

*INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE*

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

**COMMENTS OF THE UNITED STATES OF AMERICA  
ON INDIA'S PRELIMINARY RULING REQUEST**

**April 8, 2020**

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## I. INTRODUCTION

1. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), the *Agreement on Agriculture of the General Agreement on Tariffs and Trade 1994* (Agriculture Agreement) and the *Agreement on Subsidies and Countervailing Measures of the General Agreement on Tariffs and Trade 1994* (SCM Agreement) as relevant to certain issues in India's request for preliminary findings by the Panel ("Preliminary Ruling Request").

## II. INDIA'S PRELIMINARY RULING REQUEST

2. In its First Written Submission, India requested a preliminary ruling regarding certain measures raised by the Complainants in their First Written Submissions that "fall outside the scope of the Panel's terms of reference."<sup>1</sup> Specifically, India claims that all measures that have either (1) have expired prior to the establishment of the Panel or (2) were enacted after the establishment of the Panel, are not included in the terms of reference of this dispute.

3. A panel's terms of reference are set out in Articles 7.1 and 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). Specifically, when the Dispute Settlement Body (DSB) establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request.<sup>2</sup> Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."<sup>3</sup> From the text of these provisions, it follows that a panel is to examine the matter as it existed on the date the panel was established – that is, a specific measure and a claim of WTO-inconsistency – and not a different matter (measure and claim of inconsistency) that might exist at some other time. As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."<sup>4</sup>

4. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "at the time of establishment of the Panel."<sup>5</sup> It is thus the challenged measures, as they existed at the time of

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<sup>1</sup> India's First Written Submission, para. 32.

<sup>2</sup> DSU, Art. 7.1.

<sup>3</sup> DSU, Art. 6.2; see *US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

<sup>4</sup> *EC – Chicken Cuts (AB)*, para. 156.

<sup>5</sup> See, e.g., *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the

the panel’s establishment, when the “matter” was referred to the panel, that are properly within the panel’s terms of reference and on which the panel should make findings.

5. Below, the United States will set out its views on the application of the terms of reference framework set out in the DSU and India’s arguments in its Preliminary Ruling Request. Ultimately, the United States agrees with India that measures introduced after the establishment of a panel are outside of that panel’s terms of reference; however, the United States disagrees with India that expiration of annual or seasonal iterations of domestic support programs prior to the establishment of a panel require exclusion from a panel’s terms of reference.

### **1. India’s Arguments that Certain Measures Were Enacted After the Establishment of the Panel**

6. The Panel in this dispute was established on August 15, 2019. India argues that because its Maximum Admissible Export Quantities (MAEQ) scheme was not introduced until September 12, 2019, *i.e.*, after the Panel was established, that scheme does not fall within the terms of reference of the Panel.<sup>6</sup>

7. The three Complainants acknowledge that the MAEQ scheme was introduced after the establishment of the Panel.<sup>7</sup> The Complainants, however, argue that the MAEQ scheme can still be included in the Panel’s terms of reference for three reasons. First, the Complainants argue that the Panel’s terms of reference, as set out in the panel requests, are sufficiently broad to cover the scheme, which is a successor, extension, replacement, renewal, or amendment of an already named program – the Minimum Indicative Export Quota (MEIQ) scheme.<sup>8</sup> Second, the Complainants claim that the MAEQ scheme is of the same purpose and structure of the MEIQ scheme, and, therefore, of the “same essence” as a measure in existence at the time of Panel establishment.<sup>9</sup> Finally, the Complainants assert that the MAEQ is an “iteration” of the same program, and to treat it otherwise would be unfair, as it would require Members to chase “a ‘moving target’ that shifts year to year”, preventing a positive resolution to this dispute.<sup>10</sup> The

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Panel”); *id.*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they “might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel”); *see also EC – Approval and Marketing of Biotech Products*, para. 7.456.

<sup>6</sup> India’s First Written Submission, paras. 44-46.

<sup>7</sup> *See, e.g.*, Australia’s Comments on India’s Request for a Preliminary Ruling, para. 53 (“India’s Central Government introduced the MAEQ scheme on 12 September 2019 for the sugar season 2019–20.”).

<sup>8</sup> *See, e.g.*, Guatemala’s Comments on India’s Request for a Preliminary Ruling, paras. 53-55 (quoting from its Panel Request: “Guatemala identified the measures pertaining to sugar or sugarcane through which India provides subsidies contingent upon export performance, which include ‘any amendments, related, successor, replacement or implementing measures thereto’”).

<sup>9</sup> *See, e.g.*, Brazil’s Comments on India’s Request for a Preliminary Ruling, paras. 64-70.

<sup>10</sup> *See, e.g.*, Australia’s Comments on India’s Request for a Preliminary Ruling, para. 82.

Complainants argue that for any and all of these reasons, inclusion of a measure introduced after the establishment of the Panel is warranted in this dispute.<sup>11</sup>

8. The United States does not consider that the DSU permits a panel to make findings on a measure that came into existence after panel establishment. However, the United States does not consider that the Complainants would be deprived of necessary findings or a recommendation were they to make out claims successfully on the MEIQ measure that the Complainants and India agree is within the Panel’s terms of reference.

9. The inclusion of a measure not specifically identified in the request for establishment of a panel runs counter to the DSU. As described above, Article 6.2 requires a complainant to identify in its panel request “the specific measures at issue” and “a brief summary of the legal basis of the complaint.”<sup>12</sup> Where a measure has not been so identified, a panel does not have the authority to examine it.

10. Furthermore, defining the scope of a dispute based on the measures as they existed at the time of panel establishment is not only consistent with the requirements of the DSU, it also benefits the parties by balancing the interests of complainants and respondents. Just as a complainant may not obtain findings on substantively new measures introduced after the establishment of a panel,<sup>13</sup> so too the respondent may not avoid findings and recommendations by altering or revoking its measures after the date of panel establishment.<sup>14</sup> A complainant therefore may obtain a recommendation under Article 19.1 of the DSU<sup>15</sup> that is prospective, and which can be invoked both with respect to unchanged measures and with respect to any later-in-time measures a responding party may impose — whether they are imposed after the adoption of panel and Appellate Body reports, or simply after the establishment of a panel.

11. Therefore, if the Panel finds that the MEIQ is WTO-inconsistent and recommends that India brings the measure into conformity as a result of this dispute, then any actions taken by India with regards to the MEIQ after panel establishment – including the introduction of a new measure that shares some of the same characteristics – would become relevant in later actions to resolve the dispute, such as in consultations between the parties regarding compliance or through additional proceedings under the DSU. Thus, if the MAEQ is inconsistent with India’s WTO obligations (as Complainants allege) and replaces the MEIQ, then the existence of the MAEQ at

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<sup>11</sup> Australia’s Comments on India’s Request for a Preliminary Ruling, paras. 57-60; Brazil’s Comments on India’s Request for a Preliminary Ruling, para. 52; and Guatemala’s Comments on India’s Request for a Preliminary Ruling, para. 43.

<sup>12</sup> DSU, Art. 6.2; *see US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

<sup>13</sup> *See, e.g., EC – Chicken Cuts (AB)*, paras. 155-162.

<sup>14</sup> *See, e.g., EC – IT Products*, para. 7.167; *US – Wool Shirts and Blouses (Panel)*, para. 6.2; *Indonesia – Autos*, para. 14.9; *Dominican Republic – Imports and Sale of Cigarettes (Panel)*, para. 7.344; *EC – Approval and Marketing of Biotech Products*, para. 7.456; *China – Raw Materials (AB)*, para. 260.

<sup>15</sup> Article 19.1 of the DSU sets out in mandatory terms that, where a panel “concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”

the end of the reasonable period of time could be evidence that India had not come into compliance. Therefore, exclusion of a measure introduced after the establishment of a panel from the terms of reference would not require endlessly chasing a moving target, as the Complainants suggest.<sup>16</sup>

12. The text of the DSU is clear – a complainant must identify “the specific measures at issue” and “a brief summary of the legal basis of the complaint” in its panel request.<sup>17</sup> Where a measure has not been so identified, a panel does not have the authority under its terms of reference as established by the DSB to examine it. If the Panel finds that the MEIQ was not specifically identified in the panel request, it should conclude that the measure falls outside its terms of reference and decline to make findings upon it. To act otherwise would be contrary to the DSU.

## **2. India’s Arguments that Certain Measures Expired Prior to the Establishment of the Panel**

13. India argues that the Complainants have “referred to or challenged several measures pertaining to sugar seasons 2014-2015 through 2019-20[]”, and that they have not demonstrated that “all such measures (...) existed at the time of the establishment of the Panel.”<sup>18</sup> India claims that these measures expired prior to Panel establishment and are therefore outside the Panel’s terms of reference.<sup>19</sup>

14. In particular, India points to a letter dated March 18, 2020 – one day before India submitted its First Written Submission – prepared by the Indian Ministry of Consumer Affairs in response to a request from Directorate General of Foreign Trade, that sets out a list of “policies at the Central and State-level [that] were no longer in force as of 15 August 2019.”<sup>20</sup> The criteria apparently used by the Ministry of Consumer Affairs in compiling this list was whether the financial contribution of those individual schemes for that year had been exhausted.<sup>21</sup> On that basis, India argues, the Panel cannot consider certain schemes or evidence.

15. The Complainants counter that India is mistakenly conflating annual legal instruments with the underlying measure itself. For example, Australia states that it:

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<sup>16</sup> See, e.g., Brazil’s Comments on India’s Request for a Preliminary Ruling, para. 74.

<sup>17</sup> DSU, Art. 6.2; see *US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

<sup>18</sup> India’s First Written Submission, para. 40.

<sup>19</sup> India’s First Written Submission, para. 40-43.

<sup>20</sup> Communication F. No. 21(3)/2019-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution, dated 18 March 2020 (Exhibit IND-4).

<sup>21</sup> Communication F. No. 21(3)/2019-SP-I of the Ministry of Consumer Affairs, Food & Public Distribution, Department of Food & Public Distribution, dated 18 March 2020 (Exhibit IND-4) (stating, for example, that the Raw Sugar Export Incentive Scheme for 2014-15 “is no longer in existence as the payments have been made to the sugar mills” and the SAP in Haryana “had no pending SAP dues for the sugar seasons 2014-15, 2015-16 and 2017-18”).



has challenged a set of measures that have been consistently practised by India, of which certain instruments are evidence or manifestations, enabled by the same powers, and operating through the same legal framework. India is seeking to reframe Australia's panel request so that the instruments evidencing certain measures are instead characterised as individual yearly measures.<sup>22</sup>

16. Based on the panel requests, India is incorrect that Complainants base their challenges on the annual legal instruments alone. For example, India claims that the Fair and Remunerated Price (FRPs) for the 2014-15 and 2015-16 sugar seasons were individual measures, challenged by the Complainants, which have expired.<sup>23</sup> Australia's panel request, however, clearly identifies the FRP program as "a mandatory minimum price fixed by the Government of India that Indian sugar mills are required to pay sugarcane producers for sugarcane production delivered to the mill, as reflected in, but not limited to, the following instruments and documents", and then listed, amongst others, the specific instruments covering the 2014-2015 and 2015-2016 sugar seasons.<sup>24</sup> Brazil and Guatemala use the same formulation regarding the FRP in their panel requests.<sup>25</sup>

17. Consistent with Complainants' panel requests, the expiration of annual or seasonal legal instruments through which underlying, and ongoing, domestic support measures are applied, does not preclude the Panel from making findings on such measures, including based on the evidence those annual or seasonal instruments provide.

18. As stated above, the Panel is charged by the DSB to examine the matter identified in the complaining party's panel request as it existed at the time of panel establishment. Under DSU Articles 7.1 and 6.2, the task of a panel is to determine whether the measure at issue is consistent with the relevant obligations "at the time of establishment of the Panel", as previous panels and the Appellate Body have repeatedly found.<sup>26</sup> The Panel's terms of reference were to examine "the matter" – that is, the measures and claims – identified in the Complainants panel requests, as they existed at the time the DSB established the Panel.

19. Where, as here, a "measure" is comprised of multiple legal instruments, the expiry of an annual legal instrument should not deprive the complaining party of a finding and recommendation on a WTO-inconsistent measure within a panel's terms of reference. As the Appellate Body found in *China – Raw Materials*, with respect to annual instruments that implement a measure (in that dispute, export duties or quotas), a panel should make findings on a recurring measure, as evidenced by annual legal instruments that may have been superseded in

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<sup>22</sup> Australia's Comments on India's Request for a Preliminary Ruling, para. 21.

<sup>23</sup> India's First Written Submission, para. 41.

<sup>24</sup> Request for Establishment of a Panel by Australia, para. 8 and Annex A, para. 1.

<sup>25</sup> Request for Establishment of a Panel by Guatemala, para. 8; Request for Establishment of a Panel by Brazil, p. 2 and Annex, para. 8.

<sup>26</sup> *EC – Selected Customs Matters (AB)*, paras. 187, 259; *see also EC – Chicken Cuts (AB)*, para. 156; *EC – Approval and Marketing of Biotech Products*, para. 7.456; *EC – Large Civil Aircraft (Panel)*, para. 7.680.

the course of the dispute. In so doing, the Appellate body reaffirmed that both the panel and Appellate Body examine the measure *as it existed at the time of panel establishment*. The Appellate Body noted that if complainants were precluded from challenging measures applied through legal instruments of an annual nature that may have expired during the course of the panel proceedings, it would create a loophole in the system. Complainants could find themselves ‘taking aim’ at ‘appearing and disappearing targets,’ and responding parties could evade a panel’s scrutiny by removing and reinstating them in the future without any consequences, particularly when the legislative framework for the annual or seasonal measure remains.<sup>27</sup>

20. Furthermore, for those measures the Complainants argue should be part of the Panel’s AMS calculation, the Panel’s review of annual legal instruments related to a domestic support program measure within the Panel’s terms of reference takes on added importance.

21. A Member’s domestic support commitments, in terms of their Final Bound Commitment Level, apply with respect to domestic support provided over a full calendar, marketing, or financial year. Therefore, the question of whether a WTO Member is in breach of its domestic support commitments necessarily involves a retrospective examination of the level of domestic support, calculated as Current Total AMS provided over a period of time.<sup>28</sup> Where a challenge involves market price support programs, the complaining party must produce, among other things, data related to a country’s total annual production volume and average farm-gate prices for the full years at issue in order to establish the level of domestic support provided and then compare that support to a Member’s AMS commitments.

22. Under these circumstances, India’s argument that the Complainants are precluded from demonstrating India’s provision of historical domestic support would, indeed, frustrate the ability of the Complainants or any other WTO Member to challenge India’s provision of domestic support in excess of its WTO commitments. If the Panel were precluded from examining past provisions of domestic support simply because an instrument has allegedly changed, this effectively would preclude challenges to a Member’s domestic support altogether given the retrospective nature of domestic support obligations. Instead, consistent with the DSU and the Agriculture Agreement, the Panel should consider India’s domestic support provided through annual legal instruments during the years at issue, as set out in the Complainants’ panel requests and, therefore, within the Panel’s terms of reference.

23. Such an analysis is exactly what the panel and Appellate Body did in *Korea – Beef*. Specifically, in *Korea – Beef*, the United States and Australia requested the DSB to establish a panel on April 15, 1999 and July 12, 1999, respectively, and the panel was established on May 26, 1999.<sup>29</sup> The panel and Appellate Body issued findings concerning domestic support

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<sup>27</sup> *China – Raw Materials* (AB), paras. 144 and 264 (referring to the United States’ other appellant’s submission, paras. 60 and 61); *China – Raw Materials* (Panel), para. 7.33.

<sup>28</sup> *China – Domestic Support*, para. 7.89 (“We agree with the United States that demonstrating a violation of a domestic support commitment requires presenting evidence, which would typically consist of historical data.”)

<sup>29</sup> On July 26, 1999, the matter raised by Australia was referred to the same panel established to consider the U.S. complaint.

provided in 1997 and 1998 – that is, the two years *prior to* the complaining parties’ requests for panel establishment.<sup>30</sup> Moreover, in examining whether Korea’s provision of domestic support in 1997 and 1998 exceeded its domestic support commitments, the panel reviewed annual legal instruments that were no longer in effect at the time the DSB established the panel to examine the matter raised in the requests for panel establishment.<sup>31</sup>

24. Similarly, the panel in *China – Domestic Support* relied on historical data and other evidence of domestic support to find a breach of China’s AMS commitments over a four year period – 2012, 2013, 2014, and 2015.<sup>32</sup> There, as here, the market price support at issue was provided on an annual basis through annual legal instruments.<sup>33</sup>

25. Finally, India’s arguments also conflate the distinct issues of whether a measure falls within a panel’s terms of reference, and whether that measure might breach a particular WTO obligation. WTO Members can challenge subsidies under the SCM Agreement on an "as such" basis.<sup>34</sup> Article 3 of the SCM Agreement provides an outright prohibition on subsidies contingent on export performance. 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, as it is the underlying legislation that would cause the breach of the SCM Agreement. That breach would be unaffected by arguments that the measure was not applied during a particular time period.

26. Based on the foregoing, the United States disagrees with India’s arguments that annual measures it claims expired prior to the Panel’s establishment cannot be reviewed by the Panel in examining claims that India provides support to its producers inconsistently with its WTO obligations.

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<sup>30</sup> *Korea – Various Measures on Beef (Panel)*, para. 844; *Korea – Various Measures on Beef (AB)*, paras. 126-128.

<sup>31</sup> *Korea – Various Measures on Beef (Panel)*, paras. 829, 837-838.

<sup>32</sup> *China – Domestic Support*, paras. 2.1 and 7.412.

<sup>33</sup> *China – Domestic Support*, para. 7.98 (“Pursuant to the 2004 Grain Opinion and the 2004 Grain Distribution Regulation, China’s National Development and Reform Commission (NDRC), the Ministry of Finance, the Ministry of Agriculture and the State Administration of Grain (SAG) adopt jointly Annual Notices setting forth or increasing the minimum procurement price for wheat and rice in a given year[.]... the Chinese authorities issued the Annual Notices on a yearly basis between 2012 and 2015.[.]”) (citations omitted) and para. 7.99 (“Further details of the measures relating to wheat, Indica rice and Japonica rice – such as the exact periods of operation, the competent entities and modalities of the administrative purchase of agricultural products – are set forth in the Implementation Plans.[.] The Implementation Plans are adopted annually around the time of the harvesting season by the same entities that adopt the Annual Notices.[.]”) (citations omitted).

<sup>34</sup> See, e.g., *Canada – Aircraft (Panel)*, para. 9.124.