or drawback of import charges on inputs which are consumed in the production process.
 - Paragraph 4 of Part II of Annex III offers the flexibility to exporters to select import shipments on which drawback is claimed. In other words, an exporter may first import one

shipment of inputs, pay the import charges, use those inputs in the production of exported products but may then subsequently claim drawback on another shipment of inputs.

- The Panel did not even take note of any of the above arguments of India, let alone give them any consideration. The Panel's conclusions are deprived of any basic rationale and violative of its obligations under Articles 11 and 12.7 of the DSU.

14. Consequently, India requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.288, 7.289 and 7.292 that the DFIA does not fall within the scope of Footnote 1 of the SCM Agreement and its consequential findings under Articles 3 and 8 of the AoA and Article 3 of the SCM Agreement contained in paragraphs 7.297, 7.298, 7.299, 7.300 and 8.6 of the Panel Report.
15. Further India requests the Appellate Body to *find* that the DFIA Scheme does not constitute a subsidy by way of operation of Footnote 1 of the SCM Agreement and consequently does not constitute a subsidy under the AoA.

V. THE PANEL ERRED IN RECOMMENDING AN ACCELERATED TIME FRAME FOR THE WITHDRAWAL OF ALLEGED EXPORT SUBSIDIES IN LINE WITH ARTICLE 4.7 OF THE SCM AGREEMENT

16. India requests that the Appellate Body review the Panel's findings with respect to the applicability of accelerated timelines under the SCM Agreement to these disputes. Specifically, India submits that there exists a conflict between Article 4 of the SCM Agreement and Article 19 of the AoA, which by operation of Article 21 of the AoA must be resolved in favour of the AoA.
17. Consequently, India requests the Appellate Body to *reverse* the Panel's findings in paragraphs 6.56 and 6.57 that the relationship between Article 19 of the AoA and Article 4.7 of the SCM Agreement does not amount to a conflict and that the difference between Article 21.3(c) of the DSU and Article 19 of the AoA does not give rise to a conflict within the meaning of Article 21.1 of the AoA. Accordingly, India requests the Appellate Body to *reverse* the Panel's recommendations at paragraphs 7.334, 8.11 and 8.17 that India withdraw its prohibited subsidies under the Production Assistance, the Buffer Stock, and the Marketing and Transportation Schemes within 120 days from the adoption of the Panel Report and *find* that Article 4.7 does not apply to disputes raised under the AoA.
18. Pursuant to Rule 20(2)(c) of the Working Procedures, the service address, telephone and facsimile numbers for India are:
The Permanent Mission of India to the World Trade Organization
Rue du Valais 9,
1202 GENEVA
Tel:022 906 86 86
Telefax:022 738 45 48
19. India is providing a copy of this Notice of Appeal as well as its Appellant's Submission directly to the complainants as well as to all the third parties.
20. There are currently no Appellate Body Members to constitute a division for serving on appeal in this dispute. In these exceptional circumstances, and in the interests of fairness and orderly procedure in the conduct of the appeal, in accordance with Rule 16(1) and (2) of the Working Procedures for Appellate Review, India will await further instructions from the division, when it may eventually be composed, or the Appellate Body, regarding any further steps to be taken by India in this appeal.
21. Filing of the Notice of Appeal and the Appellant's Submission by India should be without prejudice to its right to re-file or amend them once the division becomes operational.
22. India also reserves its right to supplement its Appellant Submission with additional arguments.