SUBSIDIES TO THE INDIAN SUGAR SECTOR: IN COHERENCE WITH INDIA'S WTO OBLIGATIONS?

Advik Rijul Jha[1]

1. INTRODUCTION TO RECENT DEVELOPMENTS

Recently, Brazil[2], Australia[3] and Guatemala[4] have each filed individual requests for Consultation with India at the WTO challenging the domestic support measures and export subsidies provided by India to producers of sugarcane and sugar. The countries claim that these measures are inconsistent with India's obligations under the WTO Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures and the General Agreement on Tariffs and Trade, 1994. Thailand, Costa Rica and European Union have also filed requests to join the Consultations[5] filed by Brazil, Australia and Guatemala against India. The reason that these countries have approached the WTO against policy incentives given by the Indian government to the sugar industry is that these countries are some of the largest sugar producers of the world[6] and they fear that India's sugar exports would lead to a reduction of global prices and thus leading to losses for them.

The significance of filing of the Request for Consultations is that it's the first step to initiate a WTO dispute. If the Consultations between the countries fail, Brazil, Australia and

---

[1]5th year, Student, Jindal Global Law School, Sonipat

[2] *Australia and Brazil drag India to WTO over sugar subsidies*, Business Insider (Feb 28, 2019), *available at* https://www.businessinsider.in/australia-and-brazil-drag-india-to-wto-over-sugar subsidies/articleshow/68195623.cms.

[3] D. Ravi Kanth, *India, Australia locked in sugar trade dispute in WTO*, The Mint (Mar 8, 2019), *available at* https://www.livemint.com/industry/manufacturing/india-australia-locked-in-sugar-trade-dispute-at-wto-1552060700772.html.

[4] *Guatemala drags India to WTO's dispute mechanism over sugar subsidies*, The Mint (Mar 25, 2019) *available at* https://www.livemint.com/news/india/guatemala-drags-india-to-wto-s-dispute-mechanism-over-sugar-subsidies-1553538158287.html.

[5] *EU, Russia, Costa Rica seeks to join consultations in WTO dispute over India's sugar subsidies*, Economic Times (Apr 3, 2019), *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/eu-russia-costa-rica-seeks-to-join-consultations-in-wto-dispute-over-indias-sugar-subsidies/articleshow/68710009.cms.

[6] Suresh Gawali, *Distortions in World Sugar Trade, 38 EPW* 4513-4515 (2003), *available at* https://www.jstor.org/stable/4414181.

ISSN 2582-2667

Guatemala can seek for a WTO Panel to be appointed to make a ruling on the WTO compatibility of the challenged measures.[7] In case of the ruling being determined against India, such a ruling being binding, India shall have to discontinue or strictly lower the benefits provided to the sugar and sugarcane industry. This can be a dampener for India which is currently sitting on a surplus production[8] and would be looking for avenues to export sugar to make a profit. Further, the international sugar trade is a colossal industry that has been operating for centuries.[9] The price of sugar impacts international markets from Europe to Asia and down into Latin America since it is an essential agricultural product with uses in many sectors and industries.[10] Thus, these countries have approached the WTO.

In this backdrop, this paper attempts to analyze the validity of the allegations levied against India with regard to violations of its WTO obligations relating to providing domestic support and export incentives to the sugar industry. The paper will commence by giving a brief synopsis of the growth of the world sugar trade over a period of time and the sensitivity of this commodity for trade. In Part II, a few significant disputes relating to sugar which have been brought to the WTO for adjudication would be discussed. In Part III, an overview of the Indian sugar industry would be given. In Part IV, the paper will look in depth at the allegations which have been brought by countries such as Brazil, Australia and Guatemala against India with regard to India's WTO obligations in the sugar industry. Part V of the paper will delve into the possible defenses which India can adopt to refute these allegations. Part VI of the paper will suggest some policy changes which need to be implemented by India to get its measures within the WTO obligations for the future.

---

[7] Annexure 1 provides an indicative timeline for a WTO Dispute.

[8] Jayashree Bhosale, *ISMA cuts India's 2018-19 sugar production estimate to 307 lakh tonnes*, The Economic Times (Jan 21, 2019), *available at* https://economictimes.indiatimes.com/news/economy/agriculture/isma-cuts-indias-2018-19-sugar-production-estimate-to-307-lakh-tonnes/articleshow/67622494.cms.

[9] J.H. Galloway, *The Sugarcane Industry: An Historical Geography from its origins to 1914*, CUP (1989).

[10] Vladimir P. Timoshenko and Boris C. Swerling, *The World's Sugar: Progress and Policy*, SUP (1957).

2. BRIEF HISTORY OF THE WORLD SUGAR TRADE

Sugar originated in India.[11] Sugar spread from its original habitat, to the Tigris River Valley and flourished under the rule of the Persians and Muslims.[12] Sugar continued to spread into Egypt, northern Africa, Syria, Palestine, the Mediterranean islands, and Spain.[13] The returning Crusaders in 1100 A.D. were the ones who brought sugar to Britain.[14] During the exploration age of the New World, sugar journeyed southward across the Atlantic to the Spanish West Indies, Mexico, and Brazil and beyond.[15]

Refinement process and its use in the international trade were major factors which influenced the transformation of sugar into a commodity.[16] The early fourteenth century was the first instance in history when sugar began arriving in sufficient quantities to be widely available. Christopher Columbus' second transoceanic voyage in 1493 was a significant factor in enabling sugar to flourish all across the Caribbean.[17] Further, after 1700, when Europeans had founded colonies in tropical America to produce sugar, did it appear on the world market in large enough quantities and at low enough prices for it to become a commonplace article of everyday use.

West African slaves were required to perform the refinement and trade of sugar owing to it being a labor-intensive process.[18] Slaves were brought over from West Africa and forced to work on the cultivation of sugar. Plantations were built all over the colonies and the slaves would work the plantations under extreme conditions to keep up with the growing need for sugar. As sugar became more of a hot commodity around the world, more slave labour was needed to keep up with the demands. The gruesome labour involved in the

---

[11] Roy A. Balinger, *A History of Sugar Marketing through 1974*, *available at* https://www.ers.usda.gov/webdocs/publications/40532/50517_aer382a.pdf?v=0.
[12] Nadia B. Ahmad, *The International Sugar Trade and Sustainable Development: Curtailing the Sugar Rush*, 39 N.C.J. Int'l L. & Com. Reg. 675 (2014).
[13] See *supra note 11*.
[14] A.C. Hannah and Donald Spence, *The International Sugar Trade* (1996).
[15] See, *supra note11*.
[16] *Id.*
[17] H. Hobhouse, *Seeds of Change: Five Plants that Tranformed Mankind*, Harper & Row (1986), New York, *available at* https://hort.purdue.edu/newcrop/Hort_306/reading/Reading%2034-1.pdf.
[18] *Id.*

cultivation of sugar cane led to the death of many African slaves.[19] However the Europeans needed cheap or free labour to continue on with the vast profit they were making, so more and more slaves were brought in to work. To the Europeans, it was cheaper to bring over more African slaves than it was to better the conditions and lessen the labour of their already existing slaves.[20]

3. WHY SUGAR IS SO SENSITIVE FOR TRADE NEGOTIATION

Sugar is one of the most important commodities produced and consumed around the world. Sugar is produced in over 123 countries worldwide but over 70% of world sugar production is consumed domestically, thus leaving only the residue to be traded in the world.[21] Trade restrictions have had an adverse impact resulting in volatility in the world market due to the amount of freely traded sugar being miniscule.[22]

Further, the world sugar market has undergone significant structural changes over the past decade still it remains heavily distorted due to protectionism policy by various governments. Changes in domestic support policies and border measures, such as the imposition of export restrictions, have a major impact on trade volumes and international prices. Other uncertainties like saturated demand from developed countries also affecting the market. The sensitivity of sugar in world trade is also influenced by changes in oil and energy prices and their implications on the share of sugarcane for ethanol production to a large extent.[23]

4. HISTORY OF SUGAR SENSITIVITY IN INTERNATIONAL TRADE REGULATION

---

[19] *Id.*

[20] *Sugar and Slavery in an age of Global Transformation*, *available at* https://www.sunypress.edu/pdf/63296.pdf.

[21] *The Indian Sugar Industry: Sector Roadmap 2017* by KPMG, *available at* http://www.in.kpmg.com/pdf/indian_sugar_industry.pdf.

[22] Deokate Tai Balasaheb, *India's Sugar Trade: A fresh look*, Indira Gandhi Institute of Development Research (2013) *available at* http://www.igidr.ac.in/pdf/publication/WP-2013-024.pdf.

[23] *Id.*

Sugar Disputes in the GATT era –

US Sugar Waiver:

The case arose in regard to restrictions imposed on the import of agricultural products including sugar by the US. The complainant was the erstwhile EEC which is now covered under the European Union. According to a US federal legislation, the President could order restrictions to be put on imports of agricultural products which materially affected agricultural programs or substantially reduced the amount of the product which could be processed in the US. In pursuance of this legislation, the USA in 1987 put restrictions on the imports of sugar which were also supported by a waiver which they had signed in 1955 under the GATT. Owing to the impact that such a policy would have on the sugar market and specifically to the EEC, the GATT was approached to declare the measures applied by the United States on imports of sugar and sugar-containing products as inconsistent with the General Agreement and that accordingly they impaired benefits accruing to the Community. The panel found that the quota on imports of raw and refined sugar imposed by the United States was inconsistent with the General Agreement but owing to the existence of the waiver of 1955, US was not in breach of its obligations.[24]

Earlier Sugar Disputes in the WTO -

The EC Sugar Dispute:

In September 2004, a WTO Panel requested by Brazil, Australia, and Thailand concerning EU export subsidies for sugar found against the EU, a result upheld by the WTO Appellate Body in April 2005.[25]

---

[24]UNITED STATES - RESTRICTIONS ON THE IMPORTATION OF SUGAR AND SUGAR-CONTAINING PRODUCTS APPLIED UNDER THE 1955 WAIVER AND UNDER THE HEADNOTE TO THE SCHEDULE OF TARIFF CONCESSIONS, *available at* http://www.worldtradelaw.net/reports/gattpanels/ussugarwaiver.pdf.download.

[25] Stephen J. Powell & Andrew Schmitz, *The Cotton and Sugar Subsidies Decisions: WTO's Dispute Settlement System Rebalances the Agreement on Agriculture*, 10 Drake J. Agric. L. 287 (2005), *available at* http://scholarship.law.ufl.edu/facultypub/27.

The measures which were the bone of contention between the parties were C sugar and ACP/India re-exports. The EC sugar regime had established production quotas i.e. made two categories of sugar, known as ‘A sugar’ and ‘B sugar’. These quotas were put in place to signify the maximum amounts of sugar which could be sold within the EC in a year. ‘C sugar’ was the nomenclature ascribed to any surplus sugar which was produced which had to be mandatorily exported. A host of domestic support measures were in place including direct export subsidies for domestic prices of ‘A sugar’ and ‘B sugar’. However, no such support was extended to exporters of ‘C sugar’. The argument put forth by the complainants was that such a policy led to an indirect benefit to ‘C sugar’ through a cross-subsidization of A and B sugar. Moving to the second issue i.e. ACP/India re-exports, under the Sugar Protocol of the Cotonou Agreement, preferential access was granted by the EU to 1.3 million tonnes of sugar from African, Caribbean, and Pacific (ACP) countries. EU producers obtained export subsidies to re-export amounts of sugar equivalent to the imports of ACP-origin sugar. An arrangement akin to this was also in place with India. It was contended by the complainants that ACP/India re-exports should have been included in its calculation of total subsidized exports.[26]

EU subsidies on sugar exports were held by the Panel and AB reports to be beyond the level formally notified to the WTO and were thus in violation of the WTO Agreement on Agriculture. In the Panel’s opinion, EU’s WTO export-subsidy limits should take into its calculations both C sugar exports and ACP/ India re-exports. The Panel further observed that C-sugar exports benefited from a cross-subsidization from A and B quota sugar, effectively receiving an export subsidy. In conclusion it was held that '*A, B, or C sugar are part of the same line of production which essentially means that the EC sugar regime provides an advantage to its sugar producers i.e. allows them to produce and export C sugar at below total cost of production.*'[27]

---

[26] Bernard Hoekman and Robert Howse, *EC–Sugar*, World Trade Rev 149-178 (2008).
[27] Paola Conconi, *EC - Export Subsidies on Sugar Prepared for the ALI Project on the Case Law of the WTO*, 7 World Trade Rev. 179 (2008).

<u>*China –*</u>

A request for consultation had been filed by Brazil against China with the WTO on 16th of October 2018. Brazil had questioned the legitimacy of measures taken by China with regard to safeguard measure imposed on imported sugar, China's administration of its tariff-rate quota for sugar and China's import licensing system for out-of-quota sugar.[28] According to Brazil, these measures are inconsistent with China's obligations under the WTO framework.

China's safeguard measure on sugar takes the form of an additional *ad valorem* duty of 45% for the first year, followed by 40% in the second year and 35% in the third year of its implementation. The safeguard duty applies to imports outside the existing TRQ for sugar. On its accession to the WTO, a TRQ of 1,945,000 tons of sugar, covering raw and refined sugar was established by China. The in-quota rate for this sugar was 15%. The out-of-quota rate has been significantly increased by imposition of this sugar safeguard from its earlier benchmark of 50%. Further, exemptions from these safeguard measures had been extended to a number of developing countries which have now been revoked effective from August 2018.

The administration of its tariff rate quota for sugar was the second measure by China which had been challenged at the WTO. A TRQ to permit the importation of specified volumes of sugar at lower in-quota duty rates is provided by China's Schedule of Concessions and Commitments on Goods. This administration of the TRQ by China for sugar is alleged to be inconsistent with its WTO obligations.

China's Automatic Import Licensing System for Sugar is the third measure under challenge. With respect to imports of sugar not covered by the TRQ, the Ministry of Commerce

---

[28] Tom Miles, *Brazil launches trade dispute against China over sugar: WTO*, Reuters (Oct 22, 2018), *available at* https://www.reuters.com/article/us-china-brazil/brazil-launches-trade-dispute-against-china-over-sugar-wto-idUSKCN1MW178.

requires that importers and refiners obtain an import license, which China labels as an "automatic" import license. However, Ministry of Commerce provides verbal instructions to importers and refiners, informing each of them of the maximum amount of sugar that they will be permitted to import outside of the TRQ, before such requests for import licenses are made. Importers and refiners make their import requests based on such instructions, and they refrain from requesting authorization to import sugar above the pre-determined amounts. Approval is granted only up to the maximum level approved by Ministry of Commerce. China makes this restriction effective through import licenses, which are granted only if the request presented by the importer does not exceed the amount set by Ministry of Commerce. Importation of out-of-quota sugar is being restricted by China through this policy.[29] These measures of China have been challenged in the WTO and this dispute is currently in the consultation phase.

Thailand -

A request for consultation had been filed by Brazil against Thailand with the WTO in 2016. Thailand imposes a quota system that limits the quantity of sugar sold in the domestic market and imposes price controls on ex-factory, wholesale, and retail sales of cane and sugar in the country. Thailand's quota system guarantees a high price for the sugar produced for domestic consumption (Quota A). Sugar produced in excess of this quota cannot be sold internally and must be exported (Quotas B and C). Thailand's quota and price control system cross-subsidizes exports of Quota B and Quota C sugar which is inconsistent with WTO rules. Moreover, Thailand supplements the fixed prices for cane sales to sugar mills with additional payments to cane growers. Because Thailand has not specified any export subsidy commitments in Section II of Part IV of its Schedule, Brazil was of the view that Thailand's quota and price control system and its supplementary payments to cane growers constitute export subsidies for sugar in violation of Thailand's obligations under the

[29] BRAZIL INITIATES WTO DISPUTE COMPLAINT AGAINST CHINESE MEASURES ON SUGAR IMPORTS, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds568_e.htm.

Agreement on Agriculture.[30] Subsidies were also being provided by Thailand to convert agricultural land from rice to cane production and to develop additional capacity to manufacture cane into sugar which constituted prohibited and actionable subsidies under the Agreement on Subsidies and Countervailing Measures. It was further alleged that Thailand had exceeded its *de minimis* level through policy measures such as domestic support for cane and sugar in the form of price support, supplementary payments to cane growers, and incentives to convert land used for rice production to cane production and to develop additional capacity to manufacture cane into sugar. The allegation put forth by Brazil was that since Thailand's domestic support for the sugar sector alone exceeds its total AMS[31] commitment level specified in its Schedule, Thailand violates its obligations under the Agreement on Agriculture.[32] These measures of Thailand have been challenged in the WTO and this dispute is currently in the consultation phase.

Regional Sugar Disputes-

Canada and USA:

Canada requested consultations with the USA regarding import restraints imposed by them on sugar imported from Canada. Canada was concerned that United States implementation of the WTO Agreement on Agriculture prejudiced Canadian sugar exports to the United States, thus resulting in a violation of both the NAFTA and the WTO agreements. Consultations were initially unsuccessful, and the matter was referred to the Free Trade Commission. In a related matter, Canadian sugar producers filed an antidumping action against refined sugar from the United States, which resulted in the imposition of antidumping duties. Specifically, the binational panel convened under NAFTA Chapter 19 affirmed the antidumping determination upon remand. The allegation that the filing of the antidumping action would prevent the continuation of bilateral consultations was denied by

---

[30] *Id.*
[31] *Id.*
[32] THAILAND – SUBSIDIES CONCERNING SUGAR, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds507_e.htm.

Canadian government officials before Parliament. However, finally Canada negotiated a quota agreement with the United States.[33]

Chile and Colombia:

Colombia requested consultations with Chile in April 2001 concerning the definitive safeguard measures imposed by Chile in respect of a number of agricultural products, including sugar. Another measure which was challenged pertained to Chile's decision of 14 March 2001 not to recognize Colombia's substantial interest to be consulted with respect to the modification of concessions regarding, *inter alia*, refined sugar.[34] Chile had notified its intention to modify these concessions pursuant to Article XXVIII of GATT 1994 in November of 2001. According to Colombia, the above measures were inconsistent with Chile's obligations under WTO. The Chilean measures, taken together or individually, appear to nullify and impair benefits accruing to Colombia as per their submissions. This dispute has been in the consultation stage.

USA and Mexico:

American sugar refiners had complained that Mexico was exporting low-cost refined sugar to the United States and limiting exports of raw sugar to be refined in the United States. An agreement was signed which was intended to prevent Mexico from dumping cheap sugar into the U.S. market thus leading to culmination of this dispute.[35]

Uganda and Kenya:

---

[33] David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 Am. Univ. Int. Law Rev., *available at* https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1328&context=auilr.

[34] CHILE: SAFEGUARD MEASURES AND MODIFICATION OF SCHEDULES REGARDING SUGAR, *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds230/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.

[35] Adriana Barrera, *Exclusive: U.S.-Mexico sugar deal struck ahead of NAFTA talks; industry divided*, Reuters (June 5, 2017), *available at* https://www.reuters.com/article/us-usa-trade-mexico-idUSKBN18W1YK.

Dispute had arisen regarding the sugar market between Uganda and Kenya.[36] Since 2015, Uganda and Kenya nearly severed ties because Kenya did not believe that its neighbour had the capacity to export sugar. Kenya had not required to import sugar from Uganda till last year owing to having sufficient domestic production and import from other producers. However, this year the situation has been different and thus Kenya has imported sugar from Uganda and in the process accepting its neighbour to be a dominant player in the sugar sector in the region.

NAFTA:

North American Free Trade Agreement (NAFTA) between USA and Mexico has provided Mexico with tariff-free sugar exports into the US market since January 1, 2008. About 1.3 mn. tons of sugar per year is exported by Mexico to USA.[37]

DR-CAFTA:

The Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) also includes attractive sugar provisions that provide Dominican Republic to export 0.15 mn. tons p.a. to Central America.[38]

Indonesia:

Indonesia allows raw sugar imports from Thailand and Australia at a concessional duty of 5% under ASEAN/bi-lateral agreement. For others, import duty of about 35 USD/ton is leviable. About 3.5 mn. tons of sugar have been exported by Thailand and 0.5 mn. tons by Australia in 2017-18 to Indonesia. Indonesia imports 1200 and above ICUMSA level of raw sugar, which is not an international standard, and benefits selected countries/preferred nations.[39]

---

[36] UGANDA WINS SUGAR DISPUTE AGAINST KENYA, TAARIFA (Mar 29, 2019), *available at* https://taarifa.rw/2019/03/29/uganda-wins-sugar-dispute-against-kenya/.
[37] INDIAN SUGAR MILLS ASSOCIATION HANDBOOK 2018-19.
[38] *Id.*
[39] *Id.*

Japan:

Japan allows duty free imports to Thailand and Australia only. Japan also has certain quality specifications called J-spec (over 6000 ICUMSA) which is generally produced by Thailand only. Australia exported 0.9 mn. tons of sugar and Thailand exported 0.4 mn. tons to Japan in 2017-18. Other countries are not able to import anything.[40]

KAFTA:

There is an agreement between Korea and Australia namely, Korea-Australia Free Trade Agreement (KAFTA) under which there is no import tariff for raw sugar (particular specification). Australia exports about 1.5 mn. tons p.a. to Korea. Thailand also enjoys similar benefits, as per which they exported 0.5 mn. tons to Korea in 2017-18 SS.[41]

China:

China imports (duty free) around 0.4 mn. tons from Cuba under an bi-lateral agreement, for which a TRQ (quota) is reserved for them.[42]

Malaysia:

Malaysia imports sugar under an import licensing arrangement managed by the Malaysian Ministry of International Trade and Industry (MITI). Imports are partly under long term sugar contracts (LTCs) and partly spot sales. LTCs are negotiated by MITI and for a number of years, Malaysia has maintained LTCs with Australia, Thailand and Fiji. Australia and Thailand together exported about 0.6 mn. tons in 2017-18.[43]

5. INDIA, SUGAR AND WTO COMPLIANCE

[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*

Sugar Production and Trade – An Indian context-

India has been a major producer of sugar over the last few years but has still failed to capture a reasonable chunk of the world sugar market for itself. India's sugar exports are not more than 3 to 4% of the total quantum of world sugar exports (Around 2 mn. tons have been exported by India in 2018-19 and 6 -7 mn. tons in the current year).[44] The higher support provided to the sugar industry by EU and other countries has enabled them to export sugar at a comparatively lower rate in spite of them having considerably higher costs of production than India.[45]

In India, both sugar and sugarcane are in the list of essential commodities, under the purview of the Essential Commodities Act, 1956. Consequently, both production and trade have been influenced by both government controls and policy.[46] India being the largest consumer enters the international market only in years of surplus production and has not been a regular exporter. However, in recent years the introduction of new varieties has improved productivity of sugarcane and recovery of sucrose therefrom boosting sugar production.[47] Additionally, the rapid increase in the minimum support price of sugarcane (called Fair and Remunerative Price i.e. FRP) has encouraged farmers to shift to sugarcane cultivation. It is estimated that sugarcane gives the farmer almost 60-70% better returns than the alternate crops.[48] The rapid increase in sugar production resulted in India surpassing Brazil as the world's largest sugar producer in the 2017-18 sugar season at over 32 million metric tonnes. The situation was somewhat similar in 2018-19, 2019-20 and in the current 2020 -2021 sugar season.[49]

---

[44] *India will continue to export about 60-70 lakh tons of sugar during 2020-21 season: ISMA,* ChiniMandi.com (June 25, 2020), *available at* https://www.chinimandi.com/india-will-continue-to-export-about-60-70-lakh-tonnes-of-sugar-during-2020-21-season-isma/.
[45] See *supra note 6.*
[46] See *supra note22.*
[47] THE INDIAN SUGAR INDUSTRY: SECTOR ROADMAP 2017 by KPMG, *available at* http://www.in.kpmg.com/pdf/indian_sugar_industry.pdf.
[48] See *supra note 37.*
[49] See *supra note 44*.

By law, the sugar mills are expected to crush all the sugarcane in the area. Sugarcane, unlike other crops cannot be stored and has to be crushed immediately.[50] Farmers are also expected to be paid within 14 days. However, given the fact that crushing takes place over 4-6 months and sugar consumption is spread over the whole year, creates liquidity issues for the sugar mills. Given the small size of most land holdings[51], this has serious implications by way of agrarian unrest on the part of small and marginal farmers who have waited for a year to get paid against the crop. The situation is exacerbated in years of surplus and to reduce cane-price arrears India has to resort to exports. Given the high rate of sugarcane, and the political compulsion to increase prices year on year, our prices are uncompetitive and thus government has to step in with financial assistance in one form or the other to encourage exports.

Since 2010-11, India has been a surplus producer i.e. producing higher than domestic consumption in most years.[52] The odd year of lower production has not caused worry because of carryover stocks. However, the sudden leap in production in 2017-18 to over 32 million tonnes has resulted in closing stocks of 10.5 million tonnes and given this year's expected production of 32.22 million tonnes, the closing balance is likely to touch 15 million tonnes.[53] Consequently, this has resulted in mounting cane price arrears due to huge amounts locked in unsold sugar stocks. Over the past years the government has stepped in with policy interventions to promote exports as well as prevent domestic prices from falling in a bid to help mills clears their cane dues.[54] Thus, we have seen the creation of buffer stock, assistance on cane price payments, soft loans, transport assistance for exports and the minimum export obligation on sugar mills which must be met for receiving the above assistance.

---

[50] See *supra note 47*.
[51] *Id.*
[52] See *supra note 37*.
[53] *Id.*
[54] See *supra note 47*.

These measures have, allegedly led to distortions in the world market and also threaten to displace conventional exporters leading to their approaching the WTO.

General farm goods debate-

The crux of this issue lies in the general farm goods debate which has a corollary relationship with the Doha Rounds especially with regard to the agricultural sector. The Doha agreement's purpose was to boost the economic growth of developing countries. Its objective was to reduce subsidies for developed countries' agricultural industries. Food is one commodity which developed countries have the capacity to export and such aid would be reciprocated by the developing nations by opening their market to services from the developed countries. Such a policy change would also modernize these markets for the developing countries.[55]

The main issue of conflict relating to agriculture at the Doha Rounds was export subsidies and domestic support measures on agriculture[56] by USA, European Union and other advanced countries. The developing countries insisted on substantial reduction and elimination of these measures and ensuring greater market access to them in return for non-agriculture market access in their countries. The advanced countries, in particular the USA, were not willing to accede to the demand. This led to open confrontation between the USA and European Union on the one side and India, China and Brazil on the other. The little progress made in other areas were over-shadowed by this conflict and consequently, the Ministerial Meeting did not end on a positive note.[57]

Export subsidies and domestic support measures are still a roadblock for the Doha Round negotiations. As agriculture is tightly related to food security, it is a vital concern for

[55] DOHA ROUND OF TRADE TALKS, THE BALANCE, *available at* https://www.thebalance.com/what-is-the-doha-round-of-trade-talks-3306365.
[56] Alan Mathews, *Doha Negotiations on Agriculture and Future of the WTO Multilateral Trade System, available at* https://ageconsearch.umn.edu/record/160370/files/01Matthews%20-%20EAAE%20135.pdf.
[57] Fasih Uddin, *The Fate of Doha Development Agenda*, Policy Perspectives, Vol. 9, No. 2 (2012), pp. 87-96, *available at* https://www.jstor.org/stable/42922706.

developing countries.[58] It is the main reason for India providing subsidies to the agricultural sector, one of which has been challenged i.e. the sugar sector.

Another related factor for food security was discussed at the Bali Rounds which provided for exemption of measures such as expenditure on public stockholding for food security purposes from the calculation of AMS under the ambit of Green Box measures.[59] The *Bali Ministerial Decision on Public Stockholding*[60]was a step forward to achieve this objective as it allowed putting in place an '*interim mechanism' designed to regulate governmental support for 'traditional staple food crops in pursuance of public stockholding programmes for food security purposes'*.[61]

Owing to small land-holdings in India, farmers often are not able to earn a decent livelihood leading to problems like suicide and social unrest. In this backdrop, the government has to step in by providing subsidies and food stockholding to the agriculture sector which then may get them at loggerheads with fellow Member states at the WTO for breaching their WTO obligations such as the present issue which is the crux of this paper i.e. the dispute with regard to the Indian sugar sector.

6. SUBSTANCE OF CHALLENGES TO INDIA'S SUGAR AND SUGARCANE SUBSIDIES

The subsidies which have been given by the Indian government to its sugar sector during the sugar season of 2017-2018 and 2018-2019 and even earlier seasons, have been challenged by countries such as Guatemala, Australia and Brazil for being in violation of

---

[58] Barbara Pastori, *The Failure of the Doha Rounds (2012)*, *available at* https://tesi.luiss.it/8107/2/pastori-sintesi-2012.pdf.

[59] Anwarul Hoda, *Public Stockholdings Issue in the WTO*, ICRIER Policy Series (November 2017), *available at* http://icrier.org/pdf/Policy_Series_17.pdf.

[60] WTO, MINISTERIAL DECISION OF 07 DECEMBER, 2013 ON PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES, WT/MIN(13)/38 (2013), *available at* https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm.

[61] Mary E. Footer, *Trade-related International Food Security and the Developing World 6(2) TRADE L. & DEV. 288 (2014)*, *available at* http://www.tradelawdevelopment.com/index.php/tld/article/viewFile/6%282%29%20TL%26D%20288%20%282014%29/215.

India's WTO commitments specifically under the Agreement on Agriculture[62], Agreement on Subsidies and Countervailing Measures[63] and the General Agreement on Trade and Tariffs, 1994[64]. The products which have been challenged separately at the WTO for subsidies provided by India are Sugarcane and Sugar which come under the ambit of "Basic Agricultural Product' and 'Agricultural Product' respectively.

The measures taken by India which have been challenged pertain to Domestic Price Support under the Agreement on Agriculture and Export Incentives dealt with under Agreement on Agriculture as well as Agreement on Subsidies and Countervailing Measures. The allegations levied on India under these will be discussed in detail in the subsequent part of the paper.

Domestic Price Support-

Brazil, Australia, and Guatemala claim that the domestic price support for sugarcane in the form of a mandatory minimum "Fair and Remunerative Price" that Indian sugar mills are required to pay sugarcane producers, *inter alia*, is inconsistent with India's obligations under the Agreement on Agriculture because they provide domestic support for sugarcane in excess of India's *de minimis* entitlement of 10 percent of the value of production. Another measure of the Indian government which has been challenged at the WTO by these countries pertains to financial assistance to sugarcane producers which include production subsidies provided to sugar mills to offset sugarcane price arrears, soft loans provided to sugar mills to offset sugarcane price arrears, and subsidies to maintain buffer stocks.[65]

---

[62] AGREEMENT ON AGRICULTURE, *available at* https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm.

[63] AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES, *available at* https://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

[64] GENERAL AGREEMENT ON TRADE AND TARIFFS, 1994, *available at* https://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

[65] DS 581: INDIA – MEASURES CONCERNING SUGAR AND SUGARCANE, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds581_e.htm ; DS 579: India – Measures Concerning Sugar and Sugarcane, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds579_e.htm ; DS 580: India – Measures Concerning Sugar and Sugarcane, *available at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds580_e.htm.

The basis of these allegations flow from the Agreement on Agriculture. Domestic policies, such as market price support measures, direct production subsidies or input subsidies are covered under the term 'domestic price support'. Under the Agreement on Agriculture, such non-exempt domestic support measures have trade-distorting effects or effects on production and are referred to as "Amber Box" measures.[66] Part IV of the Country's Schedule under the GATT lists down all domestic support measures in favour of agricultural producers that do not fit into any of the exempt categories which are subject to reduction commitments. The 1986-88 average levels reference price is the basis for ascertaining this cap. In case of WTO countries with no reduction commitments in its Schedule such as India, the level of domestic support not covered by the exempt category, i.e., the aggregate monetary value of Amber Box measures is subject to *de minimis* limitation requirements.

Under the *de minimis* provisions of the Agreement on Agriculture there is a requirement to limit such domestic support to 10 per cent of the total value of production of the agricultural product. Non-product specific support which is more than 10 per cent of the value of total agricultural production is also subject to limitation/reduction.

The subsidies provided to the domestic producers by India are as per the allegations levied, in excess of the 10 per cent *de minimis* provision of the agreement, thus a violation of India's commitments.

Export Incentives-

Brazil, Australia, and Guatemala claim that the Minimum Indicative Export Quotas ("MIEQ") that operate in conjunction with the other regulations are export subsidies. Along with the MIEQ, schemes for creation and maintenance of 'Buffer Stock', the Duty-free Import Authorization (DFIA) for raw sugar; and Export incentives and freight assistance

[66] Suman Modwel, *The WTO and Agriculture: Why Is India So Furious*, 5 J. World Investment & Trade 289 (2004).

under the Sugar Development Fund (SDF) Rules and other regulations are also claimed as export subsidies. Accordingly, these regulations are claimed as being inconsistent with India's export subsidy obligations under Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures and the GATT Article XVI.[67]

The basis of these allegations flow from the Agreement on Agriculture. Under the Agreement on Agriculture, '*export subsidies*' are "*subsidies contingent on export performance, including the export subsidies listed in detail in Article 9 of the Agreement*".[68] As specified in more detail in Article 9.1 of the Agreement, the list covers most of the export subsidy practices which are prevalent in the agricultural sector, viz direct export subsidies contingent on export performance, producer financed subsidies such as government programs which require a levy on all production which is then used to subsidize the export of a certain portion of that production, cost reduction measures such as subsidies to reduce the cost of marketing goods for export such as upgrading and handling costs and the costs of international freight. Further, under Article 3 of the Agreement on Subsidies and Countervailing Measures, subsidies based upon export performance have been prohibited.

However, the allegation levied is that since India did not schedule export subsidy reduction commitments in its Schedule of Concessions, India, therefore, may not provide export subsidies to sugarcane or sugar based on export performance.

7. THE INDIAN POSITION

The plausible legal argument which can be put forth is on the basis of the WTO Ministerial Decision on Export Competition at Nairobi of 19 December 2015.[69] This Ministerial Decision extended the window of Article 9.1 (d) and (e) till 2023 which was earlier to be

[67] See *supra note 64.*
[68] See *supra note 61.*
[69] TENTH WTO MINISTERIAL CONFERENCE, NAIROBI, 2015, *available at* https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_agriculture_e.htm.

in effect till 2001 as per Article 9.4 of the Agreement on Agriculture. This in effect allows countries such as India to continue giving out subsidies which are in consonance with Article 9.1 (d) and (e) till 2023.

The need for India to continue with the subsidies has been pointed out earlier with regard to cane price arrears which has an essential economic angle as well. Owing to farmers having to be paid within 14 days for their sugarcane[70], and the sugar sales being a year-around process, sugar mills invariably face liquidity issues to pay the farmers for their produce i.e. resulting in cane arrears. For example, the cane arrears of 2020-2021 marketing year alone stand at Rs. 16,883 crore.[71] In order to mitigate this along with the need to ensure that surplus production doesn't result in fall in prices due to excess supply over demand (economics of demand and supply) which could reduce price of sugar in the domestic market. In case of such a fall in prices, it would become difficult for mills to even pay the minimum support price of sugarcane (called Fair and Remunerative Price i.e. FRP) to farmers, let alone make their ends meet which would disincentivize the mills themselves.

In order to avoid these economic challenges and put the surplus stock to better use, it becomes imperative for the government to support exports through measures mentioned earlier. The cane arrears can be paid off by the mills through the revenue earned through exports within a shorter time frame than having to wait for a whole year for domestic sales to take place. It also helps to maintain the FRP obtained on sale as surplus production is utilized and is not able to distort the domestic market. As apart from the economic angle, farmer unrests can also become a political issue at the national and international level as seen with respect to the recent farm laws.[72]

---

[70] See *supra note 47*.
[71] *Sugarcane arrears at Rs. 16,883 crore on Jan 31 of 2020 – 2021 marketing year*, Business Standard (Feb 9, 2021), *available at* https://www.business-standard.com/article/economy-policy/sugarcane-arrears-at-rs-16-883-cr-as-on-jan-31-of-2020-21-marketing-year-121020901492_1.html.
[72] Kabir Agarwal, *India's Farmer Protests: A Basic Guide to the Issues at Stake*, The Wire (Dec 11, 2020), *available at* https://thewire.in/agriculture/indias-farmers-protests-guide-issues-at-stake-reforms-laws-msp.

However, in case this defense on the basis of the WTO Ministerial Decision on Export Competition is indeed taken up by India, it playing out before the panel and repercussions of its effect thereafter would be noteworthy on the WTO jurisprudence. This is submitted as the conflict which would arise would be whether the Agreement on Agriculture would supersede the Ministerial Decision of 2015 which was arrived at through consent of all Member States or vice-versa.

8. WAY FORWARD: HOW INDIA CAN GET ITS POLICIES WITHIN ITS WTO OBLIGATIONS FOR THE FUTURE

In all likelihood the measures of India with regard to the sugar sector will be held to be in violation of its WTO obligations once a panel to adjudicate this dispute is formed which is considered inevitable. Further, India does not stand on a very firm footing with respect to the possible defenses it can take. Thus, it is important to look at the way forward for India and future policies measures which are taken as WTO panel rulings have no retrospective effect.

In this regard keeping in mind the need to be WTO compliant, it is suggested that Article 6.2[73] and Article 6.5[74] of the Agreement on Agriculture need to be utilized till the maximum extent along with using Green Box[75] subsidies.

Redesign schemes under Agreement on Agriculture-

Article 6.2 of the Agreement on Agriculture provides that *'government measures of assistance, whether direct or indirect, to encourage agricultural and rural development*

[73] See *supra note 61*.
[74] *Id*.
[75] Shona Hawkes and Jagjit Kaur Plahe, *Worlds apart: The WTO's Agreement on Agriculture and the right to food in developing countries*, 34(1) Int. Political Sci. Rev. 21-38 (2013), pp. 21-38, *available at* https://www.jstor.org/stable/23352702 ; Martha Getachew Bekele, *Offer of a Truce: The Peace Clause Agreement on Food Stockholding in Bali (2014)*, *available at* http://www.cuts-geneva.org/pdf/BP-2014-7-Peace%20Clause.pdf.

and various subsidies generally included in such measures, such as investment subsidies, agricultural input subsidies and domestic support to producers to encourage diversification (e.g. from narcotic crops), shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures.'[76] Domestic support meeting these criteria shall not be required to be included in the calculation of a country's current AMS.[77] Policies furthering these objectives brought about by the government will pass the test of WTO compatibility and are suggested to be introduced.

Moving on, Article 6.5 of the Agreement on Agriculture can also be used by India to make its policies WTO compliant. Direct payments under production-limiting programs shall not be subject to reduction if such payments are based on fixed area and yields. These policies would not be considered to be a part of the 10 per cent *de minimis* requirement.

Green Box Subsidies-

Green Box subsidies are another avenue which can be explored by India to provide support to the Indian sugar sector while remaining WTO compliant. These pertain to measures that "*do not have distorting effects in agricultural markets*", such as research funds, direct payments decoupled from production levels and market prices etc.[78] Under the broad ambit of Green Box subsidies, decoupled income support is a policy which can be looked at along with income safety net.

Decoupled income support[79] was included in Green Box subsidies with neither any limit on the level of such payments nor any obligation to reduce them, based on the assumption that they would have no, or minimal, trade-distorting effects.[80] Thus, this is a policy measure

[76] See *supra note 61*.
[77] See *supra note 65*.
[78] *Id.*
[79] Annex 2 of the Agreement on Agriculture, *available at* https://www.wto.org/english/docs_e/legal_e/14-ag_02_e.htm#annII.
[80] See *supra note 65*.

which would be WTO compliant following the process mentioned here as it would not be related to export performance which is prohibited under the Agreement on Subsidies and Countervailing Measures. Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period. The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period. The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period. Such payments would no longer be contingent upon production. A similar scheme has been launched by the Indian government recently known as the Pradhan Mantri Kisan Samman Nidhi (PM – KISAN)[81] which is pertaining to the agricultural sector in general. Such a policy measure would enable subsidies to be given to the sugar industry while remaining WTO complaint.

Income safety net[82] is another policy which can be looked at. Its functioning could be as described hereunder. Eligibility determined by income loss, which exceeds 30% of average gross income or the equivalent in net income terms in the preceding 3-year period or a 3-year average based on the preceding 5-year period. The amount of such payments shall compensate for <u>less</u> than 70 % of the producer's income loss in the year the producer becomes eligible to receive this assistance. The amount of any such payments shall relate solely to income. The amount of such payments shall not relate to the type or volume of production (including livestock units) undertaken by the producer; or to the prices, domestic or international, applying to such production, or factors of production.

[81] Rituraj Tiwari, *PM Narendra Modi to launch scheme to give Rs 6,000 to farmers on February 24*, The Economic Times (Apr 18, 2019), *available at* https://economictimes.indiatimes.com/news/politics-and-nation/pm-narendra-modi-to-launch-scheme-to-give-rs-6000-to-farmers-on-feb-24/articleshow/67979715.cms.

[82] See *supra note 78.*

Last but not the least, ethanol production policy brought out by the government is a good way for India to meet its WTO compliance with respect to sugar industry subsidies as well to meet its climate change and Atmanirbhar Bharat objectives. Tweaking the old age, I'd like to say that the ethanol policy will help India *kill multiple birds with one stone*. First of all, the diversion of the surplus sugar into ethanol production would reduce the export by India i.e. nullifying the argument of other countries that India is distorting the market with its lower prices at the WTO level. Secondly, in line with the ethanol blending program[83] under the National Policy on Bio-fuels being followed, India is moving towards complying with its Nationally Determined Contributions (NDC's) with respect to climate change at the international level under the Paris Climate Change agreement.[84] Third but not last, by using ethanol as a fuel, India not only has the opportunity to reduce its oil/fuel import bill but also move towards self-reliance in fuel production, even though partially for now, as the National Policy on Bio-fuels targeting 10% all-India average ethanol blending in petrol by 2022 (from 4.2% in 2017-18) and 20% by 2030.[85] For instance, Oil marketing companies (OMC) are set to procure 283 crore litres of ethanol from mills for blending up to 10% with petrol in 2020-21 (December-November). This is against 167 crore, 179 crore and 150.5 crore litres in the preceding three supply years and a mere 38 crore litres in 2013-14.[86] This would also boost the Atmanirbhar Bharat project (Self-reliant India)[87] along with helping to pay off the cane arrears of farmers.[88]

---

[83] ETHANOL BLENDING PROGRAM POLICY DOCUMENT, *available at* http://petroleum.nic.in/sites/default/files/biofuels.pdf.

[84] *India on course to exceed Paris agreement targets, says report*, The Economic Times (Nov 24, 2020), *available at* https://economictimes.indiatimes.com/news/politics-and-nation/india-on-course-to-exceed-paris-agreement-targets-says-report/articleshow/79394789.cms?from=mdr.

[85] Harish Damodaran, *As ethanol turns cheaper than petrol, sugar industry sees opportunity*, Indian Express (Mar 8, 2021), *available at* https://indianexpress.com/article/business/economy/price-and-policy-push-ethanol-cheaper-than-petrol-sweet-spot-for-sugar-industry-7218665/.

[86] *Id.*

[87] *Cabinet approves Mechanism for procurement of ethanol by Public Sector Oil Marketing Companies under Ethanol Blended Petrol Programme - Revision of ethanol price for supply to Public Sector OMCs for Ethanol Supply Year 2020-21*, PIB (Oct 29, 2020), *available at* https://pib.gov.in/PressReleasePage.aspx?PRID=1668399.

[88] See *supra note 84.*

9. CONCLUSION

This present dispute does not augur well for India. India would have to slowly and steadily tweak its policies in the sugar sector and make them WTO compliant or face the anomaly of dishing out exorbitant sums as penalty.

The current policies may be able to safeguard India till 2023 based on the Ministerial Decision of 2015 mentioned earlier but that is just a short-term gain. However, removing these subsidies immediately is also not feasible as it will adversely impact the Indian farmers and thus domestic production. As is well-known, India has a majority of small farmers who are from the low-income group. Cane price arrears have an immense economic and political impact which has to be kept in mind as mentioned earlier. Immediate withdrawal of subsidies can impact them economically leading them to commit suicides.[89]

Thus, a revisiting of the current policies governing domestic support and export assistance to the Indian sugar industry needs to be undertaken. WTO compatibility has to be worked into these policies as India is a large stakeholder at the WTO. India can only raise challenges to measures of other countries if it is compliant with the WTO obligations in the first place. Further, in order to prevent domestic uncertainty, chaos and repercussions which such challenges to measures taken by the Indian government at the WTO pose, it is better to be compliant with international obligations. As the adage goes, prevention is always better than cure. Further, as mentioned above, the ethanol blending program can be an excellent option to meet WTO compliance as well as other international and national objectives such as climate change, payments to cane farmers and Atma Nirbhar Bharat.

[89] Chethan Kumar, *25% of Karnataka's farmer suicides in four sugar districts*, The Times of India (Nov 27, 2018), *available at* https://timesofindia.indiatimes.com/city/bengaluru/25-of-karnatakas-farmer-suicides-in-four-sugar-districts/articleshow/66819674.cms ; Dr. Vandana Shiva, Kunwar Jalees, *Farmers Suicides in India*, Research Foundation for Science, Technology and Ecology, *available at* https://www.navdanya.org/attachments/Organic_Farming10.pdf.

10. ANNEXURE 1 – INDICATIVE TIMELINE FOR A WTO DISPUTE

Stage	Time-period (up to)	Scope
Request for Consultation	15-30 days	WTO Members file Request for Consultations with the WTO, the Country against whom a complaint is sought has to respond to the Request.
Consultation	60 days	The countries in dispute have the opportunity to settle their differences without proceeding further. Options such as mediations, negotiations are available.
Panel set up	45 days	In case the Consultations fail, the complaining countries can ask for a panel to be appointed. The panel adjudicates the dispute and makes its rulings and recommendations in its Report.
Final Panel Report issued to parties	6 months	The final Report of the Panel deciding the dispute is submitted to the parties.
Final panel report circulated to WTO members	3 weeks	The final report of the Panel deciding the dispute is submitted to the WTO for consideration.
Dispute Settlement Body adopts report (if no appeal)	60 days	The Final Report is adopted by all the WTO members as binding.
Appeal Filed	30 days	Either side can appeal a panel's ruling by means of an Appeal based on points of law such as legal interpretation of the WTO Agreements.
Appeal Report	60-90 days	Each Appeal is heard by three members of the permanent seven-member Appellate Body set up by the Dispute Settlement Body

		The appeal can uphold, modify or reverse the panel's legal findings and conclusions.
Dispute Settlement Body adopts Appeal Report	30 days	The Appeal Report is adopted by all the WTO members as binding.