INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE

(DS579, DS580, and DS581)

THIRD-PARTY EXECUTIVE SUMMARY
OF THE UNITED STATES OF AMERICA

January 15, 2021

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.

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," 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."

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." 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." 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.

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

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

7. 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.

8. 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')."

9. 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. A "market" is the physical or geographic place where commercial transactions take place, or the business of buying and selling, including the rate of purchase or sale, of a particular good or commodity. "Price" is defined as "a sum in money or goods for which a thing is or may be bought or sold." "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."

10. 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." Further, it defines "price support" as "assistance in maintaining the levels of prices regardless of supply and demand."

11. 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.

12. 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." Further, it stated that "all producers of the 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."

13. 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." 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."

14. 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. 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."

- 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. 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.

15. 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." The difference between these prices is then multiplied by the "quantity of production eligible to receive the applied administered price." 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.

16. 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.

17. 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*.

18. India attempts to argue that its market price support measures do not quality as domestic support at all, and therefore should not be included in its AMS calculation. India mistakenly points to the text of Annex 3 to the Agricultural Agreement to make this argument.

19. 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" 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." Therefore, the ordinary meaning of "shall include" indicates that measures involving budgetary outlays and revenue forgone 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 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.

20. 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'." "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." 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."

21. 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. 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.

22. 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.

23. The Complainants claim that India maintains export subsidies in breach of Articles 3.3, 8, and 9 of the Agriculture Agreement and Article 3 of the SCM Agreement.

24. Article 3.3 of the Agriculture Agreement sets out two categories of commitments for export subsidies: a commitment on scheduled agricultural products and a commitment on unscheduled agricultural products. Section II of Part IV of India's Schedule does not list any commitments on sugar, therefore, sugar is an unscheduled agricultural product. 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.

25. India also has committed not to provide sugar subsidies contingent on export through Articles 1 and 3 of the SCM Agreement. 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 Articles 3.1(a) and 3.2 of the SCM Agreement.

26. 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. The relevant dictionary definition of "contingent" is "[c]onditional; dependent on, upon; [d]ependent for its existence on something else." In the export subsidy context, "the grant of a subsidy must be 'tied to' export performance." 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. This export contingency can be demonstrated "in law" (*de jure*) or "in fact" (*de facto*).

27. India sets out two broad defences, both inadequate to rebut challenges to subsidy measures under the Agriculture Agreement and the SCM Agreement.

28. First, India fails to recognize that export subsidies under the Agriculture Agreement are measured based on amounts "allocated or incurred" by a government. Under the Agriculture Agreement, India has a zero commitment level for export subsidies. 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.

29. 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.

30. 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").

31. 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.

32. Although Article 27 of the SCM Agreement provides a limited exception to Article 3.1(a), India no longer qualifies for that limited exception. 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). 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. 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. As a result, India is now subject to Article 3 of the SCM Agreement. India's status vis-à-vis Article 3 of the SCM Agreement was confirmed by the panel in *India – Export Related Measures*.

33. 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.

34. 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).

35. 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.

36. 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.